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ENGLISH AND EMPIRE DIGEST

WITH

COMPLETE AND EXHAUSTIVE

ANNOTATIONS.

VOLUME IV.

THE ENGLISH AND EMPIRE DIGEST

WITH

COMPLETE AND EXHAUSTIVE

ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME IV.

BANKRUPTCY

(PARTS I–XVIII.)

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In this Volume English Cases reported up to 1st January, 1920, are included, and other cases are included so far as the Reports of the same were available in London on that date.

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REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 (*e.g.*, [1891] A. C.)	Eng.
A. Jur. Rep.	Australian Jurist Reports	Aus.
A. L. T.	Australian Law Times	Aus.
A. R.	Ontario Appeals	Can.
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)	Scot.
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	Eng.
Agra	Agra High Court	Ind.
Agra F. B.	Agra High Court, Full Bench	Ind.
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833	Ir.
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	Eng.
All.	New Brunswick Reports (Allen)	Can.
Alta. L. R.	Alberta Law Reports	Can.
Amb.	Ambler's Reports, Chancery, 2 vols., 1725—1783	Eng.
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605	Eng.
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	Eng.
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	Eng.
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	Eng.
App. Ct. Rep.	Appeal Court Reports	N.Z.
App. D.	South African Law Reports, Appellate Division	S. Af.
Argus L. R.	Argus Law Reports	Aus.
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848	Scot.
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	Eng.
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
Ashb.	Ashburner's Principles of Equity, 1902	Eng.
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)	Eng.
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754	Eng.
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law	Eng.
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
B.	Barber's Gold Law	S. Af.
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834	Eng.
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822	Eng.
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830	Eng.
B. & C. R. (preceded by date)	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) (*e.g.*, [1918—19] B. & C. R.)	Eng.
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
B. C. R.	British Columbia Reports	Can.
B. Dig.	Bose's Digest	Ind.
B. L. R.	Bengal Law Reports	Ind.
B. L. R. A. C.	Bengal Law Reports, Appeal Cases	Ind.
B. L. R. P. C.	Bengal Law Reports, Privy Council	Ind.
B. L. R. Sup. Vol.	Bengal Law Reports, Supp. Vol.	Ind.
B. W. C. C.	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.
Bac. Abr.	Bacon's Abridgment	Eng.

Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	Eng.
Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)	Eng.
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814	Ir.
Bankr. & Ins. R.	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855	Eng.
Bar. & Arn.	Barron and Arnold's Election Cases, 1 vol., 1843—1846	Eng.
Bar. & Aust.	Barron and Austin's Election Cases, 1 vol., 1842	Eng.
Barn. Ch.	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741	Eng.
Barn. K. B.	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734	Eng.
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760	Eng.
Batt.	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826	Ir.
Beat.	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830	Ir.
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866	Eng.
Beav. & Wal.	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846	Eng.
Beaw.	Beawes's Lex Mercatoria	Eng.
Bell, C. C.	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	Eng.
Bell, Ct. of Sess.	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	Scot.
Bell, Ct. of Sess. fol.	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795	Scot.
Bell, Dict. Dec.	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland) 2 vols., 1808—1833	Scot.
Bell, Sc. App.	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	Scot.
Bellewe	Bellewe's Cases *temp.* Richard II., King's Bench, 1 vol.	Eng.
Belt's Sup.	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756	Eng.
Ben. & D.	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579	Eng.
Benl.	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627	Eng.
Ber.	New Brunswick Reports (Berton)	Can.
Bing.	Bingham's Reports, Common Pleas, 10 vols., 1822—1834	Eng.
Bing. N. C.	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840	Eng.
Biss. & Sm.	Bisset and Smith's Digest	S. Af.
Bitt. Prac. Cas.	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	Eng.
Bitt. Rep. in Ch.	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884	Eng.
Bl. Com.	Blackstone's Commentaries	Eng.
Bl. D. & Osb.	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848	Ir.
Bli.	Bligh's Reports, House of Lords, 4 vols., 1819—1821	Eng.
Bli. N. S.	Bligh's Reports, House of Lords, New Series 11 vols., 1827—1837	Eng.
Bluett	Bluett's Isle of Man Cases	I. of M.
Bom.	Bombay High Court Reports	Ind.
Bom. A. C.	Bombay Reports, Appellate Jurisdiction	Ind.
Bom. O. C.	Bombay Reports, Original Civil Jurisdiction	Ind.
Bos. & P.	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804	Eng.
Bos. & P. N. R.	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807	Eng.
Bourke	Bourke's Reports	Ind.
Br. & Col. Pr. Cas.	British and Colonial Prize Cases, 3 vols., 1914—1919	Eng.
Bract.	Bracton De Legibus et Consuetudinibus Angliæ	Eng.
Bro. Abr.	Sir J. Brooke's Abridgement	Eng.
Bro. C. C.	W. Brown's Chancery Reports, 4 vols., 1778—1794	Eng.
Bro. Ecc. Rep.	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872	Eng.
Bro. N. C.	Sir R. Brooke's New Cases, 1 vol., 1515—1558	Eng.
Bro. Parl. Cas.	J. Brown's Cases in Parliament, 8 vols., 1702—1800	Eng.
Bro. Supp. to Mor.	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.	Scot.
Bro. Synop.	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827	Scot.
Brod. & Bing.	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822	Eng.
Brod. & F.	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864	Eng.
Broun	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845	Scot.
Brown. & Lush.	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866	Eng.
Brownl.	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624	Eng.
Bruce	Bruce's Decisions, Court of Session (Scotland), 1714—1715	Scot.
Buch.	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879	S. Af.

Buch. A. C.	Buchanan's Reports of Appeal Court (Cape)	S. Af.
Buchan.	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813	Scot.
Buck	Buck's Cases in Bankruptcy, 1 vol., 1816—1820	Eng.
Bull. N. P.	Buller's Nisi Prius (published, London, 1772)	Eng.
Bulst.	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626	Eng.
Bunb.	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741	Eng.
Burr.	Burrow's Reports, King's Bench, 5 vols., 1756—1772	Eng.
Burr. S. C.	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776	Eng.
Burrell	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840	Eng.
C. A.	Court of Appeal Reports, 3 vols., 1867—1877	N.Z.
C. & P.	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841	Eng.
C. B.	Common Bench Reports, 18 vols., 1845—1856	Eng.
C. B. N. S.	Common Bench Reports, New Series, 20 vols., 1856—1865	Eng.
C. C. Ct. Cas.	Central Criminal Court Cases (Sessions Papers), 1834—(current)	Eng.
C. L. Ch.	Common Law Chambers	Can.
C. L. J.	Cape Law Journal	S. Af.
C. L. J. N. S.	Canada Law Journal, New Series, 1865—(current)	Can.
C. L. J. O. S.	Canada Law Journal, Old Series, 10 vols., 1855—1864	Can.
C. L. R.	Common Law Reports, 3 vols., 1853—1855	Eng.
C. L. R.	Commonwealth Law Reports	Aus.
C. L. R.	Calcutta Law Reporter	Ind.
C. L. R.	Cape Law Reports	S. Af.
C. L. T.	Canadian Law Times	Can.
C. L. T. Occ. N.	Canadian Law Times, Occasional Notes	Can.
C. P.	Upper Canada Common Pleas	Can.
C. P. D.	Law Reports, Common Pleas Division, 5 vols., 1875—1880	Eng.
C. P. D.	Cape Provincial Division Reports	S. Af.
C. R. [date] A. C.	Canadian Reports, Appeal Cases	Can.
C. T. R.	Cape Times Reports of the Supreme Court of the Cape of Good Hope	S. Af.
C. W. N.	Calcutta Weekly Notes	Ind.
Cab. & El.	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885	Eng.
Cald. Mag. Cas.	Caldecott's Magistrates' Cases, 1 vol., 1776—1785	Eng.
Calth.	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618	Eng.
Cam. Cas.	Cameron's Supreme Court Cases	Can.
Cam. Prac.	Cameron's Supreme Court Practice	Can.
Camp.	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816	Eng.
Can. Com. Cas.	Commercial Law Reports of Canada	Can.
Can. Crim. Cas.	Canadian Criminal Cases, Annotated	Can.
Can. Ry. Cas.	Canadian Railway Cases	Can.
Car. & Kir.	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853	Eng.
Car. & M.	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1842	Eng.
Carp. Pat. Cas.	Carpmael's Patent Cases, 2 vols., 1602—1842	Eng.
Cart.	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673	Eng.
Cart.	Cases on British North America Act (Cartwright)	Can.
Carth.	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700	Eng.
Cary	Cary's Reports, Chancery, 1 vol.	Eng.
Cas. in Ch.	Cases in Chancery, fol., 3 parts, 1660—1697	Eng.
Cas. Pract. K. B.	Cases of Practice, King's Bench, 1 vol., 1655—1775	Eng.
Cas. Sett.	Cases of Settlements and Removals, 1 vol., 1685—1727	Eng.
Cas. *temp.* Finch	Cases *temp.* Finch, Chancery, fol., 1 vol., 1673—1680	Eng.
Cas. *temp.* King	Select Cases *temp.* King, Chancery, fol., 1 vol., 1724—1733	Eng.
Cas. *temp.* Talb.	Cases in Equity *temp.* Talbot, fol., 1 vol., 1730—1737	Eng.
Cass. Dig.	Cassells' Digest	Can.
Ch. (preceded by date)	Law Reports, Chancery Division, since 1890 (*e.g.*, [1891] 1 Ch.)	Eng.
Ch. App.	Law Reports, Chancery Appeals, 10 vols., 1865—1875	Eng.
Ch. Cas. in Ch.	Choyce Cases in Chancery, 1557—1606	Eng.
Ch. Ch.	Upper Canada Chancery Chambers Reports	Can.
Ch. D.	Law Reports, Chancery Division, 45 vols., 1875—1890	Eng.
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Char. Pr. Cas.	Charley's New Practice Reports, 3 vols., 1875—1876	Eng.
Chip.	New Brunswick Reports (Chipman)	Can.
Chit.	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822	Eng.
Cl. & Fin.	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846	Eng.
Cl. & Sc. Dr. Cas.	Clark and Scully's Drainage Cases	Can.
Clay.	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650	Eng.
Clif. & Rick.	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	Eng.
Clif. & Steph.	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	Eng.
Co. A.	Cook's Lower Canada Admiralty Court Cases	Can.
Co. Ent.	Coke's Entries	Eng.
Co. Inst.	Coke's Institutes	Eng.

Co. L. J.	Colonial Law Journal	N.Z.
Co. Litt.	Coke on Littleton (1 Inst.)	Eng.
Co. Rep.	Coke's Reports, 13 parts, 1572—1616	Eng.
Cochran	Nova Scotia Law Reports	Can.
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Coll.	Collyer's Reports, Chancery, 2 vols., 1844—1846	Eng.
Coll. Jurid.	Collectanea Juridica, 2 vols.	Eng.
Colles	Colles' Cases in Parliament, 1 vol., 1697—1713	Eng.
Colt.	Coltman's Registration Cases, 1 vol., 1879—1885	Eng.
Com.	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740	Eng.
Com. Cas.	Commercial Cases, 1895—(current)	Eng.
Com. Dig.	Comyns' Digest	Eng.
Comb.	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698	Eng.
Con. & Law.	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843	Ir.
Cong. Dig.	Congdon's Digest	Can.
Cooke & Al.	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834	Ir.
Cooke, Pr. Cas.	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	Eng.
Cooke, Pr. Reg.	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742	Eng.
Coop. G.	G. Cooper's Reports, Chancery, 1 vol., 1792—1815	Eng.
Coop. Pr. Cas.	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838	Eng.
Coop. *temp.* Brough.	C. P. Cooper's Cases *temp.* Brougham, Chancery, 1 vol., 1833—1834	Eng.
Coop. *temp.* Cott.	C. P. Cooper's Cases *temp.* Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)	Eng.
Cor.	Coryton's Reports	Ind.
Corb. & D.	Corbett and Daniell's Election Cases, 1 vol., 1819	Eng.
Correspondances Jud.	Correspondances Judiciaires	Can.
Couper	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885	Scot.
Cout.	Coutlees' Unreported Cases	Can.
Cout. Dig.	Coutlees' Digest	Can.
Cowp.	Cowper's Reports, King's Bench, 2 vols., 1774—1778	Eng.
Cox & Atk.	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846	Eng.
Cox, C. C.	E. W. Cox's Criminal Law Cases, 1843—(current)	Eng.
Cox, Eq. Cas.	S. C. Cox's Equity Cases, 2 vols., 1745—1797	Eng.
Cox, M. & H.	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, 1 vol., 1846—1852	Eng.
Cr. & J.	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	Eng.
Cr. & M.	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834	Eng.
Cr. & Ph.	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841	Eng.
Cr. App. Rep.	Cohen's Criminal Appeal Reports, 1908—(current)	Eng.
Cr. M. & R.	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835	Eng.
Craw. & D.	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846	Ir.
Craw. & D. Abr. C.	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838	Ir.
Cress. Insolv. Cas.	Cresswell's Insolvency Cases, 1 vol., 1827—1829	Eng.
Cripps' Church Cas.	Cripps' Church and Clergy Cases, 2 parts, 1847—1850	Eng.
Cro. Car.	Croke's Reports *temp.* Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641	Eng.
Cro. Eliz.	Croke's Reports *temp.* Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603	Eng.
Cro. Jac.	Croke's Reports *temp.* James I., King's Bench and Common Pleas, 1 vol., 1603—1625	Eng.
Cru. Dig.	Cruise's Digest of the Law of Real Property, 7 vols.	Eng.
Cunn.	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735	Eng.
Curt.	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844	Eng.
D.	Duxbury's Reports of the High Court of the South African Republic	S. Af.
D. C. A.	Dorion's Queen's Bench Reports	Can.
D. L. R.	Dominion Law Reports	Can.
Dalr.	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720	Scot.
Dan.	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823	Eng.
Dan. & Ll.	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829	Eng.
Dav. & Mer.	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844	Eng.
Dav. Ir.	Davys' (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—1611	Ir.
Dav. Pat. Cas.	Davies' Patent Cases, 1 vol., 1785—1816	Eng.
Day	Day's Election Cases, 1 vol., 1892—1893	Eng.
Dea. & Sw.	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857	Eng.

Deac.	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840	Eng.
Deac. & Ch.	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835	Eng.
Dears. & B.	Dearsley and Bell's Crown Cases Reserved, 1 vol., 1856—1858	Eng.
Dears. C. C.	Dearsly's Crown Cases Reserved, 1 vol., 1852—1856	Eng.
Deas & And.	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832	Scot.
De G.	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848	Eng.
De G. & J.	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859 ...	Eng.
De G. & Sm.	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852 ...	Eng.
De G. F. & J.	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—1862	Eng.
De G. J. & Sm. ...	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865	Eng.
De G. M. & G.	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols., 1851—1857	Eng.
Delane	Delane's Decisions, Revision Courts, 1 vol., 1832—1835 ...	Eng.
Den.	Denison's Crown Cases Reserved, 2 vols., 1844—1852	Eng.
Dick.	Dickens' Reports, Chancery, 2 vols., 1559—1798	Eng.
Dig.	Justinian's Digest or Pandects	Eng.
Dirl.	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677	Scot.
Dods.	Dodson's Reports, Admiralty, 2 vols., 1811—1822	Eng.
Donnelly	Donnelly's Reports, Chancery, 1 vol., 1836—1837	Eng.
Doug. El. Cas. ...	Douglas' Election Cases, 4 vols., 1774—1776	Eng.
Doug. K. B.	Douglas' Reports, King's Bench, 4 vols., 1778—1785	Eng.
Dow	Dow's Reports, House of Lords, 6 vols., 1812—1818	Eng.
Dow & Cl.	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832 ...	Eng.
Dow. & L.	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849 ...	Eng.
Dow. & Ry. K. B. ...	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827	Eng.
Dow. & Ry. M. C. ...	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827	Eng.
Dow. & Ry. N. P. ...	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823	Eng.
Dowl.	Dowling's Practice Reports, 9 vols., 1830—1841	Eng.
Dowl. N. S.	Dowling's Practice Reports, New Series, 2 vols., 1841—1843 ...	Eng.
Dr. & Wal.	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841	Ir.
Dr. & War.	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843	Ir.
Dra.	Draper's King's Bench Reports	Can.
Drew.	Drewry's Reports, Chancery, 4 vols., 1852—1859	Eng.
Drew. & Sm.	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865 ...	Eng.
Drinkwater	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841 ...	Eng.
Drury *temp.* Nap. ...	Dryry's Reports *temp.* Napier, Chancery (Ireland), 1 vol., 1858—1859	Ir.
Drury *temp.* Sug. ...	Drury's Reports *temp.* Sugden, Chancery (Ireland), 1 vol., 1841—1844	Ir.
Dugd. Orig.	Dugdale's Origines Juridiciales	Eng.
Dunl. (Ct. of Sess.) ...	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols., 1838—1862	Scot.
Dunning	Dunning's Reports, King's Bench, 1 vol., 1753—1754	Eng.
Durie	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642	Scot.
Dyer	Dyer's Reports, King's Bench, 3 vols., 1513—1581	Eng.
E. & A.	Upper Canada Error and Appeal	Can.
E. & B.	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858	Eng.
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E. D. C.	Reports of the Eastern Districts Court (Cape) from 1880 ...	S. Af.
E. D. L.	South African Law Reports, Eastern Districts Local Division	S. Af.
E. L. R.	Eastern Law Reporter	Can.
E. R. (or Eng. Rep.) ...	English Reports	Eng.
E. R.	Ontario Election Reports	Can.
Eag. & Y.	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825	Eng.
East	East's Reports, King's Bench, 16 vols., 1800—1812	Eng.
East, P. C.	East's Pleas of the Crown	Eng.
Ecc. & Ad.	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855	Eng.
Eden	Eden's Reports, Chancery, 2 vols., 1757—1766	Eng.
Edgar	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725	Scot.
Edw.	Edwards' Reports, Admiralty, 1 vol., 1808—1812	Eng.
Elchies	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754	Scot.

Eng. Pr. Cas.	Roscoe's English Prize Cases, 2 vols., 1745—1858	Eng.
Eq. Cas. Abr.	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744	Eng.
Eq. Rep.	Equity Reports, 3 vols., 1853—1855	Eng.
Esp.	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810	Eng.
Ex. D.	Law Reports, Exchequer Division, 5 vols., 1875—1880	Eng.
Exch.	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856	Eng.
Exch. C. R.	Exchequer Court Reports	Can.
F. (Ct. of Sess.)	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906	Scot.
F.	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880	S. Af.
F. & F.	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867	Eng.
F. N. D.	Finnemore's Notes and Digest of Natal Cases, 1863—1867	S. Af.
Fac. Coll.	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1841	Scot
Falc.	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751	Scot
Falc. & Fitz.	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838	Eng
Fenton	Fenton, Important Judgments	N.Z.
Ferg.	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	Scot.
Fitz. Nat. Brev.	Fitzherbert's Natura Brevium	Eng.
Fitz-G.	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	Eng.
Fl. & K.	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842	Ir.
Fonbl.	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852	Eng.
For.	Forrest's Reports, Exchequer, 1 vol., 1800—1801	Eng.
Forb.	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713	Scot.
Fort. De Laud.	Fortesque, De Laudibus Legum Angliæ	Eng.
Fortes. Rep.	Fortescue's Reports, fol., 1 vol., 1692—1736	Eng.
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G.	Gregorowski's Reports of the High Court of the Orange Free State from 1883	S. Af.
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Gal. & Dav.	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843	Eng.
Gale	Gale's Reports, Exchequer, 2 vols., 1835—1836	Eng.
Gaz. L. R.	New Zealand Gazette Law Reports	N.Z.
Geld. Dig.	Geldert's Digest	Can.
Gib. Cod.	Gibson's Codex Juris Ecclesiastici Anglicani	Eng.
Giff.	Giffard's Reports, Chancery, 5 vols., 1857—1865	Eng.
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Gl. & J.	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	Eng.
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H. & C.	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866	Eng.

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Har. & W.	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	Eng.
Harc.	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	Scot.
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Hong Kong L. R.	Hong Kong Reports	Hong Kong.
Hop. & Colt.	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878	Eng.
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I. L. R. (Vol.) Mad.	Indian Law Reports, Madras	Ind.
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Jebb, C. C.	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	Ir.
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Jo. & Car.	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	Ir.
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K. B. (preceded by date)	Law Reports, King's Bench Division, since 1900 (*e.g.*, [1901] 2 K. B.)	Eng.
Kames, Dict. Dec.	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	Scot.
Kames, Rem. Dec.	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	Scot.
Kames, Sel. Dec.	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	Scot.
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Keil.	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578	Eng.
Kel.	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	Eng.
Kel. W.	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734	Eng.
Keny.	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	Eng.
Keny. Ch.	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	Eng.
Kerr	New Brunswick Reports (Kerr)	Can.
Kilkerran	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	Scot.
Kn. & Omb.	Knapp and Ombler's Election Cases, 1 vol., 1834—1835	Eng.
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Konst. & W. Rat. App.	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	Eng.
Konst. Rat. App.	Konstam's Reports of Rating Appeals, 2 vols., 1894—1904	Eng.
L. & G. *temp.* Plunk.	Lloyd and Goold's Reports *temp.* Plunkett, Chancery (Ireland), 1 vol., 1834—1839	Ir.
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L. C. R.	Lower Canada Reports	Can.
L. G. R.	Local Government Reports, 1902—(current)	Eng.
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L. Th.	La Themis	Can.
Lane	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	Eng.
Lat.	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628	Eng.
Laws. Reg. Cas.	Lawson's Registration Cases, 1895—(current)	Eng.
Ld. Raym.	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	Eng.
Le. & Ca.	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865	Eng.
Leach	Leach's Crown Cases, 2 vols., 1730—1814	Eng.
Lee	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758	Eng.
Lee *temp.* Hard.	T. Lee's Cases *temp.* Hardwicke, King's Bench, 1 vol., 1733—1738	Eng.
Leg. Rep.	Legal Reporter	Ir.
Legge	Legge's Reports	Aus.
Leon.	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	Eng.
Lev.	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696	Eng.
Lew. C. C.	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	Eng.
Ley	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	Eng.
Lib. Ass.	Liber Assisarum, Year Books, 1—51 Edw. III.	Eng.
Lilly	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	Eng.
Litt.	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	Eng.
Lloyd, L. R.	Lloyd's List Law Reports, 1919—(current)	Eng.
Lloyd, Pr. Cas.	Lloyd's Reports of Prize Cases, 5 vols., 1914—1918	Eng.
Lofft	Lofft's Reports, King's Bench, foll., 1 vol., 1772—1774	Eng.
Long. & T.	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1841—1842	Ir.

Lud. E. C.	Luder's Election Cases, 3 vols., 1784—1787	Eng.
Lumley, P. L. C. ...	Lumley's Poor Law Cases, 2 vols., 1834—1842	Eng.
Lush.	Lushington's Reports, Admiralty, 1 vol., 1859—1862	Eng.
Lut.	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704	Eng.
Lut. Reg. Cas. ...	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853 ...	Eng.
Lynd.	Lyndwood, Provinciale, fol., 1 vol.	Eng.
M.	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	S. Af.
M. & S.	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	Eng.
M. & W.	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	Eng.
M. C. R.	Montreal Condensed Reports	Can.
M. H. C. R.	Madras High Court Reports	Ind.
M. L. R. (Vol.) K. B. or Q. B.	Montreal Law Reports, King's Bench or Queen's Bench ...	Can.
M. L. R. (Vol.) S. C. ...	Montreal Law Reports, Superior Court	Can.
M. M. Cas.	Martin's Reports of Mining Cases	Can.
Mac.	Macassey's New Zealand Reports	N.Z.
Mac. & G.	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—1852	Eng.
Mac. & H.	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852 ...	Eng.
M'Cle	M'Cleland's Reports, Exchequer, 1 vol., 1824	Eng.
M'Cle. & Yo.	M'Cleland and Younge's Reports, Exchequer, 1 vol., 1824—1825	Eng.
Macfarlane	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839	Scot.
Macl. & Rob.	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	Scot.
Macph. (Ct. of Sess.) ...	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1862—1873	Scot.
Macq.	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—1865	Scot.
Macr.	Macrory's Patent Cases, 2 parts, 1847—1856	Eng.
Mad.	Madras High Court Reports	Ind.
Madd.	Maddock's Reports, Chancery, 6 vols., 1815—1821	Eng.
Madd. & G.	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	Eng.
Madox	Madox's Formulare Anglicanum	Eng.
Madox, Exch.	Madox's History and Antiquities of the Exchequer, 2 vols. ...	Eng.
Mag.	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	Eng.
Man. & G.	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845	Eng.
Man. & Ry. K. B. ...	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830	Eng.
Man. & Ry. M. C. ...	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830 ...	Eng.
Man. L. J.	Manitoba Law Journal	Can.
Man. L. R.	Manotoba Law Reports	Can.
Man. R. *temp.* Wood ...	Manitoba Reports *temp.* Wood	Can.
Mans.	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	Eng.
Mar. L. C.	Maritime Law Reports (Crockford), 3 vols., 1860—1871 ...	Eng.
March	March's Reports, King's Bench and Common Pleas, 1 vol., 1639—1642	Eng.
Marr.	Marriott's Decisions, Admiralty, 1 vol., 1776—1779	Eng.
Marsh.	Marshall's Reports, Common Pleas, 2 vols., 1813—1816 ...	Eng.
Marsh.	Marshall's Reports	Ind.
Mayn.	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326	Eng.
Meg.	Megone's Companies Acts Cases, 2 vols., 1889—1891	Eng.
Men.	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	S. Af.
Mer.	Merivale's Reports, Chancery, 3 vols., 1815—1817	Eng.
Milw.	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843	Ir.
Mod. Rep.	Modern Reports, 12 vols., 1669—1755	Eng.
Mol.	Molloy's Reports, Chancery (Ireland), 3 vols., 1808—1831 ...	Ir.
Mont.	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	Eng.
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Mont. & M.	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830	Eng.
Mont. D. & De G. ...	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844	Eng.
Moo. & P.	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	Eng.
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Mood. & R.	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	Eng.
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Moore, K. B.	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	Eng.
Mor. Dict.	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	Scot.
Morr.	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	Eng.
Mos.	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	Eng.
Mun. Rep.	Municipal Reports	Can.
Murd. Epit.	Murdoch's Epitome	Can.
Murp. & H.	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	Eng.
Murr.	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	Scot.
My. & Cr.	Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841	Eng.
My. & K.	Mylne and Keen's Reports, Chancery, 3 vols., 1832—1835	Eng.
N. A. C.	Native Appeal Cases	S. Af.
N. & S.	Nichols and Stop's Reports (Tasmania)	Tasmania.
N. B. Dig.	New Brunswick Digest (Stevens)	Can.
N. B. Eq. Rep.	New Brunswick Equity Reports	Can.
N. B. R.	New Brunswick Reports	Can.
N. B. R. (All.)	New Brunswick Law Reports (Allen)	Can.
N. B. R. (Ber.)	New Brunswick Law Reports (Berton)	Can.
N. B. R. (Chip.)	New Brunswick Reports (Chipman)	Can.
N. B. R. (Han.)	New Brunswick Reports (Hannay)	Can.
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N. S. W. Bkpty. Cas.	New South Wales Bankruptcy Cases	Aus.
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Owen	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614	Eng.
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Pat. App.	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822	Scot.
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Peake	Peake's Reports, Nisi Prius, 1 vol., 1790—1794	Eng.
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Per. & Kn.	Perry and Knapp's Election Cases, 1 vol., 1833	Eng.
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Ph.	Phillips' Reports, Chancery, 2 vols., 1841—1849	Eng.
Phil. El. Cas.	Philipps' Election Cases, 1 vol., 1780	Eng.
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R.	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878	S. Af.
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R. A. C.	Ramsay, Appeal Cases	Can.
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Rep. in C. of A.	Reports in Courts of Appeal	N.Z.
Res. & Eq. Jud.	New South Wales Reserved and Equity Judgments	Aus.
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Ridg. L. & S.	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795	Ir.
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Ridg. *temp.* H.	Ridgeway's Reports *temp.* Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746	Eng.
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Robert. App.	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727	Scot.
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S.	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J.	South African Law Journal	S. Af.
S. A. L. R.	South Australian Law Reports	Aus.
S. A. L. R.	South African Law Reports	S. Af.
S. A. R.	Reports of the High Court of the South African Republic, 1881—1892	S. Af.
S. C.	Reports of the Supreme Court of the Cape of Good Hope from 1880	S. Af.
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S. C. (H. L.) (preceded by date).	Court of Session Cases (Scotland) (House of Lords), since 1906 (*e.g.*, [1906] S. C. (H. L.))	Scot.
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S. C. R.	Canada, Supreme Court Reports	Can.
S. L. T.	Scots Law Times, 1893 (current)	Scot.
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S. R.	Reports of the High Court of Southern Rhodesia	S. Af.
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S. R. Q.	Queensland Reports, Supreme Court	Aus.
S. V. A. R.	Stuart's Vice-Admiralty Reports	Can.
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Salk.	Salkeld's Reports, King's Bench, 3 vols., 1689—1712	Eng.
Sask. L. R.	Saskatchewan Law Reports	Can.

Sau. & Sc.	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840	Ir.
Saund.	Saunders's Reports, King's Bench, 2 vols., 1666—1672	Eng.
Saund. & A.	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	Eng.
Saund. & B.	Saunders and Bidder's Locus Standi Reports, 1905—(current)	Eng.
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Shep. Touch.	Sheppard's Touchstone of Common Assurances	Eng.
Show.	Shower's Reports, King's Bench, 2 vols., 1678—1695	Eng.
Show. Parl. Cas.	Shower's Cases in Parliament, fol., 1 vol., 1694—1699	Eng.
Sid.	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670	Eng.
Sim.	Simons' Reports, Chancery, 17 vols., 1826—1852	Eng.
Sim. & St.	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826	Eng.
Sim. N. S.	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852	Eng.
Skin.	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697	Eng.
Sm. & Bat.	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825	Ir.
Sm. & G.	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857	Eng.
Smith, K. B.	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806	Eng.
Smith, L. C.	Smith's Leading Cases, 2 vols.	Eng.
Smith, Reg. Cas.	C. L. Smith's Registration Cases, 1895—(current)	Eng.
Smythe	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840	Ir.
Sol. Jo.	Solicitors' Journal, 1856—(current)	Eng.
Spence	Spence's Equitable Jurisdiction of the Court of Chancery	Eng.
Spinks	Spinks' Prize Court Cases, 2 parts, 1854—1856	Eng.
Stair Rep.	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681	Scot.
Stark.	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823	Eng.
State Tr.	State Trials, 34 vols., 1163—1820	Eng.
State Tr. N. S.	State Trials, New Series, 8 vols., 1820—1858	Eng.
Stewart	Stewart's Nova Scotia Admiralty Reports, 1803—1813	Can.
Stockton	Stockton's Vice-Admiralty Report and Digest	Can.
Story	Story's Commentaries on Equity Jurisprudence	Eng.
Stra.	Strange's Reports, 2 vols., 1716—1747	Eng.
Stu. M. & P.	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853	Scot.
Stuart	Sessions Cases (Stuart)	Scot.
Stuart, Adm.	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856	Can.
Stuart, Adm. N. S.	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874	Can.
Stuart, K. B.	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835	Can.
Sty.	Style's Reports, King's Bench, fol., 1 vol., 1646—1655	Eng.
Sw.	Swabey's Reports, Admiralty, 1 vol., 1855—1859	Eng.
Sw. & Tr.	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865	Eng.
Swan.	Swanston's Reports, Chancery, 3 vols., 1818—1821	Eng.
Swin.	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841	Scot.
Syme	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829	Scot.
T. & M.	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851	Eng.

T. H.	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909	S. Af.
T. Jo.	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685	Eng.
T. L.	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current)	S. Af.
T. L. R.	The Times Law Reports, 1884—(current)	Eng.
T. P.	Reports of the Supreme Court of the Transvaal, 1910—(current)	S. Af.
T. P. D.	South African Law reports, Transvaal Provincial Division	S. Af.
T. Raym.	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683	Eng.
T. S.	Reports of the Supreme Court of the Transvaal, 1902—1909	S. Af.
Taml.	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830	Eng.
Tas. L. R.	Tasmanian Law Reports	Aus.
Taunt.	Taunton's Reports, Common Pleas, 8 vols., 1807—1819	Eng.
Tax Cas.	Tax Cases, 1875—(current)	Eng.
Tay.	Taylor's King's Bench Reports	Can.
Temp. Wood	Manitoba Reports *temp.* Wood	Can.
Term Rep.	Term Reports (Durnford and East), fol., 8 vols., 1785—1800	Eng.
Terr. L. R.	Territories Law Reports	Can.
Thom.	Nova Scotia Reports (Thomson)	Can.
Toth.	Tothill's Transactions in Chancery, 1 vol., 1559—1646	Eng.
Town. St. Tr.	Townsend, Modern State Trials	Eng.
Trist.	Tristram's Consistory Judgments, 1 vol., 1872—1890	Eng.
Tudor, L. C. Merc. Law.	Tudor's Leading Cases on Mercantile and Maritime Law	Eng.
Tudor, L. C. Real. Prop	Tudor's Leading Cases on Real Property	Eng.
Turn. & R.	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825	Eng.
Tyr.	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835	Eng.
Tyr. & Gr.	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836	Eng.
U. C. Jur.	Upper Canada Jurist	Can.
U. C. L. J. N. S.	Canada Law Journal, New Series, 1865—(current)	Can.
U. C. L. J. O. S.	Canada Law Journal, Old Series, 10 vols., 1855—1864	Can.
U. C. R.	Upper Canada Reports, Queen's Bench	Can.
Udal	Fiji Law Reports (Udal)	Fiji.
V. L. R.	Victorian Law Reports	Aus.
V. R.	Victorian Reports	Aus.
V. R. (Adm.)	Victorian Reports (Admiralty)	Aus.
Vaugh.	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673	Eng.
Vent.	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	Eng.
Vern.	Vernon's Reports, Chancery, 2 vols., 1680—1719	Eng.
Vern. & Scr.	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788	Ir.
Ves.	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817	Eng.
Ves. & B.	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814	Eng.
Ves. Sen.	Vesey Sen.'s Reports, 2 vols., 1747—1756	Eng.
Vin. Abr.	Viner's Abridgment of Law and Equity, fol., 22 vols.	Eng.
Vin. Supp.	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	Eng.
W.	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857	S. Af.
W. A. L. R.	West Australian Law Reports	Aus.
W. A'B. & W.	Webb, A'Beckett and Williams' Victorian Reports	Aus.
W. & W.	Wyatt and Webb	Aus.
W. C. C.	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907	Eng.
W. H. C.	South African Law Reports, Witwatersrand High Court	S. Af.
W. Jo.	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640	Eng.
W. L. D.	South African Law Reports, Witwatersrand Local Division	S. Af.
W. L. R.	Western Law Reporter	Can.
W. L. T.	Western Law Times	Can.
W. N. (preceded by date)	Law Reports, Weekly notes, 1866—(current) (*e.g.*, [1866] W. N.)	Eng.
W. N.	Calcutta Weekly Notes	Ind.
W. R	Weekly Reporter, 54 vols., 1852—1906	Eng.
W. R.	Sutherland's Weekly Reporter	Ind.
W. R.	Weekly Reporter, reporting cases in the Cape Provincial Division	S. Af.
W. W. & A'B.	Wyatt, Webb and A'Beckett	Aus.
W. W. R.	Western Weekly Reports	Can.
Wallis	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791	Ir.
Web. Pat. Cas.	Webster's Patent Cases, 2 vols., 1602—1855	Eng.
Welsh, Reg. Cas.	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840	Ir.
Went. Off. Ex.	Wentworth's Office and Duty of Executors	Eng.
West	West's Reports, House of Lords, 1 vol., 1839—1841	Eng.
West *temp.* Hard.	West's Reports *temp.* Hardwicke, Chancery, 1 vol., 1736—1740	Eng.

West. Tithe Cas.	Western's London Tithe Cases, 1 vol., 1592—1822	Eng.
White	White's Justiciary Reports (Scotland), 3 vols., 1886—1893	Scot.
White & Tud. L. C.	White and Tudor's Leading Cases in Equity, 2 vols.	Eng.
Wight.	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	Eng.
Will. Woll. & Dav.	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837	Eng.
Will. Woll. & H.	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839	Eng.
Willes	Willes' Reports, Common Pleas, 1 vol., 1737—1758	Eng.
Wilm.	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	Eng.
Wils.	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774	Eng.
Wils. & S.	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	Scot.
Wils. Ch.	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	Eng.
Wils. Ex.	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817	Eng.
Win.	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625	Eng.
Wm. Bl.	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779	Eng.
Wm. Rob.	William Robinson's Reports, Admiralty, 3 vols., 1838—1850	Eng.
Wms. Saund.	Williams' Notes to Saunders' Reports, 2 vols.	Eng.
Wolf. & B.	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864	Eng.
Wolf. & D.	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858	Eng.
Woll.	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841	Eng.
Wood	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798	Eng.
Y A D.	Young's Vice-Admiralty Reports	Can.
Y. & C. Ch. Cas.	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843	Eng.
Y. & C. Ex.	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841	Eng.
Y. & J.	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830	Eng.
Y. B.	Year Books	Eng.
Yelv.	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613	Eng.
You.	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832	Eng.

ABBREVIATIONS

USED IN THIS WORK.

(For Abbreviations used in citing Reports, *see* pp. xiii.—xxviii., *ante*.)

A.-G.	for Attorney-General.
Act.	,, Actiengesellschaft.
Admlty.	,, Admiralty.
Affd.	,, Affirmed.
Affg.	,, Affirming
Akt.	,, Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Anon.	,, Anonymous.
Apld.	,, Applied.
Appct.	,, Applicant.
Appln.	,, Application.
Appln.	,, Application to Register a Trade Mark.
Applt.	,, Appellant.
Apprvd.	,, Approved.
Arbn.	,, Arbitration.
Archbp.	,, Archbishop.
Art.	,, Article.
Assce.	,, Assurance.
Assocn.	,, Association.
B. C.	,, Borough Council.
Bkpcy.	,, Bankruptcy.
Bkpt.	,, Bankrupt.
Bldg. Soc.	,, Building Society.
Bp.	,, Bishop.
C. A.	,, Court of Appeal.
C. & S. L. Ry. Co.	,, City & South London Railway Co.
C. C. A.	,, Court of Criminal Appeal.
C. C. R.	,, County Court Rules.
C. C. R.	,, Court of Crown Cases Reserved.
C. L. P. Act	,, Common Law Procedure Act.
C. L. Ry. Co.	,, Central London Railway Co.
C. S. U. C.	,, Consolidated Statutes of Upper Canada.
Cale. Ry. Co.	,, Caledonian Railway Co.
Ct.	,, Court.
Ct. of Eq.	,, Court of Equity.
Ct. of R.	,, Court of Review.
Co.	,, Company.
Co-op. Assocn.	,, Co-operative Supply Association.
Comrs.	,, Commissioners.
Consd.	,, Considered.
Corpn.	,, Corporation.
D. C.	,, Divisional Court.
Dbtd.	,, Doubted.
Deft.	,, Defendant.
Distd.	,, Distinguished.
Eccl Comrs.	,, Ecclesiastical Commissioners
Eccl. Ct.	,, Ecclesiastical Court.
Ex. Ch.	,, Exchequer Chamber.
Ex p.	,, *Ex parte.*
Exch.	,, Exchequer.

Exor.	for Executor.
Exorship.	,, Executorship.
Expld.	,, Explained.
Extd.	,, Extended.
Extrix.	,, Executrix.
Folld.	,, Followed.
G. & S. W. Ry. Co.	,, Glasgow & South Western Railway Co.
G. C. Ry. Co.	,, Great Central Railway Co.
G. E. Ry. Co.	,, Great Eastern Railway Co.
G. N. of Scotland Ry. Co.	,, Great North of Scotland Railway Co.
G N. Picc. & Brompton Ry. Co.	,, Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co.	,, Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland	,, Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co.	,, Great Western Railway Co.
Govt.	,, Government.
Grdns.	,, Guardians or Guardians of the Poor.
H. C. of A.	,, High Court of Australia.
H. L.	,, House of Lords.
I. R. Comrs.	,, Inland Revenue Commissioners.
Insce.	,, Insurance.
JJ.	,, Justices.
Jud. Act	,, Judicature Act.
L. & B. Ry. Co.	,, London & Brighton Railway Co.
L. & N. W. Ry. Co.	,, London & North Western Railway Co.
L. & S. W. Ry. Co.	,, London & South Western Railway Co.
L. & Y. Ry. Co.	,, Lancashire & Yorkshire Railway Co.
L. B.	,, Local Board.
L. B. & S. C. Ry. Co.	,, London, Brighton & South Coast Railway Co.
L.C.	,, Lord Chancellor.
L. C. & D. Ry. Co.	,, London, Chatham & Dover Railway Co.
L. C. C.	,, London County Council.
L. Elec. Ry. Co.	,, London Electric Railway Co.
L. G. Board	,, Local Government Board.
L.J.	,, Lord Justice.
L.JJ.	,, Lords Justices.
L. T. & S. Ry. Co.	,, London, Tilbury & Southend Railway Co.
M. S. Act	,, Merchant Shipping Act.
M. S. & L. Ry. Co.	,, Manchester, Sheffield & Lincolnshire Railway Co.
Mags.	,, Magistrates.
Mentd.	,, Mentioned.
Met. Dist. Ry. Co.	,, Metropolitan District Railway Co.
Met. Ry. Co.	,, Metropolitan Railway Co.
Mid. G. W. Ry. Co.	,, Midland Great Western Railway Co.
Mid. Ry. Co.	,, Midland Railway Co.
Mtge.	,, Mortgage.
Mtgee.	,, Mortgagee.
Mtgor.	,, Mortgagor.
N. B. Ry. Co.	,, North British Railway Co.
N. E. Ry. Co.	,, North Eastern Railway Co.
N. F.	,, Not Followed.
N. P.	,, Nisi Prius.
O.	,, Order.
O. H.	,, Outer House.
Overd.	,, Overruled.
P. C.	,, Privy Council.
Petn.	,, Petition or Election Petition.
Pltf.	,, Plaintiff.
R. C.	,, Rural Council.
R. D. C.	,, Rural District Council.
R. S. A.	,, Rural Sanitary Authority.
R. S. C.	,, Revised Statutes of Canada.
R. S. C.	,, Rules of the Supreme Court, 1883.
Refd.	,, Referred.
Regn. of Trade Mk.	,, Registration of Trade Mark.
Regr. of Trade Mks.	,, Registrar of Trade Marks
Resp.	,, Respondent.
Restg.	,, Restoring.
Revsd.	,, Reversed.

Revsg.	for Reversing.
Ry. Co.	,, Rail. Co. or Railway Co.
S. C.	,, Same Case.
S. C. (name of colony following)	,, Supreme Court of a Colony.
S. E.	,, Settled Estates.
S. E. & C. Ry. Co.	,, South Eastern & Chatham Railway Co.
S. E. Ry. Co.	,, South Eastern Railway Co.
S. P.	,, Same Point.
S.S. Co.	,, Steamship Co.
Sect.	,, Section.
Set. Land Act	,, Settled Land Act.
Settlmt.	,, Settlement.
Soc.	,, Society.
Soc. Anon.	,, Société Anonyme, etc.
Solr.	,, Solicitor.
Trade Mk.	,, Trade Mark.
Tram. Co.	,, Tramways Company.
U. C.	,, Urban Council.
U. D. C.	,, Urban District Council.
U. S. A.	,, United States of America.
Union Assmt. Com.	,, Union Assessment Committee.
Urban S. A.	,, Urban Sanitary Authority.
V. A. C.	,, Vice-Admiralty Court.
V.-C.	,, Vice-Chancellor.

MEANING OF TERMS

USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases are listed chronologically except such as are classiffed as " Referred to " or " Mentioned." These come at the end and are arranged *inter se* in chronological order. The terms used in classifying the annotating cases are as follows :—

" APPLIED " (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.

" APPROVED " (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.

" CONSIDERED " (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.

" DISTINGUISHED " (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.

" DOUBTED " (Dbtd.).—This expression is used where the court in the annotating case, without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.

" EXPLAINED " (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.

" EXTENDED " (Extd.).—Compare " APPLIED," *supra.*

" FOLLOWED " (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.

" NOT FOLLOWED " (N.F.).—Compare " FOLLOWED," *supra*, to which it is the adverse.

" OVERRULED " (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.

" REFERRED " (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.

" MENTIONED " (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.

TABLE OF CASES.

NOTE.—A FULL TABLE OF CASES CONTAINING ALL CASES APPEARING IN BOTH VOLUMES IV. AND V. WILL BE FOUND AT THE COMMENCEMENT OF VOLUME V.

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PART XXI. ACTIONS, ARBITRATIONS, AND OTHER LEGAL PROCEEDINGS BY AND AGAINST TRUSTEE AND BANKRUPT.
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Administration of Estates of Deceased Persons generally	*See* EXECUTORS AND ADMINISTRATORS.
Bills of Exchange	,, BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS.
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Receivers	,, RECEIVERS.
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Statutes of Limitation	,, LIMITATION OF ACTIONS.
Winding up Unincorporated Associations	,, SPECIFIC TITLES.

NOTE—*The Act now in force in England is Bankruptcy Act*, 1914 (*c.* 59), *herein referred to as* 1914 *Act. In considering the cases set out in this title regard must be had to their date, the Act under which they were decided, and the effect of the subsequent Acts.*

Part I.—Bankruptcy Jurisdiction.

SECT. 1.—OBJECTS AND CREATION OF BANKRUPTCY LAWS.

1. Protection of creditors.]—The principle of bkpt. laws, as it is to be found in 34 & 35 Hen. 8, c. 4, is to prevent persons craftily obtaining into their hands great substance of other men's goods, & at their own wills & pleasures consuming the substance obtained by credit of other men, & it is always to be remembered that it is the protection of persons who have so given credit which is the professed object of bkpt. laws (LORD ELLENBOROUGH, C.J.).—SUTTON *v.* WEELEY (1806), 7 East, 442 ; 3 Smith, K. B. 445 ; 103 E. R. 171.

Annotations :—**Refd.** Heane *v.* Rogers (1829), 9 B. & C. 577. **Mentd.** Cannan *v.* Denew (1833), 3 L. J. C. P. 65 ; Kent *v.* Astley (1869), L. R. 5 Q. B. 19.

2. ——.]—The conditions imposed by 1869 Act, s. 126, are conditions for the benefit of the creditors. The creditor may waive them, debtor cannot.—BRESLAUER *v.* BROWN (1878), 3 App. Cas. 672 ; 47 L. J. Q. B. 729 ; 39 L. T. 67 ; 26 W. R. 536, H. L.

Annotations :—**Distd.** Oppenheim *v.* Jackson (1879), 49 L. J. Q. B. 216, C. A. **Consd.** Lewis *v.* Leonard (1880), 5 Ex. D. 165, C. A. **Distd.** *Re* Lacey, *Ex p.* Lacey (1880), 16 Ch. D. 131, C. A. **Refd.** Tea Co. *v.* Jones (1880), 43 L. T. 255. **Mentd.** Morgan *v.* Hardy (1886), 17 Q. B. D. 770.

3. —— Mode of recovering debt.]— Taking out a commission of bkpcy. is a well-known mode of recovering a debt (BAYLEY, J.).—GUTHRIE *v.* FISK (1824), 3 B. & C. 178 ; 5 Dow. & Ry. K. B. 24 ; 107 E. R. 700.

Annotations :—**Refd.** *Re* Hall, *Ex p.* Hall (1838), 8 L. J. Bcy. 5 ; Williams *v.* Harding (1866), L. R. 1 H. L. 9, H. L. **Mentd.** Williams *v.* Beaumont (1833), 10 Bing. 260 ; Hope *v.* Meek (1855), 10 Exch. 829 ; *Re* Winterbottom, *Ex p.* Winterbottom (1886), 18 Q. B. D. 446 ; *Re* Nance, *Ex p.* Ashmead, [1893] 1 Q. B. 590, C. A.

4. —— Equitable distribution of assets—Release of debtor.]—The bkpcy. law is a special law, having for its object the distribution of an insolvent's assets equitably amongst his creditors & persons to whom he is under liability, &, upon this *cessio bonorum*, to release him under certain conditions from future liability in respect of his debts & obligations (JAMES, L.J.).—*Re* LEVY, *Ex p.* WALTON (1881), 17 Ch. D. 746 ; 50 L. J. Ch. 657 ; 45 L. T. 1 ; 30 W. R. 395, C. A.

Annotations :—**Refd.** Harding *v.* Preece (1883), 9 Q. B. D. 281 ; Heritable Reversionary Co. *v.* Millar, [1892] A. C. 598, H. L. ; O'Grady *v.* Wilmot, [1916] 2 A. C. 231, H. L. **Mentd.** *Re* Clarke, *Ex p.* East & West India Dock Co. (1881), 17 Ch. D. 759, C. A. ; *Re* Latham, *Ex p.* Glegg (1881), 19 Ch. D. 7, C. A. ; *Re* Morrish, *Ex p.* Hart Dyke (1882), 22 Ch. D. 410, C. A. ; East & West India Dock Co. *v.* Hill (1882), 22 Ch. D. 14, C. A. ; Hill *v.* East & West India Dock Co. (1884), 9 App. Cas. 448, H. L. ; *Re* Cock, *Ex p.* Shilson (1887), 20 Q. B. D. 343, D. C. ; De Vesci *v.* O'Connell, [1908] A. C. 298, H. L. ; R. *v.* Halliday, [1917] A. C. 260 H. L. ; Tozer *v.* Viola, [1918] 1 Ch. 75, C. A.

5. Relief of debtor.]—The object of 1869 Act, s. 7, was to compel a man to commit an act of bkpcy., if he could not pay debts for which an action could be maintained at common law, & for which a man was then liable.—*Re* FOSTER, *Ex p.* FOSTER (1883), 22 Ch. D. 797 ; 52 L. J. Ch. 577 ; 48 L. T. 497 ; 31 W. R. 774, C. A.

6. —— From committal order.]—*Semble :* it was the intention of the legislature, by 1883 Act, to enable debtor, in a proper case, to relieve himself from the pressure of a committal order by obtaining an adjudication in bkpcy. against himself.—*Re* HANCOCK, *Ex p.* HILLEARYS, [1904] 1 K. B. 585 ; 73 L. J. K. B. 245 ; 90 L. T. 389 ; 52 W. R. 547 ; 48 Sol. Jo. 260 ; 11 Mans. 1, C. A.

Annotation :—**Mentd.** Hamilton *v.* Caldwell (1919), 88 L. J. P. C. 173, H. L.

—— —— **Effect of receiving order.**]—*See* Part IV., sect. 6, *post.*

Right of bankrupt to petition against himself, *see, further*, Part III., sect. 2, *post.*

7. Discharge of debtor—Distribution of property—Protection of trustee.]——The purpose of 1869 Act, s. 23, & indeed the purpose of the whole stat. is (1) to clear & discharge bkpt. in cases where it is proper that he should be discharged from liability ; (2) to facilitate as early as possible the distribution of the property which is to be divided among the creditors & the winding up of the bkpcy. ; & (3) to protect

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4 i. *Protection of creditors—Equitable distribution of assets.*] — The object of the legislature in creating the Insolvent Ct. is to administer the estates of insolvents, & the Ct. of Ch. will not, unless in a very exceptional case, interfere with the jurisdiction thus created.—MCNEIL *v.* RELIANCE MUTUAL FIRE INSURANCE CO. (1879), 26 Gr. 567.—**CAN.**

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the trustee from any liability to which he might be subject & to which he ought not to be subject beyond what is necessary for the purpose of accomplishing the two prior objects.—HILL *v.* EAST & WEST INDIA DOCK CO. (1884), 9 App. Cas. 448; 53 L. J. Ch. 842; 51 L. T. 163; 48 J. P. 788; 32 W. R. 925, H. L.

Annotations:—**Consd.** De Vesci *v.* O'Connell, [1908] A. C. 298, H. L. **Apld.** Ball *v.* Hunt (1912), 5 B. W. C. C. 459, H. L. **Consd.** O'Grady *v.* Wilmot, [1916] 2 A. C. 231, H. L. Tozer *v.* Viola, [1918] 1 Ch. 75, C. A. **Refd.** *Re* Cock, *Ex p.* Shilson (1887), 20 Q. B. D. 343, D. C.; Railton *v.* Wood (1890), 15 App. Cas. 363, P. C.; Heritable Reversionary Co. *v.* Millar, [1892] A. C. 598, H. L.; R. *v.* Dibden, [1910] P. 57, C. A.; Revill *v.* Bethell, [1918] 1 K. B. 638, D. C. **Mentd.** Lybbe *v.* Hart (1885), 29 Ch. D. 8, C. A.; *Re* Finley, *Ex p.* Clothworkers' Co. (1888), 21 Q. B. D. 475, C. A.; Stacey *v.* Hill (1900), 69 L. J. Q. B. 796.

8. Consequences to debtor—Bankruptcy regarded as crime.]—Bkpcy. ever was & yet is considered as a crime. It was anciently punished with corporal punishment; the body, lands & goods are at this day subject to the comrs. (ABNEY, J.).—TRIBE *v.* WEBBER (1744), Willes, 464; 125 E. R. 1270.

9. —— ——.]—An act of bkpcy. in the eye of the law is considered as a crime (MANSFIELD, C.J.).—HOOPER *v.* SMITH (1763), 1 Wm. Bl. 441; 96 E. R. 252.

Annotations:—**Mentd.** Law *v.* Skinner (1775), 2 Wm. Bl. 996; Bamford *v.* Baron (1788), 2 Term Rep. 594, n.; *Ex p.* Binmer (1816), 1 Madd. 250; *Re* Barrell, *Ex p.* Bailey (1853), 3 De G. M. & G. 534, L. JJ.; Goodriche *v.* Taylor (1863), 3 New Rep. 245.

10. —— ——.]—Bkpcy. is considered as a crime, & bkpt. in the old laws is called an offender: but it is a principle of natural justice, & of our law, that *actus non facit reum nisi mens sit rea* (LORD KENYON, C.J.).—FOWLER *v.* PADGET (1798), 7 Term Rep. 509; 101 E. R. 1103.

Annotations:—**Refd.** R. *v.* Prince (1875), L. R. 2 C. C. R. 154, C. C. R. **Mentd.** Robertson *v.* Liddell (1806), 3 Smith K. B. 347; Williams *v.* Nunn (1809), 1 Taunt. 270; Lloyd *v.* Heathcote (1820), 5 Moore, C. P. 129; Benson *v.* Dunn (1870), 23 L. T. 848; Mersey Docks & Harbour Board *v.* Henderson (1888), 13 App. Cas. 595, H. L.; R. *v.* Tolson (1889), 23 Q. B. D. 168, C. C. R.

11. —— ——.]—In earlier times bkpcy. was a crime, & in dealing with our law to commit the crime it was necessary to commit an act of bkpcy. (LORD HALSBURY, C.).—CLOUGH *v.* SAMUEL, [1905] A. C. 442; 74 L. J. K. B. 918; 93 L. T. 491; 54 W. R. 114; 21 T. L. R. 702; 12 Mans. 347, H. L.

Annotations:—**Mentd.** *Re* Magnus, *Ex p.* Salaman, [1910] 2 K. B. 1049, C. A.; *Re* Hart, *Ex p.* Green, [1912] 3 K. B. 6, C. A.; *Re* Midgley (1913), 108 L. T. 45, D. C.; *Re* Lind, Industrials Finance Syndicate *v.* Lind, [1915] 2 Ch. 345, C. A.

12. —— **Quasi-penal—Forms to be followed.**]—Bkpcy. proceedings are of a peculiar character. They involve *quasi*-penal consequences to debtor, & it is essential that all those forms, the object of which is to prevent injustice, should be strictly followed (BOWEN, L.J.).—*Re* HOWES, *Ex p.* HUGHES, [1892] 2 Q. B. 628; 62 L. J. Q. B. 88; 67 L. T. 213; 40 W. R. 647; 36 Sol. Jo. 629; 4 R. 4, C. A.

Annotations:—**Refd.** *Re* Low, *Ex p.* Gibson, [1895] 1 Q. B. 734, C. A. **Mentd.** *Re* Lynes, *Ex p.* Lester, [1893] 2 Q. B. 113, C. A.; *Re* A Judgment Debtor, [1908] 2 K. B. 474, C. A.; *Re* A Debtor (No. 2 of 1912), *Ex p.* The Debtor (1912), 106 L. T. 895.

13. —— —— **Words of statutes must be strictly construed.**]—Words, having a proper professional meaning, when they are found in a sect. of an Act of Parliament which is defining acts of bkpcy., should be construed as strictly as if they occurred in a sect. which was defining a misdemeanour, because the commission of an act of bpkcy. entails disabilities on the person who commits it (BOWEN, L.J.).—*Re* CHINERY, *Ex p.* CHINERY (1884), 12 Q. B .D. 342; 53 L. J. Ch. 662; 50 L. T. 342; 32 W. R. 469; 1 Morr. 31, C. A.

Annotations:—**Folld.** *Re* Cohen, *Ex p.* Schmitz (1884), 12 Q. B. D. 509; *Re* Sanders, *Ex p.* Whinney (1884), 13 Q. B. D. 476. **Apld.** *Re* Faithful, *Ex p.* Moore (1885), 14 Q. B. D. 627, C. A.; *Re* Ford, *Ex p.* Ford (1886), 18 Q. B. D. 369. **Folld.** *Re* Gardiner, *Ex p.* Coulson (1887), 57 L. J. Q. B. 149. **Apld.** *Re* Riddell, *Ex p.* Strathmore (1888), 20 Q. B. D. 512, C. A. **Folld.** *Re* Arkell, *Ex p.* Arkell (1889), 61 L. T. 90. **Apld.** Onslow *v.* I. R. Comrs. (1890), 25 Q. B. D. 465, C. A. **Folld.** *Re* Binstead, *Ex p.* Dale, [1893] 1 Q. B. 199, C. A.; *Re* A Bankruptcy Notice, *Ex p.* Official Receiver, [1895] 1 Q. B. 609, C. A.; *Re* Owen, *Ex p.* Peters (1900), 83 L. T. 572. **Apld.** *Re* G. J., *Ex p.* G. J., [1905] 2 K. B. 678, C. A. **Mentd.** *Re* Combined Weighing & Advertising Machine Co. (1889), 43 Ch. D. 99, C. A.; Fontaine's Case (1889), 41 Ch. D. 118, C. A.; Pritchett & Young *v.* English & Colonial Syndicate (1899), 43 Sol. Jo. 602, C. A.; Geisse *v.* Taylor, [1905] 2 K. B. 658; *Re* Clark, *Ex p.* Pope & Owles, [1914] 3 K. B. 1095, C. A.

14. —— **Not quasi-criminal.**]—Now that a debtor may petition against himself, bkpcy. proceedings can no longer be considered as of a *quasi*-criminal nature (VAUGHAN WILLIAMS, L.J.).—*Re* X. Y., *Ex p.* HAES, [1902] 1 K. B. 98; 71 L. J. K. B. 102; 85 L. T. 564; 9 Mans. 5; *sub nom. Re* DEBTOR, *Ex p.* PETITIONING CREDITORS, 50 W. R. 182, C. A.

Annotations:—**Expld.** *Re* Debtor, [1910] 2 K. B. 59, C. A. **Mentd.** *Re* Debtor, *Ex p.* Taylor (1910), 54 Sol. Jo. 459, C. A.

15. —— **Disqualifications.**]—Proceedings in bkpcy. are not actions, but what petitioning creditor seeks by his petition is in the highest degree penal in its consequences. It amounts to loss of civil status carrying with it grave disqualifications (FLETCHER MOULTON, L.J.).—*Re* A DEBTOR (No. 7 of 1910), [1910] 2 K. B. 59; 79 L. J. K. B. 1065; 102 L. T. 691; 26 T. L. R. 429; 17 Mans. 263, C. A.

See, further, particular Parts, *post*.

16. What will support jurisdiction.]—Whatever it is necessary to decide collaterally to the point of proof, will give jurisdiction in bkpcy.—*Re* BRICKWOOD, *Ex p.* ROWTON (1810), 1 Rose, 15; 17 Ves. 426; 34 E. R. 165, L. C.

Annotations:—**Folld.** *Re* Boldero, *Ex p.* Pease (1812), 19 Ves. 25; *Ex p.* Cowan (1819), 3 B. & Ald. 123. **Distd.** *Re* Goren, *Ex p.* Cutts (1838), 3 Deac. 242, L. C.

As to effect of proof, *see* Part VIII., s. 13, *post*.

17. Bankruptcy created by statute—1883 Act practically a code.]—The above Act does not incorporate the former Acts or leave them standing. By the Act the whole previous legislation was swept away; the whole thing was made a *tabula rasa*, & now the whole of bkpcy. jurisdiction is contained in the above Act (BRETT, M.R.).—*Re* BARNETT, *Ex p.* REYNOLDS (1885), 15 Q. B. D. 169; 54 L. J. Q. B. 354; 53 L. T. 448; 33 W. R. 715; 1 T. L. R. 433; 2 Morr. 147, C. A.

Annotations:—**Distd.** *Re* Bassett's Plaster Co., *Ex p.* Bassett (1894), 1 Mans. 297. **Refd.** Sharp *v.* McHenry, Sharp *v.* Brown (1886), 55 L. T. 747. **Mentd.** *Re* Richardson & Cook, *Ex p.* Grime (1902), 86 L. T. 690.

18. —— ——.]—The above Act was intended to be a complete code (CAVE, J.).—*Re* GYLL, *Ex p.* BOARD OF TRADE (1888), 58 L. J. Q. B. 8; 59 L. T. 778; 37 W. R. 164; 5 Morr. 272, D. C.

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13 i. *Consequences to debtor—Quasi-penal—Words of statutes must be strictly construed.*]—Insolvent Act, 1869, ss. 92, 93, being *quasi*-penal, is to be strictly construed, & to warrant imprisonment under its provisions the case must be brought within the express words of the Act.—JONES *v.* BIJEAU (1873), 14 N. B. R. (Pug.) 334.—**CAN.**

17 i. *Bankruptcy created by statute—Unfortunate Debtors' Act (14 Vict. c. 2, P.E.I.) not repealed by Insolvent Act, 1875 (D.).*]—MUNN *v.* MCCANNELL (1877), 2 P. E. I. 148.—**CAN.**

17 ii. *S. P.* *Re* BLACKBURN (1879), 2 P. E. I. 281.—**CAN.**

17 iii. —— 49 *Geo.* 3 (*c.* 27), *not applicable to seal fishery.*]—HUNTER & CO. *v.* LANGDON'S TRUSTEES (1823), 1 Nfld. L. R. 297.—**NFLD.**

Annotations :—**Mentd.** *Re* Hester, *Ex p.* Hester (1889), 22 Q. B. D. 632, C. A. ; *Re* Burnett, *Ex p.* Official Receiver (1894), 1 Mans. 89 ; *Re* Debtor, *Ex p.* Official Receiver (1901), 84 L. T. 666, C. A.

19. Bankruptcy—Creature of statute.]—Bkpcy. is the creature of statute. The practice & procedure in bkpcy. existing in 1883 is to be followed where not altered by the Act of that year or by a rule (LORD ESHER, M.R.).—*Re* NORTH, *Ex p.* HASLUCK, [1895] 2 Q. B. 264 ; 64 L. J. Q. B. 694 ; 72 L. T. 854 ; 59 J. P. 724 ; 11 T. L. R. 417 ; 39 Sol. Jo. 560 ; 2 Mans. 326 ; 14 R. 436, C. A.

Annotations :—**Mentd.** Bridge *v.* Adams (1899), 63 J. P. Jo. 394 ; Goldsmiths' Co. *v.* West Met. Ry. Co., [1904] 1 K. B. 1, C. A. ; Mason *v.* Bolton's Library, [1913] 1 K. B. 83, C. A.

20. Bankruptcy Acts—Whether retrospective—6 Geo. 4, c. 16.]—*Held :* 6 Geo. 4, c. 16, s. 82, was retrospective.—TERRINGTON *v.* HARGREAVES (1829), 5 Bing. 489 ; 3 Moo. & P. 137 ; 7 L. J. O. S. C. P. 207 ; 130 E. R. 1150.

Annotation :—**Mentd.** Luckin *v.* Simpson (1840), 6 Bing. N. C. 353.

21. —— —— **2 & 3 Vict. c. 29.**]—*Held :* 2 & 3 Vict. c. 29, touching execution against bkpts., was retrospective.—LUCKIN *v.* SIMPSON (1840), 6 Bing. N. C. 353 ; 8 Scott, 676 ; 4 Jur. 487 ; 133 E. R. 136.

Annotations :—**Consd.** Moore *v.* Phillipps (1841), 7 M. & W. 536. **Mentd.** *Re* Burghart, *Ex p.* Varnish (1841), 1 Mont. D. & De G. 514.

22. —— —— **1849 Act.**]—*Held :* 1849 Act, ss. 224 & 225, by which a deed of arrangement signed by six-sevenths in number & value of a trader's creditors, was binding on the other creditors on the expiration of three months after notice, were not to be construed retrospectively, so as to deprive a creditor of his right to continue an action commenced by him before the Act came into operation.—MARSH *v.* HIGGINS (1850), 9 C. B. 551 ; 1 L. M. & P. 253 ; 19 L. J. C. P. 297 ; 137 E. R. 1007.

Annotations :—**Consd.** M'Kenzie *v.* Sligo & Shannon Ry. Co. (1852), 21 L. J. Q. B. 380. **Refd.** Waugh *v.* Middleton (1853), 8 Exch. 352 ; R. *v.* Vine (1875), L. R. 10 Q. B. 195.

23. —— —— **1861 Act.**]—*Held :* 1861 Act, s. 166, was not retrospective.—REED *v.* WIGGINS (1862), 13 C. B. N. S. 220 ; 1 New Rep. 61 ; 32 L. J. C. P. 131 ; 143 E. R. 88 ; *sub nom.* READ *v.* WIGGINS, 7 L. T. 423 ; 11 W. R. 148.

24. —— —— **1869 Act.**]—*Held :* the above Act had no retrospective operation, & where it spoke of traders, it meant such persons only as were traders at the time when it first came into operation.—*Re* JECKS, *Ex p.* BAILEY (1871), L. R. 13 Eq. 314 ; 41 L. J. Bcy. 1 ; 25 L. T. 918 ; 20 W. R. 76.

Annotations :—**Mentd.** Slater *v.* Pinder (1872), 26 L. T. 482, Ex. Ch. ; *Re* Stevens, *Ex p.* M'George (1882), 20 Ch. D. 697, C. A.

25. —— —— **1883 Act.**]—*Held :* the *quasi*-penal provisions of 1883 Act, s. 28 (2) (3), were retrospective, *i.e.* they applied to acts done by debtor before the Act came into operation, if the proceedings were instituted under that Act.—*Re* ROGERS, *Ex p.* ROGERS (1884), 13 Q. B. D. 438 ; 33 W. R. 354 ; 1 Morr. 159, D. C.

Annotations :—**Refd.** *Re* Binko (1885), 1 T. L. R. 239. **Mentd.** *Re* Freeman (1909), 25 T. L. R. 365.

26. —— —— ——.] — *Held :* (LORD ESHER, M.R. *diss.*), 1883 Act, s. 32, had not a retrospective operation, & the disqualifications created by it did not attach to a person made a bkpt. before the passing of the Act.—*Re* PULBOROUGH SCHOOL BOARD ELECTION, BOURKE *v.* NUTT, [1894] 1 Q. B. 725 ; 63 L. J. Q. B. 497 ; 70 L. T. 639 ; 58 J. P. 572 ; 42 W. R. 388 ; 10 T. L. R. 349 ; 38 Sol. Jo. 327 ; 1 Mans. 172 ; 9 R. 395, C. A.

Annotation :—**Consd.** Lane *v.* Lane, [1896] P. 133.

27. —— —— **1890 Act.**]—*Held :* 1890 Act, s. 3, was not retrospective in its operation, & did not apply to a debt, including interest above 5 per cent., proved under a scheme adopted by the ct. before the date of the passing of the Act. *Semble :* if the scheme had been adopted between the dates of the passing of the Act & of its coming into operation, the sect. would have applied.—*Re* ATHLUMNEY, *Ex p.* WILSON, [1898] 2 Q. B. 547 ; 67 L. J. Q. B. 935 ; 79 L. T. 303 ; 47 W. R. 144 ; 42 Sol. Jo. 740 ; 5 Mans. 322.

Annotation :—**Refd.** *Re* Nepean, *Ex p.* Ramchund, [1903] 1 K. B. 794.

28. —— —— **1913 Act.**]—*Semble :* 1913 Act, s. 12, was retrospective.—SHAW *v.* ALLEN (1914), 30 T. L. R. 631.

29. —— —— **1914 Act.**]—*Held :* 1914 Act, s. 39, was retrospective & referred to pending bkpcies.—*Re* CULLWICK, *Ex p.* LONDON SENIOR OFFICIAL RECEIVER, [1918] 1 K. B. 646 ; 87 L. J. K. B. 827 ; 119 L. T. 31 ; 34 T. L. R. 343 ; [1918-19] B. & C. R. 33.

Annotation :—**Consd.** *Re* Cohen, *Ex p.* Official Receiver, [1919] 2 K. B. 271.

30. *S. P. Re* COHEN, *Ex p.* OFFICIAL RECEIVER, [1919] 2 K. B. 271 ; 88 L. J. K. B. 841 ; 121 L. T. 389 ; 35 T. L. R. 412 ; [1918-19] B. & C. R. 214.

31. Bankruptcy commenced under repealed Act.]—Circumstances in which :—*Held :* the case must be decided according to the law in force when the transactions in question took place.—KINDER *v.* BUTTERWORTH (1826), 6 B. & C. 42 ; 9 Dow. & Ry. K. B. 47 ; 5 L. J. O. S. K. B. 23 ; 108 E. R. 369.

Annotation :—**Mentd.** Bittleston *v.* Timmis (1845) 1 C. B 389.

32. Bankruptcy ends operation of Statute of Limitations.]—Stat. Limitations has nothing to do with the bkpcy. laws. When a bkpcy. ensues there is an end to the operation of that Act with reference to debtor & creditor (BACON, C.J.).—*Re* WESTBY, *Ex p.* LANCASTER BANKING CORPN. (1879), 10 Ch. D. 776 ; 48 L. J. Bcy. 89 ; 39 L. T. 673 ; 27 W. R. 292.

Annotations :—**Mentd.** *Re* Gosling, *Ex p.* Pitt (1882), 20 Ch. D. 308, C. A. ; *Re* Smith, Green *v.* Smith (1883), 24 Ch. D. 672.

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20 i. *Bankruptcy Acts—Whether retrospective — Insolvent Act, 1864 not retrospective.*]—WORTHINGTON *v.* HAMILTON (1864), 10 U. C. L. J. 304.—**CAN.**

20 ii. —— —— 1878 *Act retrospective & not ultra vires.*]—CUTLIP *v.* CALDWELL (1879), 1 R. & G. 74.—**CAN.**

31 i. *Bankruptcy commenced under repealed Act.*] — *Held :* the repeal of Insolvent Acts by 43 Vict. c. 1 (D.), before claim made, was no bar thereto, the estate of the insolvent having vested in the assignee before the repeal.—CLARKSON *v.* WHITE (1883), 4 O. R. 663.—**CAN.**

31 ii. *S. P.* COOPER *v.* KIRKPATRICK (1880), 8 P. R. 248.—**CAN.**

a. *Bankruptcy rules limited by Act creating them.*]—*Held :* New South Wales Bkpcy. Act, 1887, s. 119, did not authorise a rule purporting to create a jurisdiction in excess of that conferred by the Act.—KING *v.* HENDERSON, [1898] A. C. 720 ; 67 L. J. P. C. 134 ; 79 L. T. 37 ; 47 W. R. 157, P. C.—**AUS.**

b. *English decisions applicable.*] —The English "bkpcy." decisions are strictly applicable to colonial insolvencies, where a trader is the insolvent.—WYLD *v.* CALDWELL (1869), 8 N. S. W. S. C. R. 36.—**AUS.**

c. ——.]—The provisions & the wording of Presidency Town Insolvency Act being almost the same as those of the English Bkpcy. Act, the rulings of the English cts. on the latter Act are to be followed in interpreting the Indian Act.—MERCANTILE BANK OF INDIA, LTD. *v.* MADRAS OFFICIAL ASSIGNEE (1916), I. L. R. 39 Mad. 250.—**IND.**

32 i. *Decennial prescription—Bankrupt residing abroad.*]—A Scottish bkpt. under sequestration went to Russia, & resided there for more than ten years till his death. His daughter, residing in Scotland, brought an action of declarator against her father's creditors, to have it found that the debts were extinguished by the decennial prescription of Russia, & null & void :—*Held :* the debts were not null & void, & extinguished.—RICHARDSON *v.* HADDINGTON (LADY) (1824), 2 Sh. Sc. App. 406.—**SCOT.**

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See, generally, LIMITATION OF ACTIONS.

33. Bankruptcy rules not imperative.]—Bkpcy. Rules are not imperative, but directory only.—*Re* SHALLOW & INGLE, *Ex p.* DE BOOS (1879), 40 L. T. 659.

SECT. 2.—**OFFICERS OF THE COURT.**

34. Jurisdiction of Great Seal—Every person acting under commission.]—The Great Seal has jurisdiction over all the officers employed in the conduct of a commission of bkpcy., & over every person acting under & coming in under the commission, as to all questions arising out of, or connected with the conduct of the commission.—*Re* RICHARDSON, *Ex p.* RAWLINSON (1824), 3 L. J. O. S. Ch. 54.

35. Commissioner — London & country commissioners.]—*Semble:* there was no difference between the duties of the London & country comrs.—*Re* RIDGE, *Ex p.* ROLFE (1837), 3 Mont. & A. 305; 2 Deac. 421; 6 L. J. Bcy. 84; 1 Jur. 313, Ct. of R.

Annotation:—**Mentd.** Stammers *v.* Elliott (1867), L. R. 4 Eq. 675.

36. —— Junior commissioner acting in absence of senior commissioner.]—A junior comr. of the London Ct. of Bkpcy., after the senior comr. had transacted all the business before him & left the ct. for the day, made an order for the transfer of a petition for adjudication & all proceedings thereunder from a country district to London. The senior comr. treated the order of transfer as a nullity, as being *ultra vires*, his absence not being an "unavoidable absence" within 1849 Act, s. 20, & ordered the proceedings to be retransferred to the country district:—*Held:* (1) the junior comr. had, in such absence of the senior comr., jurisdiction to make the order of transfer; (2) the order of the senior comr. to remove back the proceedings while the order of the junior comr. was undischarged, was *ultra vires*.—*Re* SHAW, *Ex p.* SEWELL (1853), 3 De G. M. & G. 508; 22 L. J. Bcy. 29; 21 L. T. O. S. 27; 17 Jur. 333; 43 E. R. 199, L. JJ.

Annotation:—**Mentd.** *Re* Private Arrangement, *Ex p.* Devas (1861), 3 L. T. 866.

37. —— Appointment of deputy—Effect of death of commissioner.]—The Lord Chancellor appointed a substitute for a country comr. who was ill, for two months, or till further order. The comr. died before the expiration of the two months:—*Held:* the powers of the substitute expired at the death of the comr.—*Re* PALMER, *Ex p.* CORLES (1859), 3 De G. & J. 484; 28 L. J. Bcy. 15; 32 L. T. O. S. 326; 5 Jur. N. S. 110; 7 W. R. 220; 44 E. R. 1355, L. JJ.

38. —— Purchase of estate for self or another.]—A comr. of bkpcy. cannot purchase under the commission either for himself or another.—*Ex p.* BENNETT (1805), 10 Ves. 381; 32 E. R. 893, L. C.

Annotations:—**Apld.** *Re* Grundy, *Ex p.* Badcock (1829), Mont. & M. 231, L. C. **Refd.** *Re* Gundry, *Ex p.* Grylls, *Ex p.* Batten (1832), 2 Deac. & Ch. 290, Ct. of R. **Mentd.** Sanderson *v.* Walker (1807), 13 Ves. 601, L. C.; *Re* Goren, *Ex p.* Cutts (1838), 3 Deac. 242, L. C.; Greenlaw *v.* King (1840), 4 Jur. 622; Hesse *v.* Briant (1856), 6 De G. M. & G. 623, L. C.; Delves *v.* Delves (1875), L. R. 20 Eq. 77; Transvaal Land Co. *v.* New Belgium (Transvaal) Land & Development Co., [1914] 2 Ch. 488.

39. —— —— Allowed in special circumstances.]—The ct. confirmed a purchase by one of the comrs. formerly acting in the prosecution of the fiat, at a sale of bkpt.'s real estate, made under an order of the then comrs., the present comr. having certified on a reference that the sale would be for the benefit of the estate, but ordered the purchaser to pay all the costs.—*Re* DAVIS, *Ex p.* BAYNTON (1843), 7 Jur. 566, Ct. of R.

40. Registrar — General powers & jurisdiction.]—*Held:* (1) the jurisdiction which the registrars in bkpcy. had by delegation or otherwise, under 1869 Act, was preserved to them in respect of pending proceedings by 1883 Act, s. 169 (3); (2) 1883 Rules, r. 264, which provided for the exercise of their jurisdiction was not *ultra vires*, & was properly framed for the purpose of carrying out the intention of the legislature with regard to pending proceedings.—*Re* HOME, *Ex p.* EDWARDS (1885), 54 L. J. Q. B. 447; 2 Morr. 203, C. A.

41. —— Power to sit as court in vacation.]—The registrar of a district, where there are two comrs., may, during vacation time, sit as the ct.—*Re* BARNETT, *Ex p.* BARNETT (1850), 20 L. J. Bcy. 3; 15 Jur. 617.

42. —— Duty to decide cases brought before him.]—It is the duty of the registrar to hear & decide those cases brought before him, & which he is not prevented from so deciding by any order of the judge, or by the rules; & the registrar without good cause, & except on the ground of novelty or difficulty, ought not to adjourn any such case for the purpose of its being heard before the judge in bkpcy.—*Re* WEBSTER, *Ex p.* FOSTER & Co. (1886), 3 Morr. 132.

43. —— ——.]—Although the registrar may in a case of difficulty refer a matter to the judge in bkpcy. for his decision, yet there is no authority for him without reason to delegate his work to the judge, & unless a matter is especially reserved to the judge, or some difficulty arises, the registrar ought to deal with it.—*Re* FIRBANK, *Ex p.* KNIGHT (1887), 4 Morr. 50.

44. —— Jurisdiction in particular matters—Taxation of bill of costs.]—A solr., who tenders a proof in the bkpcy. of his client, in respect of costs due to him by the client, is not entitled to insist in having his bill referred for taxation to the taxing master, but the registrar has jurisdiction to determine the amount due, availing himself, if necessary, of the advice of the taxing master.—*Re* WOODS, *Ex p.* DITTON (1880), 13 Ch. D. 318; 42 L. T. 161; 28 W. R. 402, C. A.

Annotations:—**Consd.** *Re* Park, Cole *v.* Park (1889), 41 Ch. D. 326, C. A. **Apld.** *Re* Palace Restaurants, [1914] 1 Ch. 492, C. A. **Mentd.** *Re* Bushell, *Ex p.* Izard (1883), 23 Ch. D. 75, C. A.; *Re* Van Laun, *Ex p.* Chatterton, [1907] 2 K. B. 23, C. A.

See, further, Part XVI., *post.*

45. —— —— Pending business.]—H. J. died in 1871, & application for letters of administration was made by C. & by E. J. Large sums of money were required for the purposes of administration, which were paid to B. by C. & E. J., & B. paid £3,160 to the

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PART I. SECT. 2.

35 i. *Commissioner.*]—A comr. in practice & lawfully recognised by the ct. as an officer legally exercising a function so important is within the words "a comr. appointed by the ct." in 1869 Act, s. 123.—LANG *v.* FOREMAN (1872), 8 N. S. R. 546.—**CAN.**

35 ii. ——*Court has controlling power over.*]—ROGERS *v.* ROGERS (1881), 2 R. & G. 495.—**CAN.**

d. *Judge — Whether disqualified — Relationship.*]—The fact that the insolvent was second cousin of the judge's wife, held not to disqualify the judge from dealing with the matter.—*Re* CREIGHTON (1879), 1 R. & G. 211.—**CAN.**

54 i. *Registrar—Jurisdiction in particular matters—Issues of importance.*]—*Held:* (1) the registrar had power to act, under 1883 Act, s. 23, if the judge was absent from the ct., although he was not absent from the district; (2) the registrar was not bound to decline to exercise his powers under the sect. merely on account of the importance of the matters brought before him.—*Re* BLOOMFIELD (1885), 3 N. Z. L. R. 177.—**N.Z.**

Inland Revenue Office for probate purposes. E. J. was adjudicated a bkpt. in 1875, & in 1878 B. applied for a return of the surplus. Upon an application to the registrar by the trustee in bkpcy. that the moneys should be paid to him, it was objected that under the terms of 1883 Act the registrar had no jurisdiction in pending business:—*Held:* the registrar had jurisdiction, & the application had been rightly made to him & must be remitted to him.—JONES *v.* CHEVERTON (1883), 49 L. T. 745.

46. —— —— Return of apprenticeship premium.]—An application under 1883 Act, s. 41, for the return of an apprenticeship premium paid to bkpt. as a fee, ought to be made to the registrar & not to the judge in court.—*Re* RICHARDSON, *Ex p.* GOULD (1887), 35 W. R. 381; 4 Morr. 47.

47. —— —— Injunction.]—It is the duty of the registrar to hear & determine an application made *ex p.* for an injunction, even though at the time of such application the judge in bkpcy. may be sitting.—*Re* BROOKS (1886), 3 Morr. 62.

48. —— —— Delivery of books.]—An application for an order to hand over books & papers under 1883 Act, s. 118, ought to be made to the registrar & not to the judge in ct.—*Re* FIRBANK, *Ex p.* KNIGHT (1887), 4 Morr. 50.

See, further, Part VII., sect. 6, sub-sect. 2, B., *post*.

49. —— —— Inspection of books.]—The registrar has jurisdiction to order a person to produce for the inspection of the trustee all documents & papers relating to the estate of debtor.—*Re* GEIGER (1913), 109 L. T. 224.

Annotation:—**Refd.** *Re* Ash (1913), 110 L. T. 48.

50. —— —— Retention of documents outside jurisdiction.]—*Re* ASH, No. 340, *post*.

See, further, Part XIX., *post*.

51. —— —— Leave for substituted service—Of notice to commit trustee.]—Application for leave for substituted service of a notice to commit a trustee, for disobedience to the orders of the ct., should be made to the registrar.—*Re* CALDERWOOD, *Ex p.* BOARD OF TRADE (1890), 7 Morr. 251.

See, further, Part VII., *post*.

52. —— —— Order for account.]—In his public examination a bkpt. stated that the business in which he had been engaged belonged to his wife & that he had been employed in it by her as a clerk. The registrar made an order that he should file an account of his dealings in the business:—*Held:* the registrar, for the purposes of the examination, had jurisdiction to make the order.—*Re* CRONMIRE, *Ex p.* CRONMIRE, [1894] 2 Q. B. 246; 63 L. J. Q. B. 616; 70 L. T. 610; 42 W. R. 417; 10 T. L. R. 389; 38 Sol. Jo. 386; 1 Mans. 79; 9 R. 376, C. A.

See, further, Part XIX., *post*.

53. —— —— Payment to trustee of money in hands of solicitor & forming part of bankrupt's estate.]—*Held:* the registrar had jurisdiction under 1883 Act to hear an application by the trustee in a bkpcy. under 1869 Act, that a solr. should pay over to such trustee certain money alleged to be in his hands & to belong to bkpt.'s estate.—*Re* JONES (1884), 1 Morr. 17.

Annotation:—**Refd.** *Re* Home, *Ex p.* Edwards (1865), 2 Morr. 203, C. A.

54. —— —— Issues of importance.]—The fact that a bkpt.'s application for his discharge raises issues of great importance is a good & sufficient reason for transferring the hearing of such application from the registrar to the judge sitting in bkpcy.

The fact that the registrar has been concerned in the making of the order for the prosecution of bkpt. for offences committed under Debtors Act 1869 (c. 62), does not prevent the registrar from determining bkpt.'s application for his discharge on its merits, & does not constitute a sufficient reason for transferring the hearing of such an application to the judge.—*Re* HOOLEY, *Ex p.* DEBTOR (1899), 80 L. T. 495; 6 Mans. 176.

55. —— —— Transfer of proceedings.]—On Feb. 4, 1886, a receiving order was made against one partner in the High Ct.; & on Feb. 6 the other partner presented a petition in a county ct. On an application by the partner, against whom a receiving order had been made in the High Ct., for an order to transfer the proceedings in the county ct. against the other partner to the High Ct.:—*Held:* assuming the application to be properly made to the High Ct. & not to the county ct., the application was one which ought to have been made to the registrar & not to the judge in ct.—*Re* NICHOLSON, *Ex p.* NICHOLSON (1886), 3 Morr. 46.

56. —— Delegation of powers of judge—Charging orders under Solicitors Act, 1860 (c. 127).]—The judge of the High Ct. in Bkpcy. has power as a judge of the High Ct., though not under his bkpcy. jurisdiction, to make charging orders under s. 28 of the above Act; & inasmuch as it is a power to be exercised in chambers, he can delegate that power to the registrar in bkpcy.—*Re* WOOD, *Ex p.* FANSHAWE, [1897] 1 Q. B. 314; 66 L. J. Q. B. 69; 75 L. T. 387; 3 Mans. 299.

Annotations:—**Consd.** *Re* Deakin, *Ex p.* Daniell, [1900] 2 Q. B. 489, C. A. **Refd.** *Re* Humphreys, *Ex p.* Lloyd George (1898), 67 L. J. Q. B. 412, C. A.

57. —— —— Deputy registrar of county court.]—The deputy-registrar of a county ct. may have delegated to him by the judge the power of making an adjudication of bkpcy.—*Re* LINDSAY, *Ex p.* LINDSAY (1874), L. R. 19 Eq. 52; 44 L. J. Bcy. 5; 31 L. T. 415; 23 W. R. 44.

58. —— Officer of county court—Jurisdiction of Divisional Court to enforce compliance of order.]—A registrar being an officer of the county ct., the Divisional Ct. has no jurisdiction over him personally to enforce compliance with its order in a bkpcy. proceeding.—*Re* WISE, *Ex p.* CROYDON COUNTY COURT REGISTRAR (1886), 17 Q. B. D. 389; 55 L. J. Q. B. 362; 54 L. T. 722; 34 W. R. 711; 3 Morr. 174, C. A.

59. —— Examination of prisoner in gaol—Public judicial proceeding.]—*Held:* the examination of a prisoner in gaol by a registrar in bkpcy. under 1861 Act, ss. 101, 102, was a public judicial proceeding.—RYALLS *v.* LEADER (1866), L. R. 1 Exch. 296; 4 H. & C. 555; 35 L. J. Ex. 185; 14 L. T. 563; 30 J. P. 520; 12 Jur. N. S. 503; 14 W. R. 838.

See, further, COUNTY COURTS.

60. Trustee in bankruptcy—Inquisitorial powers.]—A trustee in bkpcy. is an officer of the ct. He has inquisitorial powers given him by the ct., & the ct. regards him as its officer, & he is to hold money in his hands upon trust for its equitable distribution among the creditors (JAMES, L.J.).—*Re* CONDON, *Ex p.* JAMES (1874), 9 Ch. App. 609; 43 L. J. Bcy. 107; 30 L. T. 773; 22 W. R. 937, L. JJ.

Annotations:—**Apld.** *Re* Carnac, *Ex p.* Simmonds (1885), 16 Q. B. D. 308, C. A.; *Re* Brown, Dixon *v.* Brown (1886),

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56 i. —— *Delegation of powers of judge—By judge of Supreme Court during vacancy in office of judge in bankruptcy.*]—During an interval between the resignation of the judge in bkpcy. & the appointment of his successor, one of the judges of the Supreme Ct. purported to exercise the power of delegation to the registrar conferred by 1898 Act (N. S. W., No. 25), s. 137:—*Held:* the delegation was valid.—MOY *v.* BRISCOE & CO. (1907), 5 C. L. R. 56.—**AUS.**

Sect. 2.—*Officers of the court. Sect.* 3 : *Sub-sect.* 1.]

32 Ch. D. 597; *Re* Rhoades, *Ex p.* Rhoades, [1899] 2 Q. B. 347, C. A.; *Re* Tyler, *Ex p.* Official Receiver, [1907] 1 K. B. 865, C. A. **Consd.** Wells *v.* Wells, [1914] P. 157 C. A.; *Re* Thellusson, *Ex p.* Abdy, [1919] 2 K. B. 735, C.A. **Refd.** *Re* Opera, [1891] 2 Ch. 154; Hand *v.* Blow, [1901] 2 Ch. 721, C. A.; *Re* Hall, *Ex p.* Official Receiver, [1907] 1 K. B. 875, C. A.; Tapster *v.* Ward (1909), 101 L. T. 25; *Re* Ash (1913), 110 L. T. 48. **Mentd.** *Re* Shackleton, *Ex p.* Whittaker (1875), 10 Ch. App. 447, n.; Crew *v.* Terry (1877), 2 C. P. D. 403; *Re* Collie, *Ex p.* Adamson (1878), 8 Ch. D. 807, C. A.; *Re* McHenry, *Ex p.* McHenry (1883), 24 Ch. D. 35, C. A.; Mercer *v.* Vans Colina (1897), 4 Mans. 363; *Re* Craig, *Ex p.* Hinchcliffe, [1916] 2 K. B. 497; *Re* Stokes, *Ex p.* Mellish, [1919] 2 K. B. 256.

See, further, Part VII., *post.*

61. Receiver appointed by Court of Bankruptcy —Interference with.]—A firm having filed a petition, & a receiver having been appointed, the solr. of debtors induced the receiver not to interfere with the continuance of the business by debtors & undertook to indemnify him : —*Held :* such interference with its officer was a contempt of the Ct. of Bkpcy.—*Re* PLANT, *Ex p.* HAYWARD (1881), 45 L. T. 326, C. A.

See, generally, Part XXII., *post.*

62. —— ——.]—Where a receiver of bkpt.'s property has been appointed, it is a contempt of ct. for the holder of a valid bill of sale of goods of bkpt. to oust the receiver from possession which he has taken of such goods.—*Re* MEAD, *Ex p.* COCHRANE (1875), L. R. 20 Eq. 282; 44 L. J. Bcy. 87; 32 L. T. 508; 23 W. R. 726.

63. —— **Proceedings against—In what court.**]—Any proceeding against a receiver appointed by the Ct. of Bkpcy. in respect of acts done by virtue of his office must be taken in that ct.—*Re* POTTER, *Ex p.* DAY (1883), 48 L. T. 912, D. C.

See, generally, Part VI., sect. 8, *post.*

SECT. 3.—WHAT PERSONS ARE SUBJECT TO BANKRUPTCY LAWS.

SUB-SECT. 1.—TRADERS.

Note.—*By* 1861 *Act non-traders were made liable to become bankrupts, but this did not, generally speaking, apply to a married woman. Under the present law a married woman unless trading or carrying on business, whether separately or apart from her husband or not, is not subject to the bkpcy. law; see* 1914 *Act, s.* 125, *& sect.* 3, *sub-sect.* 6, *post.*

64. What is trading—Proof—Trader debtor's summons — Security.]—Upon a trader debtor's summons, in which a creditor seeks to obtain security for a debt alleged to be due, the ct. will require it to be proved that debtor is a trader, inasmuch as the ct. has not jurisdiction to require a person not a trader to give such security.—ANON. (1851), 18 L. T. O. S. 35.

65. —— **Quantum of dealing or amount of profit immaterial.**] — *Held :* the question of trading did not depend upon the *quantum* of dealing or upon the amount of profit, but it was enough if an individual were ready to sell what he had bought upon open applications in the apparent course of trade as usually carried on.—HUNTINGTOWER'S (LORD) CASE, *Re* TOLLEMACHE, *Ex p.* FORD (1843), 1 L. T. O. S. 83, Ct. of R.

—— **Building transactions.**]—*See* Nos. 84, 97, 101, 104–107, *post.*

66. Place of trading—Person trading in India—Drawing bills on England.]—A person residing in India & trading there, & in the course of that trading drawing bills upon England for the value of other bills sent thither, upon which he got a profit by the exchange, & in the course of that sort of dealing contracting debts in England, is a trader, & a commission of bkpt. may issue upon an act of bkpcy. committed by him in England after he had quitted India.—INGLISS *v.* GRANT (1794), 5 Term Rep. 530; 101 E. R. 298.

67. —— **Person buying but not selling in England.**]—A person living in the Isle of Man, coming from time to time to England, & buying goods which are afterwards sold in the Isle of Man, is a trader, against whom a commission of bkpt. may issue in England, although he in fact never sold any goods in England.—ALLEN *v.* CANNON (1821), 4 B. & Ald. 418; 106 E. R. 990.

Annotations :—**Refd.** *Re* Crispin, *Ex p.* Crispin (1873), 21 W. R. 491. **Mentd.** A.-G. *v.* Sulley (1859), 33 L. T. O. S. 275.

68. —— **Person trading in colony—Colonial bankruptcy — Not trading in England.**]—A. carried on trade in a colony & there became insolvent. His estate was distributed according to the laws of the colony, but he never obtained a legal discharge (similar to a certificate in England). He afterwards came to reside in England but carried on no trade or business here :—*Held :* he was not a trader.—*Re* WOLLASTON, *Ex p.* FRITH (1852), Fonbl. 233.

69. "Being a trader."]—There is no distinction between the words "being a trader" used in 1869 Act, s. 6 (3), & the same words used in s. 6 (6). The words in s. 6 (3) mean being a trader at the time when the act of bkpcy. is committed.—*Re* STEVENS, *Ex p.* M'GEORGE (1882), 20 Ch. D. 697; 51 L. J. Ch. 909; 47 L. T. 213; 30 W. R. 817, C. A.

Annotations :—**Expld. & Distd.** *Re* Dagnall, *Ex p.* Soan, [1896] 2 Q. B. 407, D. C. **Distd.** *Re* Worsley, [1901] 1 K. B. 309, C. A. **Refd.** *Re* Clark, *Ex p.* Pope (1914), 84 L. J. K. B. 89, C. A.; *Re* Reynolds, *Ex p.* White, [1915] 2 K. B. 186, C. A.

PART I. SECT. 3, SUB-SECT. 1.

64 i. *What is trading.*]—The business of the insolvent had reference only to canal property, of which he had been the owner. It was stated he had bought & sold all sorts of things, & had bought oats, wood, & iron, but there were no assets of that kind, & no books of account, books of business, or cash book, his books having reference wholly to the canal property :—*Held :* the evidence did not establish that debtor bought or sold in the course of any trade or business or got his livelihood by buying & selling.—CREIGHTON *v.* CHITTICK (1882), 7 S. C. R. 348; 2 C. L. T. 248.—**CAN.**

64 ii. —— *Proof—What affidavits necessary.*]—BAGWELL *v.* HAMILTON (1864), 10 U. C. L. J. 305.—**CAN.**

64 iii. —— —— *Debtor described in affidavit as merchant—Not sufficient.*]—*Re* CREEN (1879), 15 U. C. L. J. N. S. 35.—**CAN.**

64 iv. —— ——.]—1875 Act, s. 144, does not make a deed of assignment evidence of insolvent having been a trader.—CREIGHTON *v.* CHITTICK (1881), 2 R. & G. 90; 1 C. L. T. 568; *affd.* on appeal to S. C., 7 S. C. R. 348; 2 C. L. T. 248.—**CAN.**

64 v. —— ——.]—Issues will be directed to try whether a person, against whom a commission of bkpcy. issued, was a trader within the bkpt. laws.—*Re* WARREN (1805), 2 Sch. & Lef. 427.—**IR.**

64 vi. —— —— *County court judgment.*]—In a case of compulsory liquidation, the judgment of the county ct. judge adjudicating the party insolvent, is *primâ facie* evidence of his being a trader.—MCGUIRK *v.* MCLEOD (1874), 15 N. B. R. (Pug.) 323.—**CAN.**

66 i. *Place of trading—Person trading outside jurisdiction—Residence within jurisdiction after ceasing to trade.*]—The Irish Ct. of Bkpcy. has jurisdiction only over traders who reside & trade in Ireland, or who, residing there, trade with England; & one who, residing & trading in England, then & there contracted trade debts, cannot be adjudicated a bkpt. in Ireland in respect to those debts, though he may for some years have resided in Ireland & contracted debts there.—*Re* DAY (1862) 7 Ir. Jur. 309. —**IR.**

70. Who is a trader—Person who has ceased to trade.]—A party, to become bkpt., must be a trader at the time of petitioning creditor's debt, but if that was contracted while he was a trader, & he leave off trade, he may still become a bkpt.—DOE d. BARRAUD *v.* LAWRENCE (1825), 2 C. & P. 134.

71. ——— ———.]—A commission of bkpcy. describing bkpts. as "bankers, being traders according to 6 Geo. 4, c. 16":—*Held:* good, although they had ceased to be bankers before that Act came into operation, it being considered that the word "bankers" was descriptive of the persons only, & that the description, "traders" according to the provisions, etc., was sufficient, without specifying any particular trade.—BERNASCONI *v.* FAREBROTHER (1830), 10 B. & C. 549; L. & Welsb. 213; 5 Man. & Ry. K. B. 364; 8 L. J. O. S. K. B. 203; 109 E. R. 555.

Annotations:—**Mentd.** Wright *v.* Beckett (1834), 1 Mood. & R. 414; Wilton *v.* Chambers (1835), 1 Har. & W. 116.

72. ——— ———.]—A person ceased to trade in 1868, but in 1871 owed various debts contracted during the period he was in trade:—*Held:* he was not a trader within 1869 Act.—*Re* JECKS, *Ex p.* BAILEY (1871), L. R. 13 Eq. 314; 41 L. J. Bcy. 1; 25 L. T. 918; 20 W. R. 76.

Annotations:—**Folld.** Slater *v.* Pinder (1872), 26 L. T. 482, Ex. Ch. **Mentd.** *Re* Stevens, *Ex p.* M'George (1882), 20 Ch. D. 697, C. A.

See 1913 Act, s. 12 (1) & (2), corresponding to 1914 Act, s. 125.

73. ——— ———.]—Debtor, an auctioneer & valuer, by deed assigned his business, goodwill & premises to a purchaser, & covenanted not to carry on business within certain limits, & afterwards on the same day departed from his dwelling-house:—*Held:* on the execution of the deed of assignment, debtor had ceased to be a trader.—*Re* REYNOLDS, *Ex p.* REYNOLDS (1882), 52 L. J. Ch. 431; 47 L. T. 448; 31 W. R. 323.

74. ——— ——— **Temporary discontinuance.**]—To support a commission of bkpt. it is necessary that petitioning creditor's debts should be contracted before bkpt. ceases to be a trader, but if the debt be contracted whilst he is in trade, & a bond given for it afterwards, it is sufficient.—DAWE *v.* HOLDSWORTH (1791), Peake, 64.

Annotations:—**Folld.** *Re* Mostyn, *Ex p.* Griffiths (1853), 3 De G. M. & G. 174, L. JJ. **Mentd.** Peters *v.* Anderson (1814), 5 Taunt. 596; Devaynes *v.* Noble, Clayton's Case (1816), 1 Mer. 572; Mills *v.* Fowkes (1839), 5 Bing. N. C. 455.

75. ——— ——— **Intention.**]—Whether bkpt. has ceased to be a trader depends on whether or not in point of intention he has ceased to be a trader.—*Re* BRYANT, *Ex p.* PATERSON (1813), 1 Rose, 402.

Annotations:—**Refd.** Adams *v.* Malkin (1814), 3 Camp 534; *Re* Dufaur, *Ex p.* Dufaur (1852), 2 De G. M. & G. 246, L. J.; *Re* Taylor, *Ex p.* Salaman (1882), 21 Ch. D. 394, C. A.

76. ——— ——— ———.]—The mere quitting of a trade will not exempt a debtor from the bkpcy. laws, unless it were done with the object of abandoning it & completely detaching himself from the character of a trader.—*Ex p.* CUNDY (1816), 2 Rose, 357.

Annotation:—**Refd.** *Re* Taylor, *Ex p.* Salaman (1882), 21 Ch. D. 394, C. A.

77. ——— ——— ——— **Onus of proof on petitioning creditor.**]—It is a question of intention, to be decided on the evidence, whether debtor has permanently ceased to trade, or has only temporarily discontinued his trade with the intention of resuming it. In the latter case he is still a trader within the bkpcy. laws.

If a petitioning creditor alleges that debtor has committed an act of bkpcy. which can be committed only by a trader, the *onus* is on him to prove that debtor was a trader at the time when the act was committed.—*Re* TAYLOR, *Ex p.* SALAMAN (1882), 21 Ch. D. 394; 47 L. T. 495; 31 W. R. 282, C. A.

See, also, Nos. 121, 134, 165, 167, 177, *post.*

78. ——— **One act of buying & selling sufficient.**]—HOLROYD *v.* GWYNNE, No. 114, *post.*

79. ——— ———.]—NEWLAND *v.* BELL, No. 117, *post.*

80. ——— **Agent—Trading for principal.**]—One who trades on account of & for the benefit of another is a trader himself within 7 & 8 Vict. c. 96.—*Re* CROUCH (1845), 5 L. T. O. S. 457.

81. ——— ——— **Obtaining orders on commission.**]—If one procure orders for goods, having no stock, but buying them from those who have, he making out bills to his customers in his own name, & being himself debited by the person he buys of, this is a trading within the bkpcy. laws, but if he procure orders for another, & is by that other person paid a commission, the other person sending the goods to the customers, this was not a trading within the bkpcy. laws, antecedent to 6 Geo. 4, c. 16.—DOE d. BARRAUD *v.* LAWRENCE (1825), 2 C. & P. 134.

82. ——— ——— ——— .]—A commission agent is a trader.—*Re* LAVER (1846), 8 L. T. O. S. 236.

83. ——— ——— ———.]—*Qu.:* whether one who obtains orders for the sale of goods on commission, the goods being furnished, & accounts rendered to the customers by the principal, is a person who, within 11 & 12 Vict. c. 106, s. 65, uses the trade of merchandise "by way of commission," or "as agent or factor for others" seeks his livelihood by buying & selling.—HERNAMANN *v.* BARBER (1854),

70 i. *Who is a trader.*]—Deft. was a trader within 7 Vict. c. 10, but first became so after the expiration of that Act, & became insolvent before 19 & 20 Vict. c. 93:—*Held:* he was within the latter Act.—BOULTON *v.* NOURSE (1858), 15 U. C. R. 555.—**CAN.**

70 ii. ——— *How put in issue.*]—Plea that pltf. was not assignee as alleged held to put in issue the question whether assignor was a trader who could assign under Insolvent Act.—CREIGHTON *v.* CHITTICK (1881), 2 R. & G. 90; 1 C. L. T. 568; 7 S. C. R. 348; 2 C. L. T. 248.—**CAN.**

70 iii. ———*Person who has ceased to trade.*]—Goods were supplied by F. to M., trader carrying on business in Ireland. M. sold his business, & left to reside in Scotland, entrusting the collection of his book debts to his solr. R. F. obtained an order for substitution of service on R. of a writ of summons in an action to recover the debt, & subsequently obtained judgment for the debt & costs against M. F. then issued a debtor's summons & obtained an order from the Ct. of Bkpcy. for leave to substitute service of the summons on R., which was done, & M., not having complied with debtor's summons, was adjudicated a bkpt.:—*Held:* as M. was neither carrying on trade nor resident in Ireland, there was no jurisdiction to order substituted service of debtor's summons, & the adjudication should be annulled.—*Re* MURRAY, [1916] 2 I. R. 554.—**IR.**

70 iv. ——— ——— *After* 1869 *Act—Effect of* 1871 *Act.*]—T. A. & J. A. made application for a discharge in insolvency under the Dominion Insolvent Act, 1869. The principal objection taken to the discharge was that the Act applied to traders only, whereas the insolvents admitted that at the time of its passage they had ceased to be traders. Before judgment the Act of 1871 was passed, amending the Act of 1869, so as to include parties who having been traders at the time of the passage of the latter Act had since ceased to trade:—*Held:* the insolvents come within the latter Act & were entitled to the discharge.—*Re* ARCHIBALD & ARCHIBALD (1871), 8 N. S. R. 303.—**CAN.**

70 v. ——— ——— *Partners.*]—There is no provision in 1892 Act, s. 51, for presenting a petition against partners who have ceased to carry on business.—*Re* QUINLAN & FOSTER (1907), 26 N. Z. L. R. 513.—**N.Z.**

e. ——— *Accountant — Commission & estate agent & Government broker.*]—A person, carrying on business as, is not a trader within Insolvency Stat., 1871, s. 138 (vii.).—*Re* AARONS (1880), 6 V. L. R. 56.—**AUS.**

80 i. ——— *Agent.*]—An agent who procures & receives parcels for transmission by his employers, or who by his personal exertions obtains passengers for their dâk, although he may be entrusted with the receipt or price of carriage, & is paid by commission, is not a broker or trader.—*Re* CAMPBELL (1864), 2 Hyde, 177.—**IND.**

Sect. 3.—What persons are subject to bankruptcy laws: Sub-sect. 1.]

14 C. B. 583; 23 L. J. C. P. 145; 18 Jur. 790; 2 W. R. 469; 2 C. L. R. 825; 139 E. R. 240.

—— **Apothecary.**]—*See* Nos. 158–161, *post.*

84. —— **Architect—Purchasing building sites.**]—A person who exercised the profession of an architect & purchased several pieces of ground in different places & pulled down the buildings erected thereon, & built new houses with materials which he bought for that purpose, & did not employ a builder to carry on the works, but did himself pay the several persons employed thereon, with the intention of selling or otherwise disposing of the ground & the buildings so erected thereon:—*Held:* a builder within the bkpcy. laws.—*Re* FOWLER (1851), 1 Fonbl. 201; 16 L. T. O. S. 538.

85. —— **Attorney—Buying & selling books.**]—Trading, in the instance of an attorney buying & selling books, whether sufficient to support a commission; depending upon whether the nature of the dealing, however small, is such as to manifest an intention to deal generally.—*Ex p.* BRYANT (1813), 1 Ves. & B. 211; 2 Rose, 1; 35 E. R. 83

Annotations:—**Refd.** *Re* Wright, *Ex p.* Brundrett (1837), 6 L. J. Bcy. 29; *Re* Mason, *Ex p.* Kirkwood (1879), 11 Ch. D. 724, C. A. **Mentd.** *Re* Chambers, *Ex p.* Davy (1834), 3 L. J. Bcy. 57; *Re* Ridsdale, *Ex p.* Marson (1837), 2 Deac. 245; *Re* Fraser, *Ex p.* Central Bank of London, [1892] 2 Q. B. 633, C. A.; *Re* Hawkins, *Ex p.* Troup, [1895] 1 Q. B. 404, C. A.

86. —— —— **Acting as scrivener.**]—An attorney, in the common course of his profession purchasing & selling estates, negotiating loans, etc., is not subject to the bkpcy. laws, as a scrivener.—*Qu.:* whether he is so by acting as a scrivener, viz., receiving property into his trust for commission, paid or contracted for expressly or by implication.—*Ex p.* MALKIN (1813), 2 Ves. & B. 31; 35 E. R. 230; *sub nom. Re* ADAMS, *Ex p.* MALKIN, 2 Rose, 27, L. C.; *subsequent proceedings, sub nom.* MALKIN *v.* ADAMS (1814), 2 Rose, 28; *sub nom.* ADAMS *v.* MALKIN, 3 Camp. 534.

Annotations:—**Refd.** *Re* Gibbs (1845), 5 L. T. O. S. 475; *Re* Dufaur, *Ex p.* Dufaur (1852), 2 De G. M. & G. 246, L. J. **Mentd.** Wilkinson *v.* Candlish (1850), 5 Exch. 91.

87. —— —— ——.]—An attorney cannot be made a bkpt. as a money scrivener unless he has been in the habit of having money deposited with him for the purpose of laying it out on securities.—ADAMS *v.* MALKIN (1814), 3 Camp. 534; *sub nom.* MALKIN *v.* ADAMS, 2 Rose, 28.

Annotations:—**Folld.** Hurd *v.* Brydges (1817), Holt, N. P. 654. **Consd.** *Re* Dufaur, *Ex p.* Dufaur (1852), 20 L. T. O. S. 186, L. J. **Refd.** Kemp *v.* Neville (1820), 5 Moore, C. P. 21; Lott *v.* Melville (1841), 3 Man. & G. 40. **Mentd.** *Re* Lavender, *Ex p.* Lavender (1834), 3 L. J. Bcy. 120.

88. —— —— ——.]—An attorney, who becomes a general depository of the money of his clients, & of other persons, which he invests upon securities, charging, in addition to his fees for preparing the securities, a compensation, no matter by what name, & who unites such occupation with the business of a conveyancer, etc., is a trader within the bkpcy. laws.—HUTCHINSON *v.* GASCOIGNE (1817), Holt, N. P. 507, N. P.

Annotation:—**Refd.** Kemp *v.* Neville (1820), 5 Moore, C. P. 21.

89. —— —— ——.]—An attorney, whose principal business is in the transaction of annuities, for which he charges a commission, & who, in the course of obtaining them for those who employ him, receives large deposits of money, which he pays into a banker's hands in his own name, is not a scrivener within the bkpcy. laws.—HURD *v.* BRYDGES (1817), Holt, N. P. 654, N. P.

Annotation:—**Refd.** Kemp *v.* Neville (1820), 5 Moore, C. P. 21.

90. —— —— ——.]—In order to render an attorney liable to the bkpcy. laws as a scrivener, receiving other men's money into his trust or custody, it is not enough to show that he has negotiated loans & charged procuration money; it must distinctly appear that he has been entrusted, as a general means of obtaining a livelihood.—LOTT *v.* MELVILLE (1841), 3 Man. & G. 40; 9 Dowl. 882; 3 Scott, N. R. 346; 10 L. J. C. P. 279; 5 Jur. 436; 133 E. R. 1049.

91. —— —— ——.]—An attorney employed to receive money & pay it to the client's account, paid it to his own, &, on the client bringing an action, vexatiously defended it, & filed a bill, which was dismissed, to restrain execution. He was afterwards found bkpt. as a scrivener:—*Held:* the conduct of bkpt. was not conduct as scrivener, so as to be capable of being regarded in reference to the allowance of his certificate.—*Re* MATHIAS, *Ex p.* SPICER (1849), 3 De G. & Sm. 601; 14 L. T. O. S. 136; 14 Jur. 30; 64 E. R. 624.

Annotation:—**Consd.** *Re* Leslie, *Ex p.* Leslie (1856), 25 L. J. Bcy. 37, L. JJ.

92. —— —— ——.]—A general intent to trade as a scrivener will render an attorney liable to the bkpcy. laws.—COLOMBINE *v.* PENHALL (1850), 15 L. T. O. S. 189; *subsequent proceedings* (1853), 1 Sm. & G. 228.

Annotation:—**Folld.** *Re* Lane (1855), 2 Bankr. & Ins. R. 146.

93. —— —— ——.]—A partner in a firm of two solrs. received money belonging to the sister of the other for the purpose of investment, & in a few instances without any specific security having been arranged. The usual charges of an attorney or solr. were alone made upon the transactions:—*Held:* this did not amount to trading as a scrivener.—*Re* DUFAUR, *Ex p.* DUFAUR (1852), 2 De G. M. & G. 246; 21 L. J. Bcy. 38; 20 L. T. O. S. 186; 42 E. R. 867, L. J.

Annotations:—**Refd.** Bourdillon *v.* Roche (1858), 27 L. J. Ch. 681; *Re* X. Y., *Ex p.* Haes, [1902] 1 K. B. 98, C. A.

94. —— —— ——.]—An attorney in one or more instances had procured loans, & lent other persons money out on interest:—*Held:* he was liable to be made bkpt. as a "scrivener," one instance having been shown, it might be presumed that he carried on the business, until the contrary was shown.—R. *v.* HUGHES (1860), 1 F. & F. 726.

95. —— —— —— **Or as money broker.**]—An attorney was in the habit of having the money of his clients deposited with him to lay out for them upon mtge., & received from others a compensation or gratuity for procuring loans of money for them, besides his charges for preparing the mtge. securities:—*Held:* he was a trader within the bkpcy. laws, as a money broker, & a person receiving other men's money into his trust or custody, whether or not he might be considered liable to the bkpcy. law as a banker or a scrivener.—*Re* RUMSEY, *Ex p.* GEM (1841), 2 Mont. D. & De G. 99; 10 L. J. Bcy. 41; 5 Jur. 683, Ct. of R.

96. —— —— —— **Or as bill broker.**]—If an attorney holds out to the world that he receives bills to discount, & that such is the usual course of his business, he is liable as a bill broker to the bkpcy laws.—COLOMBINE *v.* PENHALL

86 i. —— *Attorney—Acting as scrivener.*]—A practising attorney acting in the common & ordinary business of his profession does not, by occasional negotiations of loans of money, for which he receives procuration money, thereby become a scrivener, within the bkpt. laws.—*Re* WARREN (1805), 2 Sch. & Lef. 414.—**IR.**

f. —— *Baker.*]—*Semble:* a baker not a trader within County Courts Act R. S. M., 1902 (c. 38), s. 200 (*a*), merely because as incidental to his baking business, he buys & sells candles, cakes & confectionery to a small extent.—ROBINSON *v.* GRAHAM (1906), 16 Man. L. R. 69; 3 W. L. R. 135.—**CAN.**

(1850), 15 L. T. O. S. 189; *subsequent proceedings* (1853), 1 Sm. & G. 228.
Annotation :—**Follď.** *Re* Lane (1855), 2 Bankr. & Ins. R. 146.

See, further, Nos. 102, 172, *post.*

97. —— —— **Taking possession of building site to realise security.**]—Two attornies in partnership lent money on mtge. to a party engaged in a building speculation. The mtge. being forfeited, they took possession of the carcases of the houses, & finished them at their own expense, for the purpose of selling or letting them, & they also purchased, not in their character of mtgees., a few other carcases, which they employed a builder to finish for the same purpose :—*Held :* it was not joint trading as builders, within the bkpcy. laws. —*Re* EDWARDS, *Ex p.* EDWARDS (1840), 1 Mont. D. & De G. 3 ; 9 L. J. Bcy. 11 ; 4 Jur. 153, Ct. of R.

98. —— **Attorney's clerk—Discounting bills.**]—An attorney's paid clerk occasionally discounting bills, but with no office in London for the purpose of his business :—*Held :* not a bill broker.—*Re* FORSTER, *Ex p.* PHIPPS (1837), 6 L. J. Bcy. 93 ; *sub nom. Re* FOSTER, *Ex p.* PHIPPS, 1 Jur. 529, Ct. of R.

99. —— **Auctioneer.**]—*Semble :* an auctioneer is a trader within the bkpcy. laws.—*Re* MOORE, *Ex p.* MOORE (1837), 6 L. J. Bcy. 72 ; 1 Jur. 184, Ct. of R.

100. —— **Banker.**]—A person acting as banker will be considered as one, though he does not keep an open shop.—*Ex p.* WILSON, *Ex p.* BRADSHAW (1752), 1 Atk. 217, 218 ; 26 E. R. 140, L. C.

101. —— **Barrister—Purchasing building sites.**]—A barrister, who took three pieces of ground, & built houses upon them for the purpose of letting : —*Held :* not a builder within the bkpcy. laws.—*Re* STEWART, *Ex p.* STEWART (1849), 3 De G. & Sm. 557 ; 18 L. J. Bcy. 14 ; 13 L. T. O. S. 306 ; 13 Jur. 581 ; 64 E. R. 604.

102. —— **Bill broker.**]—*Semble :* a *bonâ fide* bill broker is within the bkpcy. laws.—*Re* FORSTER, *Ex p.* PHIPPS (1837), 6 L. J. Bcy. 93 ; *sub nom. Re* FOSTER, *Ex p.* PHIPPS, 1 Jur. 529, Ct. of R.

See, also, Nos. 96, 98, *ante,* 172, *post.*

103. —— **Brickmaker.**]—A brickmaker taking the earth off the waste, for which he afterwards paid a consideration, & selling the bricks, is a trader within the bkpcy. laws.—*Ex p.* HARRISON (1782), 1 Bro. C. C. 173 ; 28 E. R. 1062, L. C.

Annotations :—**Follď.** Wells *v.* Parker (1785), 1 Term Rep. 34. **Distd.** Sutton *v.* Weeley (1806), 7 East, 442. **Refd.** *Ex p.* Bryant (1813), 1 Ves. & B. 211, L. C. ; *Re* Bradbury, *Ex p.* Emery (1854), 4 De G. M. & G. 901, L. JJ.

104. —— **Builder—Buying timber for house building.**]—A builder, who buys timber, which he works into the houses which he builds & sells when built, is not an object of the bkpcy. laws.—CLARK *v.* WISDOM (1804), 5 Esp. 147.
Annotation :—**Mentď.** *Re* Nerinckx, *Ex p.* Nerinckx (1835), 4 L. J. Bcy. 73, Ct. of R.

105. —— —— **Interested in buildings erected.**]—A man is not a trader within the bkpcy. laws by building a public theatre to be held in shares, for which he was to be paid according to measure & value, he himself being proprietor of several shares, nor by erecting public baths on ground, of which he was joint tenant in fee.—WILLIAMS *v.* STEVENS (1809), 2 Camp. 300, N. P.
Annotations :—**Consd.** *Re* Nerinckx, *Ex p.* Nerinckx (1835), 4 L. J. Bcy. 73, Ct. of R. **Refd.** Stuart *v.* Sloper (1849), 18 L. J. Ex. 321. **Mentd.** Crook *v.* Edwards (1817), 2 Stark. 302, N. P. ; *Re* Lavender, *Ex p.* Lavender (1834), 3 L. J. Bcy. 120, Ct. of R. ; Colombine *v.* Penhall (1850), 19 L. J. Q. B. 302.

106. —— —— **Building on own land.**]—A builder within the bkpcy. laws is a person who builds either on his own or another's land for profit.—*Re* NEIRINCKS, *Ex p.* NEIRINCKS (1835), 1 Deac. 78 ; 2 Mont. & A. 384 ; *sub nom. Re* NERINCKX, *Ex p.* NERINCKX, 4 L. J. Bcy. 73, Ct. of R.
Annotations :—**Distd.** *Re* Edwards, *Ex p.* Edwards (1840), 9 L. J. Bcy. 11, Ct. of R. **Consd.** Stuart *v.* Sloper (1849), 3 Exch. 700. **Refd.** *Re* Wright, *Ex p.* Brundrett (1837), 6 L. J. Bcy. 29, Ct. of R. ; *Re* Stewart, *Ex p.* Stewart (1849), 3 De G. & Sm. 557.

107. —— —— **Purchaser of land completing unfinished buildings.**]—A man, by purchasing land with unfinished houses upon it, & employing persons to complete the houses, is not a trader within 6 Geo. 4, c. 16, unless he hold himself out as a builder, or expresses his intention of continuing in that business.—*Re* EDWARDS, *Ex p.* EDWARDS (1840), 1 Mont. D. & De G. 3 ; 9 L. J. Bcy. 11 ; 4 Jur. 153, Ct. of R.

108. —— **Butcher.**]—A butcher is within the bkpcy. laws.—DALLY *v.* SMITH (1768), 4 Burr. 2148 ; 98 E. R. 120.

109. —— **Clerk—Whether acting as scrivener.**]—A clerk in the custom-house, who receives debentures or securities for merchants, for which he receives the money, & has a commission on such receipts, & employs the money he so receives in discounting bills or notes for his own benefit, is not a scrivener within the bkpcy. laws.—HAMSON *v.* HARRISON (1797), 2 Esp. 554.

110. —— **Coach proprietor.**]—*Semble :* a coach proprietor is not a trader.—*Re* WALKER (1835), 2 Mont. & A. 267.

—— **Company.**]—*See* COMPANIES.

—— —— **Promoter.**]—*See* No. 118, *post.*

—— —— **Shareholder in.**]—*See* Nos. 181 *et seq.*, *post.*

—— **Corporation.**]—*See* CORPORATIONS.

111. —— **Dealer—In exchange.**]—Drawing & redrawing bills of exchange for large sums, & a continuation of it, is trafficking in exchange, & a trading which will make a man liable to a commission of bkpt., though a loss ensues to bkpt. by so doing.—RICHARDSON *v.* BRADSHAW (1752), 1 Atk. 128 ; 26 E. R. 84.
Annotations :—**Explď.** Hankey *v.* Jones (1778), 2 Cowp. 745 ; *Ex p.* Bell (1808), 15 Ves. 355, L. C.

112. —— —— —.]—Merely drawing bills on a person's own account, at the expense of paying a ¼ per cent. commission besides interest at 5 per cent. for their being discounted, & borrowing accommodation notes in exchange for his own to

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100 i. —— *Banker.*]—Is a trader within 1864 Act, s. 3 (2).—BAGWELL *v.* HAMILTON (1864), 10 U. C. L. J. 305.—**CAN.**

100 ii. —— *Banker & broker.*]—A banker & exchange & money broker, & a dealer in foreign & uncurrent money, & buying & selling stocks :—*Held :* a trader within 1869 Act.—DUNCAN *v.* SMART (1874), 35 U. C. R. 532.—**CAN.**

g. —— *Barber.*]—Is not a trader within 1869 Act.
The sale of perfumery, being merely incidental to his business, & a purchase of tobacco nine months before his assignment, which he sold again immediately, being an isolated transaction :—*Held :* insufficient to bring him within the Act.—THOMAS *v.* HALL (1874), 6 P. R. 177.—**CAN.**

101 i. —— *Barrister.*]—A practising barrister dealt largely in land transactions, but it was not shown that he depended thereon for his living :—*Held :* not a trader.—JOSEPH *v.* HAFFNER (1881), 29 Gr. 421.—**CAN.**

h. —— *Country gentleman buying grain & selling flour.*]—A country gentleman bought grain, ground it, & sold the flour at his mill, & was considerably indebted to various persons by bond, judgment, & simple contract debts. The jury were directed that if debtor used the mill for the convenience of his tenants, or persons bound to the mill, he was not a trader, but if for the purposes of profit, he was. The jury having found that debtor was a trader, but not insolvent :—*Held :* the verdict should not be disturbed.—CLEMENTS *v.* ECCLES (1850), 2 Ir. Jur. 286.—**IR.**

k. —— *Dentist making & selling artificial teeth.*]—A manufacturer of artificial teeth for sale, who also practises as a dentist, is a trader.—*Re* BROPHY (1870), 19 W. R. 176.—**IR.**

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the same account, will not make a man an object of the bkpcy. laws.—HANKEY *v.* JONES (1778), 2 Cowp. 745 ; 98 E. R. 1339.
Annotation :—**Consd.** *Ex p.* Bell (1808), 15 Ves. 355, L. C.

113. —— —— **In standing crops.**]—*Held :* buying standing crops of grass, cutting them down, & making them into hay was a trading.—BLOXHAM *v.* GRAHAM (1795), Peake, Add. Cas. 3.

114. —— —— **In timber—One lot purchased for resale.**]—The purchase of one lot of timber with intent to sell again will make a man a trader.—HOLROYD *v.* GWYNNE (1809), 2 Taunt. 176 ; 1 Rose, 113 ; 127 E. R. 1044.
Annotation :—**Refd.** *Re* Tollemache, *Ex p.* Ford, Huntingtower's Case (1843), 1 L. T. O. S. 83, Ct. of R.

115. —— —— **In horses.**]—Buying & selling horses with an avowed intention to take out a licence, & become a dealer, is sufficient to constitute a trading within the bkpcy. laws, however limited the trading, & though no licence has been actually taken out.—WRIGHT *v.* BIRD (1814), 1 Price, 20 ; 145 E. R. 1317.

116. —— —— **In coprolite.**]—A party purchasing coprolite from any one who brings it to him without reference to the place where it is collected, with an evident intention of selling it again building a store, & employing barges to carry it away when a sufficient quantity is collected, is a trader liable to bkpcy. law. *Secus*, if the selling be confined to coprolite collected upon his own land, or upon the seashore adjacent to his own land, for that is only ancillary to the enjoyment of his land.—*Re* BAGSHAW, *Ex p.* BAGSHAW (1859), 33 L. T. O. S. 276.

117. —— —— **In pigs.**]—A. (an army officer) retired to the country, where he rented a dwelling-house & three acres of land, bought pigs & consumed part in his family & sold the rest at a neighbouring market. He made no show as a dealer & had not bought more than fourteen pigs in any one year :—*Held :* he was a trader, the smallness of the profit being no consideration, & one act of buying & selling being sufficient to constitute a trader.—NEWLAND *v.* BELL (1816), Holt, N. P. 221, N. P.

118. —— —— **In shares.**]—C. was the secretary or manager of an insurance co., & in that character acted as an agent in the placing of some of its shares. He also dealt in the shares for his friends when they wanted to sell them. He denied, however, that he acted as a broker, or that he received any brokerage :—*Held :* he was not a broker within 1849 Act, s. 65.—*Re* CLELAND, *Ex p.* CLELAND (1867), 2 Ch. App. 466, 471 ; 36 L. J. Bcy. 33 ; 16 L. T. 403 ; 15 W. R. 681, L. JJ.
Annotation :—**Mentd.** *Re* Davis, *Ex p.* Cleland (1867), 17 L. T. 187, L. J.

119. —— **Drover.**]—*Held :* one who bought cattle at one fair, kept them three or four days on his ground, & then drove them to another fair for sale, was a drover within 5 Geo. 2, c. 30.—MILLS *v.* HUGHES (1745), Willes, 588 ; Bull. N. P. 39a ; 125 E. R. 1335.
Annotations :—**Folld.** Bolton *v.* Sowerby (1809), 11 East, 274 ; Carter *v.* Dean (1818), 1 Wils. Ch. 85.

120. —— **Drover & farmer—Grazier.**]—*Held :* (1) a farmer & grazier exercising also the business of a drover, by buying & selling cattle from time to time beyond the occasions of his farms, was exempted from the operation of the bkpcy. laws by 5 Geo. 2, c. 30, s. 40 ; (2) the purchase of hay for support of his cattle, & the sale of part of it again, because it was more than was required for their consumption, did not make him a trader.—BOLTON *v.* SOWERBY (1809), 11 East, 274 ; 103 E. R. 1009
Annotation :—**Folld.** Carter *v.* Dean (1818), 1 Swan. 64.

—— **Executor.**]—*See* Nos. 287 *et seq., post.*

121. —— **Farmer—Buying horses, stock, or farm produce — For resale.**]—Deft. rented a farm, keeping two or three teams of horses for the farming business ; he also occasionally attended fairs, every now & again purchasing a horse which he constantly sold again :—*Held :* (1) a farmer, as such, was not an object of the bkpcy. laws ; & a farmer might buy horses & after using them for some time sell them again ; (2) the evidence being that horses had been bought for the express purpose of gaining by the transactions & not acquired for the farming business & as a dealer in horses, deft. had rendered himself subject to the bkpcy. laws.—BARTHOLOMEW *v.* SHERWOOD (1786), 1 Term Rep. 573, n. ; 99 E. R. 1258, n.
Annotations :—**Consd.** Patman *v.* Vaughan (1787), 1 Term Rep. 572. **Distd.** Stewart *v.* Ball (1805), 2 Bos. & P. N. R. 78. **Consd.** Bolton *v.* Sowerby (1809), 11 East, 274. **Refd.** *Re* Tollemache, *Ex p.* Ford, Huntingtower's Case (1843), 1 L. T. O. S. 83, Ct. of R. ; Bell *v.* Young (1855), 24 L. J. C. P. 66.

122. —— —— —— ——.]—*Held :* a farmer who occasionally bought hay, corn, horses, etc., with a view to sell again for profit, did not thereby make himself a trader.—STEWART *v.* BALL (1805), 2 Bos. & P. N. R. 78 ; 127 E. R. 552.
Annotation :—**Refd.** Cannan *v.* Denew (1833), 3 L. J. C. P. 65.

123. —— —— —— ——.]—A farmer buying & selling horses to an extent unauthorised by his character of farmer may be a bkpt. as a horse-dealer although he may have so bought & sold without a license to deal in horses.—*Re* GIBBS, *Ex p.* GIBBS (1814), 2 Rose, 38.

124. —— —— —— ——.]—A person who buys pigs or other stock with a view to a resale of them, as ancillary to the profitable occupation of his farm, & in the interval fed them wholly or principally on the produce of his farm, does not thereby become a trader.

A farmer bought rye-grass seed, mixed it with seed of his own growth, & sold the mixture. He bought pigs, put them on his farm, fed them on the stubbles & resold them, some after a week, some after long periods :—*Held :* neither of these was an act of trading.—PATTEN *v.* BROWNE (1817), 7 Taunt. 409 ; 129 E. R. 163.

125. —— —— —— ——.]—A farmer & grazier had frequently, before Sept., 1825, when 6 Geo. 4, c. 16, came into operation, & in some few instances after, purchased cattle with a view to resale, & not for the purpose of his farm :—*Held :* the acts of buying before Sept., 1825, were evidence to explain the quality of the subsequent acts.—WORTH *v.* BUDD (1831), 2 B. & Ad. 172 ; 9 L. J. O. S. K. B. 237 ; 109 E. R. 1107.
Annotation :—**Folld.** Knight *v.* Turquand (1836), 2 Gale, 187.

126. —— —— —— ——.]—*Held :* a farmer who was in the habit of buying half as many more sheep as was necessary to stock his farm, & of selling the surplus at a profit, was a trader within the bkpcy. law, as a sheep salesman.—*Re* NEWALL, *Ex p* NEWALL (1838), 3 Deac. 333.

127. —— —— —— **Room set aside for purpose.**]—A farmer had a room in his house for selling flour & pork :—*Held :* if there was a continuing buying & selling otherwise than as a farmer, he was

121 i. —— *Farmer.*]—A person engaged in making profit of farm produce, by supplying milk by contract, or buying & selling horses at fairs, is not a trader.—*Re* ANON. (1849), 14 L. T. O. S. 294.—**IR.**

1. —— *Indigo planter.*]—Is a trader within Insolvency Act, s. 60.—*Re* DE MOMET (1894), I. L. R. 21 Calc. 1018.—**IND.**

liable as a trader. *Aliter*, if he merely so traded in the produce of his farm.—STANSFIELD *v.* LAYTON (1851), 17 L. T. O. S. 20.

128. —— —— **Making bricks.**]—A farmer converting part of his land into brick earth, & making bricks for sale :—*Held :* a trader.—PARKER *v.* WELLS (1787), 1 Bro. Parl. Cas. 545 ; 1 Term Rep. 34, 783 ; 1 E. R. 747, H. L.

Annotations :—**Distd.** Sutton *v.* Weeley (1806), 7 East, 442. **Consd.** *Re* Bradbury, *Ex p.* Emery (1854), 4 De G. M. & G. 901, L. JJ. **Refd.** Bell *v.* Young (1855), 24 L. J. C. P. 66 ; Kent *v.* Astley (1869), L. R. 5 Q. B. 19. **Mentd.** Trelawney *v.* Thomas (1791), 1 Hy. Bl. 641 ; Campbell & Haynes U. R. (1847), 2 Cox, C. C. 463, Ex. Ch.

129. —— —— ——.]—Pltf., about two years before the issuing of the commission, had entered into an agreement for the purchase of five acres of land, one of the terms of the agreement being, that 4*s.* for every thousand bricks made on the land should be paid to the vendor, in part of the purchase-money. Pltf. made bricks from clay dug from the land. During part of the time he was in partnership with two others, who had no legal or equitable interest in the land, but that partnership had been dissolved before the issuing of the commission :—*Held :* pltf. was not a person liable to bkpcy. laws.—HEANE *v.* ROGERS (1829), 9 B. & C. 577 ; 4 Man. & Ry. K. B. 486 ; 7 L. J. O. S. K. B. 285 ; 109 E. R. 215.

Annotations :—**Refd.** Dickinson *v.* Valpy (1829), 5 Man. & Ry. K. B. 126 ; *Re* Chambers, *Ex p.* Chambers (1835), 1 Deac. 197. **Mentd.** Stratford & Moreton Ry. Co. *v.* Stratton (1831), 2 B. & Ad. 518 ; Graves *v.* Key (1832), 3 B. & Ad. 313 ; Pickard *v.* Sears (1837), 6 Ad. & El. 469 ; Freeman *v.* Cooke (1848), 2 Exch. 654 ; Newton *v.* Liddiard (1848), 12 Q. B. 925 ; *Re* Dover & Deal Railway, etc., Londesborough's Case (1854), 4 De G. M. & G. 411, L. JJ. ; Jorden *v.* Money (1854), 5 H. L. Cas. 185, H. L. ; Simpson *v.* Accidental Death Ins. (1857), 2 C. B. N. S. 257 ; Richards *v.* Johnston (1859), 4 H. & N. 660.

130. —— —— **Making lime.**]—*Held :* a farmer, making lime from a lime pit, opened & worked before the commencement of his term, & selling the surplus beyond what he required for manure, was not a trader.—*Ex p.* RIDGE (1813), 1 Ves. 360 ; 1 Rose, 316 ; 35 E. R. 140.

131. —— —— **Keeping cows—Not cow-keeper.**]—A farmer of one hundred & four acres of arable land, principally used for the growth of carraway seeds, & who kept four cows, but not for the purposes of his farm, & sold the milk :—*Held :* not a trader or cowkeeper.—*Re* CRAMP, *Ex p.* DERING (1847), De G. 398 ; 16 L. J. Bcy. 3 ; 8 L. T. O. S. 321 ; 11 Jur. 92.

Annotation :—**Follid.** Bell *v.* Young (1855), 15 C. B. 524.

132. —— —— —— ——.]—A man farming two hundred & seventy-one acres kept cows, never more than six in number, & regularly sold milk, & sometimes butter. His intention in keeping the cows was to sell milk, & if he had not done so, the keeping of so many would have been unprofitable. It would not have been bad farming if he had kept no cows, but cows, to the extent he kept them, were the most profitable stock :—*Held :* he was not a trader liable to be made a bkpt. as a "cow-keeper" within bkpcy. laws.—BELL *v.* YOUNG (1855), 15 C. B. 524 ; 24 L. J. C. P. 66 ; 1 Jur. N. S. 167 ; 3 W. R. 175 ; 139 E. R. 528.

133. —— —— **Growing & selling market garden produce.**]—H. was the lessee of a farm of one hundred & thirty-eight acres of arable & meadow land, at a rent of £316 0*s.* 8*d.* The lease was subject to the usual covenants for cultivation, etc. Upon twenty acres of the land H. had cultivated green peas, & on ten acres new potatoes. The produce of these acres had been sent to market & disposed of through various salesmen. It was proved that peas & potatoes were, according to the custom of the county, used as clearing crops, & it was alleged that these thirty acres had been so cultivated by H. These acres had also been cultivated by means of the plough, instead of the spade, which was ordinarily used in market gardens. H. was in his neighbourhood generally known as a farmer, was so assessed to the income tax, & so described on his carts :—*Held :* H. was not a market gardener, nor a trader within 1842 Act, s. 10.—*Re* HAMMOND, *Ex p.* HAMMOND (1844), De G. 93 ; 14 L. J. Bcy. 14 ; 4 L. T. O. S. 215 ; 9 Jur. 358.

134. —— —— **Farming for pleasure.**]—A person who occupies a residential property & engages in farming & market gardening for his pleasure, & carries on the same at a profit, is not carrying on a "trade or business" within 1883 Act, s. 44, although he sells his surplus produce after supplying his household. But if the primary intention is abandoned, & the business carried on with a view to profit as a means of livelihood, he will come within the mischief of the sect.—*Re* WALLIS, *Ex p.* SULLY (1885), 14 Q. B. D. 950 ; 33 W. R. 733.

135. —— —— **Training horses for profit.**]—The taking in horses for friends & training them, & thereby receiving a profit, is not sufficient to constitute a farmer a trader.—*Re* WILKINSON, *Ex p.* CLATER, *Ex p.* BECKETT-DENISON (1883), 48 L. T. 648.

136. —— **Fisherman.**]—A fisherman buying fish of other boats at sea, & selling it ashore, is a trader within the bkpcy. laws ; & if such be the usual practice of a particular class of fishermen, one of them who is proved to have done so once, will be presumed to have continued to carry on his business in the same manner till the time of his bkpcy.—HEANNY *v.* BIRCH (1812), 3 Camp. 233 ; 1 Rose, 356.

Annotations :—**Refd.** *Re* Moore, *Ex p.* Moore (1837), 6 L. J. Bcy. 72 ; *Re* Paul (1857), 28 L. T. O. S. 342.

137. —— ——.]—A fisherman, who occasionally buys fish to make up for market a cargo otherwise deficient is not a trader.—*Re* GALLIMORE, *Ex p.* GALLIMORE (1816), 2 Rose, 424, L. C.

Annotations :—**Consd.** *Re* Cleland (1867), 2 Ch. App. 466. **Refd.** *Re* Bradbury, *Ex p.* Emery (1854), 4 De G. M. & G 901, L. JJ. **Mentd.** *Re* Wilbeam, *Ex p.* Wilbeam (1819), Buck, 459 ; Heane *v.* Rogers (1829), 9 B. & C. 577 ; *Re* Coulson & Phipps, *Ex p.* Phipps (1844), 3 Mont. D. & De G. 505 ; *Re* Adams, *Ex p.* Griffin (1879), 48 L. J. Bcy. 107, C. A. ; King *v.* Henderson, [1898] A. C. 720, P. C.

138. —— **Freeholder—Making bricks.**]—A devisee for life of an estate, part of which was a brick ground, making bricks there for sale generally, with a view to profit, is not a trader, though he purchased the coals & some of the wood used in burning the bricks, & had occupied the same ground as a brickmaker for general sale, before the estate came to him by devise, for this is but a more beneficial mode of enjoying his own estate, by carrying the soil to market in an ameliorated state, & is not a buying of any commodity to sell it again, nor does it fall within the principle of bkpcy. laws, which were levelled against those who, getting other men's goods into their hands, obtain credit upon & consume the same.—SUTTON *v.* WEELEY (1806). 7 East, 442 ; 3 Smith, K. B. 445 ; 103 E. R. 171.

Annotations :—**Refd.** Cannon *v.* Denew (1833), 3 L. J. C. P. 65 ; Kent *v.* Astley (1869), L. R. 5 Q. B. 19. **Mentd.** Heane *v.* Rogers (1829), 9 B. & C. 577.

139. —— —— ——.]—A person, whether termor or freeholder, who sells bricks made from the produce of his soil, is not a trader ; but he is, if he purchases the materials of his manufacture.—*Re* GALLIMORE, *Ex p.* GALLIMORE (1816), 2 Rose, 424.

Annotations :—**Consd.** Heane *v.* Rogers (1829), 9 B. & C. 577. **Consd. & Apprvd.** King *v.* Henderson, [1898] A. C. 720, P. C. **Refd.** *Re* Wilbeam, *Ex p.* Wilbeam (1819), Buck.

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459; *Re* Coulson & Phipps, *Ex p.* Phipps (1844), 3 Mont. D. & De G. 505; *Re* Bradbury, *Ex p.* Emery (1854), 4 De G. M. & G. 901, L. JJ.; *Re* Cleland (1867), 2 Ch. App. 466, L. JJ.; *Re* Adams, *Ex p.* Griffin (1879), 48 L. J. Bcy. 107, C. A.

140. —— —— ——.]—A devisee for life, who converts the soil into bricks, is not a trader.—*Re* BURGESS, *Ex p.* BURGESS (1827), 2 Gl. & J. 183; 5 L. J. O. S. Ch. 182, L. C.

Annotations:—**Folld.** Heane *v.* Rogers (1829), 9 B. & C. 577. **Mentd.** *Re* Nerinckx, *Ex p.* Nerinckx (1835), 4 L. J. Bcy. 73.

141. —— —— ——.]—The making of bricks for sale, from clay taken from a man's own land, does not constitute him a trader, within the bkpcy. laws, nor will it be a trading, if such person buy chalk for the purpose of burning with the clay, to improve the bricks, & afterwards sell a portion of the chalk, when converted into lime.—PAUL *v.* DOWLING (1829), 3 C. & P. 500; Mood. & M. 263.

142. —— **Innkeeper.**]—Victuallers, as such, are not within the bkpcy. laws.—SAUNDERSON *v.* ROWLES (1767), 4 Burr. 2064; 98 E. R. 77.

143. —— ——.]—An innkeeper, as such, is not a trader, under the bkpcy. laws; neither is an innkeeper, selling wine & brandy, & other liquors, by the dozen, to customers out of his inn, necessarily a trader.—WILLETT *v.* THOMAS (1773), 2 Chit. 651.

144. —— ——.]—An inn-keeper, who sells liquor out of the house to all customers that apply for it, is subject to the bkpcy. laws; however inconsiderable the extent of such dealing, & the profits arising from it, may be.—PATMAN *v.* VAUGHAN (1787), 1 Term Rep. 572; 99 E. R. 1257.

Annotations:—**Distd.** Stewart *v.* Ball (1805), 2 Bos. & P. N. R. 78. **Apld.** Cannan *v.* Denew (1833), 3 L. J. C. P. 65. **Folld.** *Re* Tollemache, *Ex p.* Ford, Huntingtower's Case (1843), 1 L. T. O. S. 83, Ct. of R.

145. —— —— **Question for jury.**]—ANON. (1773), Lofft, 218; 98 E. R. 619.

146. —— **Livery stable keeper—Occasionally selling horses—Without horse-dealer's licence.**]—A livery-stable keeper, who bought horses for the purpose of letting out, occasionally sold them, but without having a horse-dealer's licence:—*Held:* this was a sufficient trading.—MARTIN *v.* NIGHTINGALE (1826), 3 Bing. 421; 11 Moore, C. P. 305; 4 L. J. O. S. C. P. 127; 130 E. R. 575.

147. —— —— **Selling provender.**] — R. a livery-stable keeper, bought provender, & sold it to his customers, & any who applied for it, "as is done in all livery stables":—*Held:* a sufficient trading to subject him to the bkpcy. laws.—CANNAN *v.* DENEW (1833), 10 Bing. 292; 3 Moo. & S. 761; 3 L. J. C. P. 65; 131 E. R. 917.

Annotation:—**Mentd.** Wright *v.* Fearnley (1838), 5 Bing. N. C. 89.

148. —— **Lodging house keeper.**]—The keeper of a private lodging-house, who also seeks a profit by furnishing her guests with provisions, is subject to the bkpcy. laws as an hotel keeper, although the provisions are set apart as the separate property of each guest.—SMITH *v.* SCOTT (1832), 9 Bing. 14; 2 Moo. & S. 35; 1 L. J. C. P. 143; 131 E. R. 519.

Annotations:—**Consd.** Cannan *v.* Denew (1833), 3 L. J. C. P. 65. **Folld.** Gibson *v.* King (1842), 10 M. & W. 667. **Apprvd.** *Re* Jones, *Ex p.* Thorne (1876), 45 L. J. Bcy. 158, C. A.

149. —— ——.]—A lodging-house keeper, not proved to have sold provisions, is not a trader.—*Re* TARRANT, *Ex p.* WILKS (1836), 2 Mont. & A. 667; 5 L. J. Bcy. 39, Ct. of R.

Annotation:—**Consd.** *Re* Wright, *Ex p.* Brundrett (1837), 6 L. J. Bcy. 29.

150. —— ——.]—A party who lets furnished lodgings is not a trader, notwithstanding he buys the furniture for the purpose of being let with the lodgings.—*Re* BOWERS, *Ex p.* BOWERS (1837), 2 Deac. 99.

151. —— ——.]—A boarding & lodging-house keeper, who also keeps a stock of wine, which she supplies to her boarders & lodgers, by a bottle at a time, as each of them may require it, is a hotel-keeper under 6 Geo. 4, c. 16, s. 2, & as such subject to bkpcy. laws.—GIBSON *v.* KING (1842), 10 M. & W. 667; Car. & M. 458; 12 L. J. Ex. 9; 6 Jur. 1044; 152 E. R. 639, N. P.

Annotation:—**Mentd.** Belcher *v.* Gummow (1847), 9 Q. B. 873.

152. *S. P. Re* BIRCH, *Ex p.* BIRCH (1842), 2 Mont. D. & De G. 659.

153. —— ——.]—A boarding-house keeper is a trader within 6 Geo. 4, c. 16, s. 2.—*Re* HUGHES, *Ex p.* DANIELS (1843), 1 L. T. O. S. 13; 7 Jur. 334, Ct. of R.

154. —— ——.]—A person who keeps a lodging-house, & supplies the lodgers with food & wine, is a trader within the bkpcy. laws.—KING *v.* SIMMONDS (1848), 1 H. L. Cas. 754; 12 Jur. 903; 9 E. R. 959, H. L.

Annotations:—**Mentd.** Colonial Bank *v.* Warden (1846), 5 Moo. P. C. C. 340; Luard *v.* Butcher (1846), 15 L. J. C. P. 187; Thorpe *v.* Plowden (1848), 2 Exch. 387, Ex. Ch.; Garrard *v.* Tuck (1849), 8 C. B. 231; Alleyne *v.* R. (1855), 24 L. J. Q. B. 282, Ex. Ch.; Levi *v.* Green (1859), 5 Jur. N. S. 1245, Ex. Ch.; Withers *v.* Parker (1859), 28 L. J. Ex. 383, Ex. Ch.; Field *v.* Rivington] (1889), 5 T. L. R. 642, C. A.

155. —— ——.]—A foreman tailor's cutter, who took in lodgers at his house where his wife also kept a boarding school:—*Held:* a trader.—*Re* WILLS, *Ex. p.* NATIONAL DEPOSIT BANK (1878), 26 W. R. 624, C. A.

156. —— ——.]—A person who takes lodgers, but does not provide them with board, carries on a "trade or business" within 1883 Act, s. 44.—*Re* HARRISON, *Ex p.* OFFICIAL RECEIVER (1892), 67 L. T. 600; 57 J. P. 88; 9 T. L. R. 53; 10 Morr. 1; 5 R. 93, D. C.

157. —— ——.]—P., a married woman whose husband was an undischarged bkpt., took a house in her name, & let two rooms which she did not use to W. at a rent of £5 a month. P. did not supply W. with board, & the rooms were not let to any other persons. The county ct. registrar declined to make a receiving order on the ground that no separate trading by P. had been proved:—*Held:* it was not possible to say on the evidence that P. carried on either a "trade or business" within 1833 Act, s. 44.—*Re* PARKINSON, *Ex p.* PLANT (1893), 9 T. L. R. 388.

See, also, No. 173, *post.*

158. —— **Medical practitioner—Selling drugs.**]—A surgeon & apothecary, who does not confine his sale of drugs to his patients, but sells them to any chance customers who apply for them is a trader.—*Re* BRIDEN, *Ex p.* DAUBENY (1836), 2 Deac. 72; 6 L. J. Bcy. 49.

Annotation:—**Consd.** Hance *v.* Harding (1888), 20 Q. B. D. 732, C. A.

159. —— —— ——.] — An insolvent described as a surgeon admitted that he was a Licentiate of the Apothecaries' Co., that he had attended other than surgical cases, & that he supplied medicines to his patients, but stated that he kept no shop, never compounded prescriptions of physicians or other persons brought to him on their own responsibility, & that he charged only for attendance &

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142 i. —— *Innkeeper.*]—Is not a trader within 1869 Act.—HARMAN *v.* CLARKSON (1872), 22 C. P. 291.—CAN. m. —— *Secretary & manager of tea company.*]—Is not a trader.—*Re* H. V. (1895), 29 I. L. T. 136.—IR.

advice, & never made a distinct charge for medicine unless supplied in surgical cases, as ancillary to his practice as a surgeon :—*Held :* the insolvent was not a trader.—*Re* BARRETT (1844), 3 L. T. O. S. 208.

160. —— —— ——.]—A surgeon, who was also licensed to practise as an apothecary, supplied medicines to his patients, but not to other persons : —*Held :* he was liable to become bkpt. as an apothecary.—*Re* PALMER, *Ex p.* CRABB (1856), 8 De G. M. & G. 277 ; 25 L. J. Bcy. 45 ; 27 L. T. O. S. 93 ; 2 Jur. N. S. 628 ; 4 W. R. 501 ; 44 E. R. 397, L. JJ.

Annotation :—**Distd.** Hance *v.* Harding (1887), 4 T. L. R. 185.

161. —— —— ——.]—A medical man practising as a general practitioner dispensed medicines to his patients, but charged by the visit irrespectively of the medicine supplied, which was covered by the charge for the visit :—*Held :* he was not a trader in drugs within 1869 Act.—HANCE *v.* HARDING (1888), 20 Q. B. D. 732 ; 59 L. T. 659 ; 36 W. R. 629 ; 4 T. L. R. 463, C. A.

Annotations :—**Mentd.** *Re* Dale To Elsden (1892), 36 Sol. Jo. 347 ; *Re* Vansittart, *Ex p.* Brown, [1893] 2 Q. B. 377 ; Mackintosh *v.* Pogose, [1895] 1 Ch. 505 ; *Re* Tetley, *Ex p.* Jeffrey (1896), 66 L. J. Q. B. 111 ; *Re* Parry, *Ex p.* Salaman, [1904] 1 K. B. 129 ; *Re* Pope, *Ex p.* Dicksee, [1908] 2 K. B. 169, C. A. ; Sturmey's Trustee *v.* Sturmey (1912), 107 L. T. 718 ; I. R. Comrs. *v.* Gribble, [1913] 3 K. B. 212, C. A. ; *Re* Collins (1914), 112 L. T. 87.

162. —— **Mine owner—Selling produce of mine.**]—One who buys a coal mine, works it, & sells the coals, is not a trader.—PORT *v.* TURTON (1763), 2 Wils. 169 ; 95 E. R. 748.

163. —— —— ——.]—A. held a lease of mines of coal & iron-stone, & carried on the business of smelting, adding to the iron ore produced from his own mines from 65 to 70 per cent. of ore which he bought elsewhere & smelted the whole into pig-iron, which he sold in the market :—*Held :* he was a trader within 1849 Act.—TURNER *v.* HARDCASTLE (1862), 11 C. B. N. S. 683 ; 31 L. J. C. P. 193 ; 5 L. T. 748 ; 142 E. R. 964.

Annotations :—**Mentd.** Johnson *v.* L. & Y. Ry. Co. & Wigan Waggon Co. (1878), 3 C. P. D. 499 ; The Winkfield, [1902] P. 42, C. A. ; Royal Mail S.S. Co. *v.* Macintyre (1911), 16 Com. Cas. 231 ; Eastern Construction Co. *v.* National Trust Co. & Schmidt, [1914] A. C. 197, P. C.

164. —— —— ——.]—The owner of a phosphate mine who sells the phosphate is not a trader.—*Re* SCHOMBERG, *Ex p.* SCHOMBERG (1874), 10 Ch. App. 172 ; 31 L. T. 665 ; 23 W. R. 204, L. JJ.

Annotations :—**Apprvd.** *Re* Stevens, *Ex p.* M'George (1882), 20 Ch. D. 697, C. A. **Distd.** *Re* Worsley, [1901] 1 K. B. 309 ; C. A. **Refd.** *Re* Dagnall, *Ex p.* Soan & Morley, [1896] 2 Q. B. 407. **Mentd.** *Re* Debtor (1910), 102 L. T. 691, C. A.

165. —— —— **Buying articles to sell to workmen —Borrowing coal to ameliorate his own.**]—The owner of a colliery buying articles & selling them to his own pitmen, is not a trader.

Whether the owner of a colliery, borrowing a particular species of coal to render his own marketable, be a trader, is a question for a jury upon the intention.—*Re* GALLIMORE, *Ex p.* GALLIMORE (1816), 2 Rose, 424, L.C.

Annotations :—**Consd.** Heane *v.* Rogers (1829), 9 B. & C. 577 ; *Re* Cleland (1867), 2 Ch. App. 466, L. JJ. **Refd.** King *v.* Henderson, [1898] A. C. 720, P. C. **Mentd.** *Re* Wilbeam, *Ex p.* Wilbeam (1819), Buck, 459 ; *Re* Coulson & Phipps, *Ex p.* Phipps (1844), 3 Mont. D. & De G. 505 ; *Re* Bradbury, *Ex p.* Emery (1854), 4 De G. M. & G. 901, L. JJ. ; *Re* Adams, *Ex p.* Griffin (1879), 48 L. J. Bcy. 107, L. JJ.

See, also, Nos. 163, *ante,* 170, *post.*

166. —— —— **Conveying persons & goods on steamers used for carrying coal.**]—A., possessed of collieries upon his estate, built a wharf & erected a crane upon land adjoining the collieries, & employed steamers to tow coal vessels up & down a creek leading from the wharf to the sea. He also employed the steamers in conveying passengers & goods from the wharf to Liverpool, where he had an office & agents, a distance of about thirty miles, at certain fixed rates for passage money, freight & wharfage. The times of sailing of the steamers were regularly printed & advertised :—*Held :* such employment of the wharf & ships was merely for the purpose of making the best use of what A. was compelled to keep for the use of his collieries, & as ancillary to the enjoyment of his land, & he was not a trader liable to bkpcy. law.—*Re* BAGSHAW, *Ex p.* BAGSHAW (1859), 33 L. T. O. S. 276.

167. —— **Quarry owner—Selling produce of quarry.**]—A person selling stone delved from his own quarry is not a trader. Whether or not he becomes so by purchasing stones from others depends upon the quantity & the intention.—*Re* ASPINALL, *Ex p.* GARDNER (1812), 1 Ves. & B. 45 ; 1 Rose, 377 ; 35 E. R. 18, L. C.

Annotation :—**Mentd.** *Re* Wailey, *Ex p.* Alexander (1832), 1 L. J. Bcy. 79.

168. —— —— —— **Selling tools to workmen.**]—The lessee of a quarry who digs rock, & works it up into slates for sale, is not hereby made a trader, nor is he so made a trader by selling tools & gunpowder to his workmen, nor by letting a builder have iron & timber to be used in building on the quarry.—*Re* CLELAND, *Ex p.* CLELAND (1867), 2 Ch. App. 466 ; 36 L. J. Bcy. 33 ; 16 L. T. 403 ; 15 W. R. 525, L. JJ.

169. —— **Pawnbroker.**] — A pawnbroker is subject to the bkpcy. laws ; & a person, who had formerly taken in goods upon pledge, but had ceased to do so, still continuing to sell the unredeemed pledges, thereby carries on the trade of a pawnbroker, & is subject to the bkpcy. laws.—RAWLINSON *v.* PEARSON (1821), 5 B. & Ald. 124 ; 106 E. R. 1139.

Annotations :—**Consd.** *Re* Reynolds, *Ex p.* White, [1915] 2 K. B. 186, C. A. **Refd.** Pott *v.* Turner (1830), 6 Bing. 702.

170. —— **Person buying articles to mix with his own produce.**]—A person who buys any article for the purpose of mixing it with his own produce, with a view to selling the mixture more advantageously than his own produce could be sold unmixed, does not thereby become a trader.—PATTEN *v.* BROWNE (1817), 7 Taunt. 409 ; 129 E. R. 163.

See, also, Nos. 163, 165, *ante.*

171 —— **Person buying carcases for dogs—Reselling skins & bones.**]—A person who purchases dead horses for his dogs, & sells the skins & bones, does not thereby become a trader, although he may sell such skins at a profit.—SUMMERSETT *v.* JARVIS (1821), 3 Brod. & Bing. 2 ; 6 Moore, C. P. 56 ; 129 E. R. 1182.

Annotation :—**Refd.** *Re* King (1846), 6 L. T. O. S. 522.

172. —— **Proctor— Acting as bill-broker.**]—A person, ostensibly carrying on the profession of a proctor, was made a bkpt. as a bill-broker. The evidence to prove the trading was, generally, "that he procured bills to be discounted, that he carried on the business of a bill-broker, & that on one occasion he was employed to get a bill for £48 discounted" : —*Held :* this was insufficient evidence of the trading, as the affidavits did not specify the name of any party, to whom bkpt. applied to discount any bills, or with whose money the same were cashed, nor even stated the whole of the particulars of any one of such bills.—*Re* BOX, *Ex p.* HARVEY (1836), 1 Deac. 571.

See, further, Nos. 96, 102, *ante.*

173. —— **Professional nurse—Keeping nursing home.**]—A professional nurse, who kept a lodging-

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house for invalids & supplied them with board at a profit, as well as lodging & nursing:—*Held:* a keeper of an "hotel," & a trader within 1869 Act.—*Re* JONES, *Ex p.* THORNE (1876), 3 Ch. D. 457; 45 L. J. Bcy. 158; 35 L. T. 532; 25 W. R. 186, C. A.

See, also, Nos. 148 *et seq., ante.*

174. —— Publisher of newspaper.]—The publisher of a newspaper, buying the whole daily impression from the proprietors, reselling it at a profit, & bearing the loss of such as remain unsold:—*Held:* a trader.—GILLINGHAM *v.* LAING (1816), 6 Taunt. 532; 128 E. R. 1142; *sub nom.* GIMMINGHAM *v.* LAING, 2 Marsh. 236.

Annotation:—**Distd.** Tucker *v.* Jones (1824), 2 Bing. 2.

175. —— Salt works owners.]—A co., which was lessee of certain land, upon which there were salt rocks, set up a manufacture of salt, & produced & sold large quantities of it, by conducting water over the salt rocks, & then into reservoirs, from which the brine was conducted into boilers. A great quantity of coal was purchased, & consumed in the manufacturing of salt:—*Held:* not a trading within the bkpcy. laws.—*Re* ATKINSON, *Ex p.* ATKINSON (1840), 1 Mont. D. & De G. 300; 9 L. J. Bcy. 43; 4 Jur. 971, Ct. of R.

176. —— Scrivener.]—A scrivener within the bkpcy. laws is one who lends out money for others for a commission.—YEO *v.* ALLEN (1783), 3 Doug. K. B. 214; 99 E. R. 619.

177. —— ——.]—A scrivener within the bkpcy. laws is one who, with an intention thereby to get a living, receives into his custody other men's money, to be laid on their account, according to the purpose for which it is deposited. The mode of his remuneration, whether by procuration fees, by a charge for commission, or otherwise, is an immaterial circumstance, the actual deposit of, & complete control over the money of others till invested, & the intention thereby to get a living, being the essence of such species of trading.—MALKIN *v.* ADAMS (1814), 2 Rose, 28; *sub nom.* ADAMS *v.* MALKIN, 3 Camp. 534.

Annotations:—**Mentd.** *Re* Gibbs (1845), 5 L. T. O. S. 475; Wilkinson *v.* Candlish (1850), 5 Exch. 91; *Re* Dufaur, *Ex p.* Dufaur (1852), 2 De G. M. & G. 246, L. JJ.

178. —— ——.]—*Semble:* no person could be the object of a commission as a scrivener, as such species of trading had ceased to exist.—*Re* LEWIS (1814), 2 Rose, 59.

179. —— ——.]—A scrivener within the bkpcy. laws is a person entrusted with the money of his employer, & who finds a borrower.—*Re* BURMAN, *Ex p.* BATH (1830), Mont. 82.

Annotation: **Refd.** Lott *v.* Melville (1841), 3 Man. & G. 40.

See, further, Nos. 86 *et seq., ante.*

180. —— Sculptor—Dealer in marble.]—A sculptor is not a trader as such, but can be made a bkpt. as a dealer in marble & as a worker of goods & commodities.—*Re* BAILEY (1855), 2 Bankr. & Ins. R. 65.

181. —— Shareholder — In trading company.]—*Qu.:* whether shareholders in joint stock trading cos. were traders liable to the bkpcy. laws.—*Ex p.* BRUNDRETT (1837), 3 Mont. & A. 50; *sub. nom. Re* WRIGHT, *Ex p.* BRUNDRETT, 6 L. J. Bcy. 29.

Annotation:—**Consd.** *Re* Hall, *Ex p.* Hall (1838), 8 L. J. Bcy. 5.

182. —— —— In banking company.]—A shareholder in a banking co. under 7 Geo. 4, c. 46, is a trader.—*Re* HALL, *Ex p.* HALL (1838), 3 Deac. 405; 1 Mont. & Ch. 478; 8 L. J. Bcy. 5.

Annotation:—**Mentd.** *Re* Caldercott, *Ex p.* Davidson (1841), 1 Mont. D. & De G. 648.

183. —— —— ——.]—A party held shares in a joint stock banking co. for a period of two years, & received successively two years' dividends on his shares:—*Held:* this was sufficient to constitute a trading as a banker.—*Re* BYROM, *Ex p.* WYNDHAM (1840), 1 Mont. D. & De G. 146, Ct. of R.

184. —— —— In joint stock company.]—Holding shares in a joint stock co., for a period of six days only, where no dividends or profit appeared to have been received by the party, during the time that he possessed the shares:—*Held:* not to constitute a trading, within the bkpcy. laws.—*Re* ATKINSON, *Ex p.* ATKINSON (1840), 1 Mont. D. & De G. 300; 9 L. J. Bcy. 43; 4 Jur. 971, Ct. of R.

185. —— —— In gas company.]—*Semble:* the member of a gas co. is a trader.—*Re* PUTTOCK, *Ex p.* BROWN (1842), 2 Mont. D. & De G. 758.

186. —— —— In mine.]—*Qu.:* whether holding shares in a mine carried on under a licence to get ores at a royalty determined by the quantity got & sold, is a trading within bkpcy. laws.—*Re* BRADBURY, *Ex p.* EMERY (1854), 4 De G. M. & G. 901; 23 L. J. Bcy. 33; 43 E. R. 760, L. JJ.

187. —— Ship owner.]—The owner of a share in a ship is not in that character subject to bkpcy. laws.—*Ex p.* BOWES (1798), 4 Ves. 168; 31 E. R. 86.

Annotations:—**Consd.** R. *v.* Page (1819), 7 Price, 616, Ex. Ch.; *Re* Bourne, *Ex p.* Bourne (1826), 2 Gl. & J. 137; *Re* Christie, *Ex p.* Saunders (1833), Mont. & B. 329, L. C.; *Re* Hall, *Ex p.* Hall (1838), 8 L. J. Bcy. 5. **Distd.** *Re* Palmer, *Ex p.* Crabb (1856), 8 De G. M. & G. 277, L. JJ.

188. —— ——.]—Shareholders of a steam packet are not traders.—*Re* WISWOULD, *Ex p.* WISWOULD (1831), Mont. 263.

189. —— Ship-broker.]—A ship-broker is, as such, liable to be made a bkpt.—POTT *v.* TURNER (1830), 6 Bing. 702; L. & Welsb. 293; 4 Moo. & P. 551; 8 L. J. O. S. C. P. 282; 130 E. R. 1451.

190. —— Smuggler.]—A smuggler may be a trader within 1 Jac. 1, c. 15, s. 2, as being a person who seeks his trade of living by buying & selling, although such buying & selling be illegal.—COBB *v.* SYMONDS (1822), 5 B. & Ald. 516; 1 Dow. & Ry. K. B. 111; 106 E. R. 1279.

—— Solicitor.]—*See* Nos. 85 *et seq., ante.*

—— Surgeon.]—*See* Nos. 158 *et seq., ante.*

191. —— Travelling bookseller—Selling by auction.]—A person travelling from town to town, & having packages of books, etc., sent after him by public conveyance, & taking rooms at each town, & there selling such books, etc., by retail by auction, is a trading person within 50 Geo. 3, c. 41, s. 7.—DEAN *v.* KING (1821), 4 B. & Ald. 517; 106 E. R. 1026.

Annotations:—**Mentd.** A.-G. *v.* Woolhouse (1827), 1 Y. & J. 753; Manson *v.* Hope (1862), 2 B. & S. 498.

192. —— Underwriter.]—An underwriter, merely in that character, cannot be a bkpt.—*Ex p.* BELL (1808), 15 Ves. 355; 33 E. R. 788.

SUB-SECT. 2.—FOREIGNERS.

193. Foreign creditor—Outside jurisdiction—Proof of debt—Brings him within jurisdiction.]—A foreign creditor residing out of the jurisdiction, by proving a debt in bkpcy., brings himself within the

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PART I. SECT. 3, SUB-SECT. 2.

193 i. *Foreign creditor.*]—By the law of Saskatchewan, a transfer made in fraud of creditors is void as against creditors, & all creditors, no matter where resident, are entitled to the benefit of that law.—MINOT GROCERY CO. *v.* DURICK (1913), 23 W. L. R. 270; 3 W. W. R. 904; 10 D. L. R. 126.—**CAN.**

193 ii. —— *Proof of debt—Brings him within jurisdiction.*]—A foreigner lodged a claim in a Scotch sequestration, & the trustee, without using arrestment *jurisdictionis fundandæ causâ,* brought an action against the foreigner for reducing an alleged preference obtained by him over the other creditors:—*Held:* the action was not incompetent in respect of want of jurisdiction.—ORD *v.* BARTON (1847), 19 Sc. Jur. 223.—**SCOT.**

jurisdiction of the ct. as to the administration of the estate, as though he were residing within it.—*Re* MORTON, *Ex p.* ROBERTSON (1875), L. R. 20 Eq. 733 ; 44 L. J. Bcy. 99 ; 32 L. T. 697 ; 23 W. R. 906.

194. Bankrupt not compelled to indorse foreign bills.]—A. obtained money from B. on the security of goods consigned to B.'s home in America, & shortly after become bkpt. B.'s agent in America, ignorant of the advances made, & of the bkpcy., remitted bills for the proceeds of the goods to A., who delivered them to a person, to get them accepted, who handed them over to B. A petition praying that A., or the assignees, might be directed to indorse them, was dismissed with costs, on the ground of jurisdiction.—*Re* PALMER, *Ex p.* HALL (1810), 1 Rose, 13.

Annotations :—**Refd.** *Re* Barrington, *Ex p.* Sidebotham (1834), 1 Mont. & A. 655, Ct. of R. ; *Re* Gibson, *Ex p.* Gibson (1853), 21 L. T. O. S. 9. **Mentd.** *Re* Mills, *Ex p.* Reid (1832), 1 Deac. & Ch. 250, Ct. of R.

195. Resident abroad—Act of bankruptcy in England.] — One who has traded to England, whether native, denizen, or alien, though never a resident trader in England, but who comes to England occasionally, & commits an act of bkpcy., is an object of bkpcy. laws.—ALEXANDER *v.* VAUGHAN (1776), 1 Cowp. 398 ; 98 E. R. 1151.

Annotations :—**Foll.** Allen *v.* Cannon (1821), 4 B. & Ald. 418. **Refd.** Williams *v.* Nunn (1809), 1 Taunt. 270. **Mentd.** A.-G. *v.* Sulley (1859), 33 L. T. O. S. 275.

196. —— ——.] — An alien non-trader domiciled abroad, who contracts debts in England, is liable to be made a bkpt. under 1869 Act, if he commits an act of bkpcy. in England, although he may have left England before the petition for adjudication is presented. But he cannot be made a bkpt. upon an alleged act of bkpcy. committed abroad.—*Re* CRISPIN, *Ex p.* CRISPIN (1873), 8 Ch. App. 374 ; 42 L. J. Bcy. 65 ; 28 L. T. 483 ; 37 J. P. 391 ; 21 W. R. 491, L. C. & L. J.

Annotations :—**Consd.** *Re* Trench, *Ex p.* Brandon (1884), 25 Ch. D. 500, C. A. ; Cooke *v.* Vogeler (Charles A.) Co., [1901] A. C. 102, H. L. **Refd.** *Re* Myer, *Ex p.* Pascal (1876), 1 Ch. D. 509, C. A. ; *Re* Sawers, *Ex p.* Blain (1879), 41 L. T. 46, C. A. ; *Re* Gutierrez, *Ex p.* Gutierrez (1879), 11 Ch. D. 298, C. A. ; *Re* A. B. (1900), 82 L. T. 169, C. A.

See, also, No. 315, *post.*

See 1914 Act, s. 1 (2).

197. —— —— **By firm of which foreigner is partner.**]—The English Ct. of Bkpcy. has no jurisdiction to make an adjudication of bkpcy. against a foreigner, domiciled & resident abroad, who has never been in England, even though he is a member of an English firm which has traded & contracted debts in England, & against which an execution in respect of a judgment debt above £50 has been levied by seizure & sale of goods of the firm in England, & in such a case the ct. ought not to make an order for service out of the jurisdiction of a bkpcy. petition on the foreigner.—*Re* SAWERS, *Ex p.* BLAIN (1879), 12 Ch. D. 522 ; 41 L. T. 46 ; 28 W. R. 334, C. A.

Annotations :—**Consd.** *Re* Pearson, *Ex p.* Pearson, [1892] 2 Q. B. 263, C. A. **Distd.** *Re* Clark, *Ex p.* Beyer, Peacock, [1896] 2 Q. B. 476, C. A. **Consd.** *Re* A. B., [1900] 1 Q. B. 541, C. A. ; Cooke *v.* Vogeler (Charles A.) Co., [1901] A. C. 102, H. L. **Refd.** *Re* Clarke, *Ex p.* Schultze (1897), 4 Mans. 231, C. A. **Mentd.** Dulaney *v.* Merry, [1901] 1 K. B. 536.

See 1914 Act, s. 1 (2).

198. —— **Act of bankruptcy committed abroad.**] —A commission of bkpcy. should not issue in respect of an act of bkpcy. committed abroad, nor when a party traded in England while resident abroad (LORD HARDWICKE, C.).—*Ex p.* SMITH (1737), cited 1 Cowp. at p. 402.

Annotation :—**Consd.** Alexander *v.* Vaughan (1776), 1 Cowp. 398.

See 1914 Act, s. 1 (1) (*d*) & s. 1 (2).

199. —— ——.]—The Ct. of Bkpcy. has no jurisdiction to make a receiving order against a foreigner resident abroad who, without coming into the jurisdiction, has in this country had a place of business, contracted debts & acquired assets, & has executed abroad an assignment of his property for the benefit of his creditors generally. Such a person is not "a debtor" within 1883 Act, s. 6 (1) (*d*).—COOKE *v.* VOGELER (CHARLES A.) Co., [1901] A. C. 102 ; 70 L. J. K. B. 181 ; 84 L. T. 10 ; 17 T. L. R. 153 ; 8 Mans. 113, H. L.

Annotations :—**Consd.** Dulaney *v.* Merry, [1901] 1 K. B. 536. **Mentd.** Vacher *v.* London Soc. of Compositors, [1913] A. C. 107, H. L.

See 1914 Act, s. 1 (2).

200. —— ——.]—Where there is jurisdiction to commit a judgment debtor under Debtors Act, 1869 (c. 62), s. 5, there is jurisdiction under 1883 Act, s. 103 (5), to make a receiving order against him in lieu of committing him, even although he is a foreigner not domiciled in England, & has not within a year ordinarily resided, or had a dwelling-house or place of business in England, & a bkpcy. petition cannot be presented against him by reason of 1883 Act, s. 6 (1) (*d*).—*Re* CLARK, *Ex p.* CLARK, [1898] 1 Q. B. 20 ; 66 L. J. Q. B. 875 ; 77 L. T. 417 ; 46 W. R. 103 ; 14 T. L. R. 7 ; 42 Sol. Jo. 15 ; 4 Mans. 231, C. A.

Annotation :—**Mentd.** Blount *v.* Whitely (1898), 79 L. T. 635, C. A.

201. —— **Service of bankruptcy notice or petition —When outside jurisdiction.**]—*Re* SAWERS, *Ex p.* BLAIN, No. 197, *ante.*

202. —— —— ——.]—*Held :* the ct. had no jurisdiction under 1883 Act to allow the service of a bkpcy. notice upon a foreigner out of the jurisdiction.—*Re* PEARSON, *Ex p.* PEARSON, [1892] 2 Q. B. 263 ; 61 L. J. Q. B. 585 ; 67 L. T. 367 ; 40 W. R. 532 ; 8 T. L. R. 622 ; 36 Sol. Jo. 573 ; 9 Morr. 185, C. A.

Annotations :—**Distd.** *Re* Clark, *Ex p.* Beyer, Peacock, [1896] 2 Q. B. 476, C. A. ; *Re* Clark, *Ex p.* Clark (1897), 77 L. T. 417, C. A. **Foll.** *Re* A. B., [1900] 1 Q. B. 541, C. A. **Consd.** Cooke *v.* Vogeler (Charles A.) Co., [1901] A. C. 102, H. L.

203. Temporarily within jurisdiction—Service of bankruptcy notice.]— A bkpcy. notice was issued under 1883 Act, s. 4 (1) (*g*), against a foreigner who had not ordinarily resided or had a dwelling-house or place of business in England within the preceding year & was then abroad. Debtor subsequently coming to England temporarily, he was served with the bkpcy. notice in this country :—*Held :* the issue of the bkpcy. notice was valid.—*Re* CLARK, *Ex p.* BEYER, PEACOCK & Co., [1896] 2 Q. B. 476 ; 65 L. J. Q. B. 684 ; 75 L. T. 305 ; 45 W. R. 118 ; 12 T. L. R. 625 ; 40 Sol. Jo. 732 ; 3 Mans. 203, C. A.

Annotation :—**Distd.** *Re* Clark, *Ex p.* Clark (1897), 77 L. T. 417, C. A.

204. —— **For purpose of litigation.**] — A domiciled Frenchman came to England for the purposes of an action which he had commenced in the English cts. He took five furnished rooms on the third & fourth floors of a house in London. He occupied the rooms exclusively for three months from Mar. to June, living in them with his wife & two servants. During the three months he paid frequent visits to France, & at the end of the three months returned there. In Sept. of the same year a bkpcy. petition was presented against him in the London Bkpcy. Ct. :—*Held :* he had had a dwelling-house in England "within a year before the date of the presentation of the petition," within 1883 Act, s. 6 (1) (*d*), & the petition was properly presented against him.—*Re* HECQUARD, *Ex p.* HECQUARD (1889), 24 Q. B. D. 71 ; 38 W. R. 148 ; 6 T. L. R. 32 ; 6 Morr. 282, C. A.

Sect. 3.—What persons are subject to bankruptcy laws: Sub-sects. 2 & 3.]

Annotations :—**Mentd.** *Re* Birkin (1896), 3 Mans. 291, C. A.; *Re* Leonard, *Ex p.* Leonard, [1896] 1 Q. B. 473, C. A.; *Re* Betts, *Ex p.* Betts, [1897] 1 Q. B. 50, C. A.; Alexander *v.* Tracy & Tracy (1915), 79 J. P. 458.

205. —— ——.]—A foreigner, who for purposes of litigation has stayed in England at hotels during nine months of the year immediately preceding the date of the presentation of a bkpcy. petition has "ordinarily resided" within 1883 Act, s. 6 (1) (*d*).—*Re* BRIGHT, *Ex p.* BRIGHT (1903), 51 W. R. 342; 19 T. L. R. 203; 47 Sol. Jo. 253, C. A.

206. —— Debt contracted abroad—Both parties foreigners.]—A debtor's summons may be served in England in respect of a debt contracted abroad by a foreigner with a foreigner.—*Re* MYER, *Ex p.* PASCAL (1876), 1 Ch. D. 509; 45 L. J. Bcy. 81; 34 L. T. 10; 24 W. R. 263, C. A.

Annotation :—**Refd.** Cooke *v.* Vogeler (Charles A.) Co., [1901] A. C. 102, H. L.

207. Business in Paris—Branch in England—Prior bankruptcy in France—Members of firm resident in England—Locus standi of syndic in foreign bankruptcy.]—A firm, having its head offices in Paris, had a branch establishment in England. The firm was declared bkpt. in Paris under the law of France, & a syndic was appointed to administer the estate. Subsequently a bkpcy. petition was presented against them in England, & an order was made appointing an interim receiver. The syndic applied to the ct. to discharge this order & to stay all further proceedings under the petition. There was no evidence as to the domicil of the members of the firm, but two of them resided in England, where the firm had large assets. The registrar refused the application :—*Held :* (1) the jurisdiction of the ct. being undoubted, & there being assets within the jurisdiction, the receiving order was rightly made; (2) the fact that a prior bkpcy. had been commenced in a foreign country, not shown to be the country of domicil of debtors, was no ground for staying the proceedings in this country. *Qu. :* whether the syndic had any *locus standi* to make the application. — *Re* ARTOLA HERMANOS, *Ex. p.* ANDRÉ CHÂLE (1890), 24 Q. B. D. 640; 59 L. J. Q. B. 254; 62 L. T. 781; 6 T. L. R. 271; 7 Morr. 80, C. A.

Annotations :—**Mentd.** *Re* Queensland Mercantile & Agency Co., *Ex p.* Australasian Investment Co., *Ex p.* Union Bank of Australia (1891), 66 L. T. 433, C. A.; *Re* Anderson, [1911] 1 K. B. 896.

See, now, 1914 Act, s. 113.

Objection to jurisdiction—How taken.]—*See* No. 385, *post.*

SUB-SECT. 3.—PERSONS ORDINARILY RESIDING OR HAVING DWELLING-HOUSE OR PLACE OF BUSINESS WITHIN JURISDICTION.

208. Ordinary residence—What amounts to—Residence in hotel for eighteen months.]—Where a debtor, who neither was domiciled in nor had a dwelling-house or place of business in England, had for eighteen months previous to the presentation of a bkpcy. petition against him a room at an hotel in London which he paid for continuously during that time, & was treated as an ordinary resident there :—*Held :* the debtor had "ordinarily resided in England" within 1883 Act, s. 6 (1) (*d*); & the creditor was entitled to present

206 i. *Temporarily within jurisdiction—Debt contracted abroad—Both parties foreigners.]* — Where a debt was contracted abroad by one foreigner to another, & debtor came to Ireland & was arrested by such creditor :—*Held :* (1) the Comrs. of the Insolvent Ct. had jurisdiction to discharge such debtor upon his petition in the usual way; (2) the fact that debtor had foreign property, which possibly might not be capable of a valid transfer in Ireland, did not deprive the Insolvent Ct. of jurisdiction.—R. *v.* INSOLVENT COURT COMRS. (1823), 2 Fox & S. Ir. 14.—**IR.**

206 ii. —— —— ——.]—Both pltf. & deft., inhabitants of a foreign country, came together into Canada to remain only a few hours. During their stay there pltf. arrested deft. :—*Held :* the arrest was regular. — RAYNOR *v.* HAMILTON (1838), 1 Ont. Dig. 184.—**CAN.**

n. *Foreign tenant of heritable subjects—Leaving jurisdiction.]*—Scots cts. have jurisdiction to award sequestration in the case of a foreign tenant of heritable subjects leaving Scotland *animo non revertendi*, if debtor has a good title to possess heritage as lessee & also beneficial possession, natural or civil, of the subjects.—*Re* WEINSCHEL (RACHEL) (1916), 2 S. L. T. 91, 205.—**SCOT.**

o. *Can claim statutory exemptions.]* —Where an alien made an assignment for the benefit of his creditors of all his property not exempt by law, an order for payment of the costs of certain proceedings by the creditors out of a fund representing the value of his exemptions, was reversed.—*Re* DEMAUREZ, 21 C. L. T. Occ. N. 457; 5 Terr. L. R. 84.—**CAN.**

p. *Effect of No. 6 of* 1843 (*Cape*), *s.* 4.]—The above sect. was not intended to extend or alter the ordinary principles as to the extent to which the Colonial Cts. will exercise jurisdiction over the persons & property of foreigners.—MICHAELIS *v.* PRETORIUS (1896), 13 S. C. 266.—**S. AF.**

PART I. SECT. 3, SUB-SECT. 3.

208 i. *Ordinary residence — What amounts to.]*— There is nothing to show that the residence contemplated by Insolvency Act, s. 5, must necessarily be a permanent residence, the object of that sect. being to extend the benefit of the Act to those who could be said to be *bonâ fide* residents for the time being within the jurisdiction of the ct. at the time they filed their petition.—*Re* DE MOMET (1894), I. L. R. 21 Calc. 634.—**IND.**

208 ii. —— ——.]—It is not necessary for petitioner applying to be declared an insolvent to have resided for a long time at a place within the jurisdiction of the ct. Even temporary residence for a time & for a particular purpose is enough to give the ct. jurisdiction to deal with an application for insolvency. —ABDUL REZAK *v.* BASIRUDDIN AHMED (1911), 17 C. W. N. 405.—**IND.**

208 iii. —— ——.]—Petitioner came down from Cawnpore, where he had resided for some time, to Calcutta, to file his petition. He stated that he intended to settle in Calcutta on obtaining his discharge :—*Held :* his being in Calcutta in such circumstances did not constitute residence. — *Re* TIETKINS (1868), 1 B. L. R. A. C. 84.—**IND.**

208 iv. —— —— *Occupation for business purposes.]*—The word "reside" in Insolvency Act, s. 5, when applicable to the insolvency of traders, includes an occupation for the purpose of trading, whether or not accompanied by sleeping or dwelling.—*Re* HOWARD BROTHERS (1873), 11 B. L. R. 254.—**IND.**

208 v. —— —— *Temporary residence in hired house.]*—A.'s zamindari & dwelling-house in the district of D. having been sold, he came to Calcutta in May, 1880, leaving his family with his relations, & filed his petition in the ct. for the Relief of Insolvent Debtors in July. He remained in a hired house at Calcutta till Sept., when the ct. rose for the vacation, & returned just before the end of the vacation, having in the interval gone to the district of D. to raise funds to carry on his insolvency proceedings. He had no residence outside the jurisdiction of the High Ct. :—*Held :* he had no residence within the jurisdiction of the High Ct. within Insolvency Act, s. 5.—*Re* RAM PAUL SINGH (1881), 8 C. L. R. 14.—**IND.**

208 vi. —— —— *"British subject" resident within jurisdiction of High Court of Madras.]*—The insolvent was born in England of English parents, & was the widow of a surgeon & resided at Salem for some time before, & at the time of, the presentation of her petition to the ct. :—*Held :* Insolvent Debtors Act, s. 5, was as applicable to a "British subject" (in the sense in which that appellation was used in the charter of the late Supreme Ct.) resident within the jurisdiction of the High Ct. of Madras as to an inhabitant within the local limits of the town of Madras.—*Re* RICKS (1866), 3 Mad. 151.—**IND.**

208 vii. —— —— *Residence & business exclusively in Ireland—Irish* 1857 *Act, s.* 31.]— A trader, having for several years resided & traded in England, took premises in Ireland in Nov., 1860, closed his place of business in England, removed his family to Ireland, &, pursuant to advertisements published in the Irish newspapers, thenceforward carried on his trade in Ireland only. Five-sixths of the amount of his debts were contracted in England. Having been adjudged a bkpt. in Ireland :—*Held :* he was residing & trading exclusively in Ireland within the above sect.—*Re* SANDERSON (1861), 7 Ir. Jur. 48.—**IR.**

208 viii. —— —— *Residence for more than forty days — For purpose of bankruptcy proceedings.]* — An Englishman, being insolvent, came to Scotland & had his exclusive residence there for more than forty days. He was not a trader in any country, & had no estate in Scotland, & all his creditors, with one exception, resided out of Scotland. The avowed object of his resi-

a bkpcy. petition against him.—*Re* NORRIS, *Ex p.* REYNOLDS (1888), 4 T. L. R. 452 ; 5 Morr. 111, C. A.

Annotation :—**Follđ.** *Re* Bright (1901), 18 T. L. R. 37, C. A.

209. ——— ——— **Occasional visits to lodging-house —Twenty weeks in England in fifteen months.**]—Debtor resided, when in London, in a lodging-house, having a bedroom only, on divers dates between Sept., 1891, & Jan. 1893, for periods of a few days at a time & occasionally for upwards of a week, the whole residence in London being not more than twenty weeks & during the rest of the period debtor resided in Scotland or abroad :—*Held :* he was not "ordinarily resident" in England within 1883 Act, s. 6 (1) (*d*).—*Re* ERSKINE, *Ex p.* ERSKINE (1893), 10 T. L. R. 32 ; 38 Sol. Jo. 144, C. A.

210. ——— ——— **Greater part of four years in London.**]—Where debtor had so much business in England that he came over & remained in England during the greater part of four years in succession :—*Held :* London, where he habitually stayed, was his place of "ordinary residence" within 1883 Act, s. 6 (1) (*d*).—*Re* BRIGHT (1901), 18 T. L. R. 37, C. A.

211. **Debtor's domicil—Onus of proof on creditor.**]—The *onus* is on petitioning creditor to prove debtor's domicil, though he may adduce such *primâ facie* evidence as will throw the burden of disproving the domicil on debtor.—*Re* MITCHELL, *Ex p.* CUNNINGHAM (1884), 13 Q. B. D. 418 ; 53 L. J. Ch. 1067 ; 51 L. T. 447 ; 33 W. R. 22 ; 1 Morr. 137, C. A.

Annotations :—**Follđ.** *Re* Barne, *Ex p.* Barne (1886), 16 Q. B. D. 522, C. A. **Refd.** *Re* Duleep Singh, *Ex p.* Cross (1890), 7 Morr. 228, C. A. **Mentd.** Casdagli *v.* Casdagli, [1919] A. C. 145, H. L.

212. ——— ———.]—The *onus* is on petitioning creditor to prove that debtor's domicil is English, as required by 1883 Act, s. 6 (1) (*d*), & that his residence has been such as to give the High Ct. jurisdiction under s. 95. But, if there is no reason to suppose that debtor will dispute that his domicil is English, or that the petition is presented in the right ct., petitioning creditor need not in the first instance adduce evidence of either of those facts.—*Re* BARNE, *Ex p.* BARNE (1886), 16 Q. B. D. 522 ; 54 L. T. 662 ; 3 Morr. 33, C. A.

213. ——— ——— **Domicil of origin—Domicil of choice.**]—In a case where the domicil of debtor is disputed the *onus* of proof of the domicil is on the creditor presenting the petition.

The father of bkpt. was formerly the Sovereign of the Punjaub, but in 1849, by a treaty made for him with the English Govt., when he was ten years of age, he renounced his sovereignty & subsequently resided in England until 1886, when he left this country taking with him his wife & bkpt. with the avowed intention of returning to India, &, on being prevented from so doing, had since resided on the continent. Bkpt. at that time had not attained his majority, & while still a minor he returned to England with his father's consent & lived with his mother at his father's expense up to & after his majority when he entered the English army as an officer, his regiment being stationed in Canada. A petition presented against bkpt. having been dismissed by the registrar on the ground that bkpt. was not domiciled in England as required by 1883 Act, s. 6 :—*Held :* (1) the father of bkpt., although he had resided in England, had never abandoned his domicil of origin in the Punjaub, & even if he had, the English domicil was renounced during the minority of bkpt., who thereupon followed the domicil of his father wherever that might be ; (2) there was not sufficient evidence to show that bkpt. after he attained his majority intended to take a domicil of choice in this country ; (3) in the circumstances the registrar was right in dismissing

dence in Scotland was to have his estate sequestrated there. The validity of the sequestration having been challenged for want of jurisdiction in the Scotch Ct. :—*Held :* at the date of presenting the petition, bkpt. was subject to the jurisdiction of the Supreme Cts. of Scotland within 19 & 20 Vict. c. 79, s. 13.—JOEL *v.* GILL (1859), 31 Sc. Jur. 511 ; 21 Dunl. (Ct. of Sess.) 929.—**SCOT.**

208 ix. ——— ——— *Absence on military service.*]—A Scot resided in a house in Scotland, life-rented by the wife, for some years before 1914. Shortly after the outbreak of the European war he was absent on military duty, but when on leave returned to the house, & had, during the year preceding the presentation of a petition for the sequestration of his estates, done so once or twice :—*Held :* debtor had "within a year before the date of the presentation of the petition resided or had a dwelling-place or place of business in Scotland" as required by 1913 (Scotland) Act, s. 11.—GARDNER *v.* MACARTHUR (1918), 56 Sc. L. R. 20.—**SCOT.**

208 x. ——— *Arrest as absent debtor.*]—A warrant cannot issue against a person as an absent debtor under R. S. (c. 125), unless he has been a resident in the province.—*Ex p.* KETTLE (1861), 5 All. 81.—**CAN.**

211 i. *Debtor's domicil — Jurisdiction of Scottish Courts — No residence in Scotland.*]—A creditor presented a petition for sequestration of the estates of a debtor, who was domiciled, & possessed heritage in Scotland, & who had been an accountant in Glasgow, but who at the date of the petition had neither residence nor place of business in Scotland :—*Held :* the Lord Ordinary must proceed with the case.—CROIL, PETITIONER (1863), 1 Macph. (Ct. of Sess.) 509.—**SCOT.**

211 ii. ——— ——— ———.]—Circumstances in which a debtor having a domicil of succession in Scotland, but not resident there, was held not subject to the jurisdiction of the Supreme Cts. of Scotland in sense of 1856 (Scotland) Act, s. 13.—STRICKLAND, PETITIONER (1911), 1 S. L. T. 212.—**SCOT.**

211 iii. ——— *Change of domicil—Effect on after-acquired property.*]—As soon as a debtor ceases to be domiciled in the country of adjudication, the law of that country ceases to have any application to his after-acquired property situated elsewhere.—*Re* EADES' ESTATE, [1917] 2 W. W. R. 65 ; 33 D. L. R. 335.—**CAN.**

211 iv. ——— ——— ———.]—Bkpt., who had been sequestrated in Scotland, went to England & was there made bkpt. The Scotch trustee petitioned the ct. to find that bkpt.'s acquirenda, subsequent to the date of the Scotch sequestration, were vested in him :—*Held :* the adjudication in the English bkpcy. barred the ct. from pronouncing the finding craved.—MEIN (BROWN'S TRUSTEES) *v.* TURNER & ANDREW (1855), 27 Sc. Jur. 185.—**SCOT.**

q. *Place of business—Business within jurisdiction—Residence outside jurisdiction.*]—Where debtor was a resident of the State of Maine but did business in New Brunswick, & went away for the purpose of defrauding his creditors :—*Held :* he might be proceeded against under Absconding Debtors Act.—R. *v.* STEADMAN (1868), 1 Han. 369.—**CAN**

r. ——— ——— ———.] — Plff., who had been engaged in business in Canada, though not permanently resident there, sued deft. for certain money. Subsequently M. was appointed official assignee & applied under Insolvent Act, 1864, s. 4 (9), to be allowed to intervene & represent plff. in the suit. Plff. was not liable to the insolvent laws. The ct. left the assignee to sue deft. for the money, so that deft. might apply under Interpleader Act, & the question be presented on the record in a feigned issue.—MELLON *v.* NICHOLLS (1868), 27 U. C. R. 167.—**CAN.**

s. ——— ——— ——— *Business carried on by agent.*]—A trader in Annam sent cinnamon to agents in Hong Kong to sell on commission, he himself coming up for the time & living in a cubicle. The agents introduced the customers but the trader himself concluded the bargains :—*Held :* debtor had a place of business within the colony & the ct. had jurisdiction over him.—*Re* CHAN YUE SHAN, *Ex p.* CHAN KING PO (1908), 4 Hong Kong L. R. 128—**HONG KONG.**

t. ——— ——— ——— ———.]—A trader residing out of the jurisdiction of the High Ct., but carrying on business at Calcutta by a gomastah, can be adjudicated an insolvent under 11 & 12 Vict. c. 21, s. 9, if his gomastah stops payment & closes & leaves his usual place of business, or does any act which, if done by the trader himself, would have rendered him liable to be adjudicated an insolvent.—*Re* HURRUCK CHUND GOLICHA (1880), I. L. R. 5 Calc. 605 ; 6 C. L. R. 382.—**IND.**

u. ——— *Firm — Non-resident partners.*]—Non-resident partners of a firm doing business in Newfoundland are subject to the jurisdiction of the Newfoundland cts. in insolvency, & their property is available for distribution amongst all their creditors.—RIDLEY & SONS' TRUSTEES *v.* ALLIANCE BANK (1875), 6 Nfld. L. R. 68.—**NFLD.**

Sect. 3.—*What persons are subject to bankruptcy laws: Sub-sects.* 3 & 4.]

the petition.—*Re* DULEEP SINGH, *Ex p.* CROSS (1890), 6 T. L. R. 385; 7 Morr. 228, C. A.

214. —— Temporary residence abroad—English domicil not abandoned—Returning abroad with intent to defeat creditors.]—Debtor, while residing in South America, had been served with a petition for restitution of conjugal rights & had appeared under protest, but subsequently withdrew the protest & made a counterclaim for nullity. A decree *nisi* was made dissolving the marriage & costs of certain proceedings were awarded to debtor's wife, & execution issued for them. About that time debtor was in England & was due to return to Buenos Ayres by a vessel sailing on a date in Apr. He took steps to conceal his movements & eventually sailed on another vessel. In May a bkpcy. petition was presented against him alleging as an act of bkpcy. that he had departed from England in Apr. with intent to defeat or delay creditors. The petition was served in the Argentine Republic & a receiving order made:—*Held:* on the facts no new domicil had been established & though debtor owned & worked a farm in the Argentine Republic, yet, in the absence of evidence as to the laws of the republic, those facts were consistent with his retaining his domicil of origin, & that was enough to found the jurisdiction in bkpcy.—*Re* LANGWORTHY, *Ex p.* LANGWORTHY (1887), 3 T. L. R. 544, C. A.

215. —— United Kingdom—Does not include Isle of Man.]—A party residing in the Isle of Man is not within the United Kingdom under 5 & 6 Vict. c. 122, s. 24 or 12 & 13 Vict. c. 106, s. 13, so as to require him to dispute a fiat within twenty-one days after advertisement.—DAVISON *v.* FARMER (1851), 6 Exch. 242; 20 L. J. Ex. 177; 15 J. P. 691; 155 E. R. 531.

Annotations:—**Mentd.** O'Flaherty *v.* M'Dowell (1857), 6 H. L. Cas. 142, H. L.; Mather *v.* Brown (1876), 1 C. P. D. 596.

216. —— England—Does not include Scotland or Ireland—No presumption that debtor is English.]—The words "domiciled in England" in 1883 Act, s. 6 (1) (*d*) mean domiciled in England, as distinguished from Scotland or Ireland, & the mere fact that debtor bears an English name, & is an officer in the British army, does not raise any presumption that his domicil is English as distinguished from Scotch or Irish, inasmuch as his domicil of origin might have been Scotch or Irish, & in either of those cases he would not, by entering into the British army, have lost his domicil of origin.—*Re* MITCHELL, *Ex p.* CUNNINGHAM (1884), 13 Q. B. D. 418; 53 L. J. Ch. 1067; 51 L. T. 447; 33 W. R. 22; 1 Morr. 137, C. A.

Annotations:—**Refd.** Casdagli v. Casdagli, [1919] A. C. 145, H. L.; **Mentd.** *Re* Barne, *Ex p.* Barne (1886), 16 Q. B. D. 522, C. A.; *Re* Dulcep Singh, *Ex p.* Cross (1890), 7 Morr. 228, C. A.; Casdagli *v.* Casdagli, [1918] P. 89, C. A.

217. What is a dwelling-house — Abandoned dwelling-house — Residence abroad.]—*Held:* a debtor, who had resided in a house of his own in England, but who had gone to reside abroad, & abandoned the house as his residence more than a year before the presentation of a petition against him, & had not again adopted it as his residence, though he might at any time during the year, had he chosen to do so, have gone to reside in it, could not be considered to have had a "dwelling-house" in England within the period prescribed by 1883 Act, s. 6 (1).—*Re* NORDENFELT, *Ex p.* MAXIM-NORDENFELT GUNS & AMMUNITION Co., [1895] 1 Q. B. 151; 64 L. J. Q. B. 182; 71 L. T. 565; 11 T. L. R. 26; 2 Mans. 20; 14 R. 71, C. A.

SUB-SECT. 4.—INFANTS.

See, generally, INFANTS & CHILDREN.

218. Commission against person under age—Void.]—A commission of bkpcy. cannot be supported against a person under age.—O'BRIEN *v.* CURRIE (1828), 3 C. & P. 283.

Annotations:—**Refd.** Belton *v.* Hodges (1832), 9 Bing. 365; *Re* Purser, *Ex p.* Stevenson (1868), 19 L. T. 23.

219. —— Superseded.]—Where a commission of bkpcy. had issued against petitioner, who at the time of the issuing of the commission was an infant under the age of twenty-one years:—*Held:* the commission must be superseded, & a writ of *supersedeas* directed for that purpose.—*Ex p.* SYDEBOTHAM (1742), 1 Atk. 146; 26 E. R. 95.

Annotations:—**Consd.** Belton *v.* Hodges (1832), 9 Bing. 365. **Refd.** *Re* Smedley (1864), 10 L. T. 432; *Re* Landon, *Ex p.* Hodgson (1874), De Colyars County Ct. Cases 227.

220. —— ——.]—A fiat superseded with costs to be paid by petitioning creditor, on the ground of the bkpt.'s minority.—*Re* HEHIR, *Ex p.* HEHIR (1833), 3 Deac. & Ch. 107; 2 L. J. Bcy. 37.

221. Debt contracted & act of bankruptcy committed during minority—Commission void.]—A commission of bkpcy. issued against an infant upon a debt contracted, & act of bkpcy, committed, during his minority is absolutely void.—BELTON *v.* HODGES (1832), 9 Bing. 365; 2 Moo. & S. 496; 2 L. J. C. P. 19; 131 E. R. 652.

Annotations:—**Expld.** Stikeman *v.* Dawson (1847), 1 De G. & Sm. 90. **Refd.** *Re* Smedley (1864), 10 L. T. 432; *Re* Purser, *Ex p.* Stevenson (1868), 19 L. T. 23; *Re* Landon, *Ex p.* Hodgson (1874), De Colyar's County Ct. Cases, 227.

222. —— ——.]—W. was convicted under Debtors Act, 1869 (c. 62), s. 12, for that he, within four months before the presentation of a bkpcy. petition against him upon which he was adjudged bkpt., quitted England, taking with him, with intent to defraud, property exceeding £20, which ought by law to have been divided amongst his creditors. At the time when he quitted England & when he was adjudged bkpt. W. was an infant. The debts proved against his estate in the bkpcy. were trade debts, contracted since the passing of Infants Relief Act, 1874 (c. 62), & it did not appear that any debts for necessaries supplied to him existed:—*Held:* the conviction could not be upheld.—R. *v.* WILSON (1879), 5 Q. B. D. 28; 49 L. J. M. C. 13; 41 L. T. 480; 44 J. P. 105; 28 W. R. 307; 14 Cox, C. C. 378, C. C. R.

Annotations:—**Consd.** R. *v.* Macdonald (1885), 1 T. L. R. 561, C. C. R. *R. v. Wilson* was independent of Infants Relief Act, 1874; at all events, the case has been often considered in the Ct. of Bkpcy. & has been put upon the other & larger ground (CAVE, J.). **Refd.** Leslie *v.* Sheill, [1914] 3 K. B. 607, C. A. **Mentd.** *Re* Jones, *Ex p.* Jones 1881), 50 L. J. Ch. 673, C. A.

223. —— Adjudication when of full age.]—Notwithstanding Infants Relief Act, 1874 (c. 62), a debtor who has traded while under age can, after he has attained full age, be adjudicated a bkpt. in respect of a trade debt contracted, & upon an act of bkpcy. committed, during his infancy.—*Re*

PART I. SECT. 3, SUB-SECT. 4.

221 i. *Debt & act of bankruptcy committed during minority—Cannot be adjudicated bankrupt.*]—An infant cannot be adjudicated a bkpt. in respect of debts contracted since Infants Relief Act, 1874 (c. 62), & falling within its provisions.—*Re* RAINEYS (1880), 3 L. R. Ir. 459.—**IR.**

221 ii. —— ——.]—A minor who has traded cannot be adjudicated an insolvent on the petition of the persons who had supplied him with funds for the purposes of his business.—*Re* NOBODEEP CHUNDER SHAW (1886), I. L. R. 13 Calc. 68.—**IND.**

221 iii. —— ——.]—Infants cannot be adjudicated insolvents in any circumstances. Contract Act, ss. 68, 247, does not make an infant a debtor.—*Re* SITAL PRASAD (1916), 22 C. W. N. 1065.—**IND.**

LYNCH, *Ex p.* LYNCH (1876), 2 Ch. D. 227; 45 L. J. Bcy. 48; 34 L. T. 34; 24 W. R. 375.

Annotations :—**N.F.** Miller *v.* Blankley (1878), 38 L. T. 527. **Dbtd.** *Re* Jones, *Ex p.* Jones (1881), 50 L. J. Ch. 673, C. A. I respectfully but entirely dissent from the decision in *Ex p. Lynch* which must now be considered as overd. I am not aware that it is a well settled rule of law that "if an infant has been held out & dealt with as a trader, he can be made a bkpt. in respect of a trade debt"; in my opinion the rule is settled the other way; in the second place, I do not agree in thinking that Infants Relief Act, 1874, has not made any difference with regard to this (JESSEL, M.R.).

224. Adjudication on infant's own petition.]—An infant under twenty-one years of age, & whether a trader or not, may be made a bkpt. on his own petition.—*Re* SMEDLEY (1864), 10 L. T. 432.

Annotations :—**Folld.** *Re* Purser, *Ex p.* Stevenson (1868), 19 L. T. 23. **Refd.** *Re* Abbott, *Ex p.* Abbott (1868), 16 W. R. 651; *Re* Landon, *Ex p.* Hodgson (1874), De Colyar's County Ct. Cases, 227. **Mentd.** *Re* Hands, *Ex p.* Hands (1867), 15 W. R. 1089.

225. ——.]—Under 1861 Act, an infant can be adjudicated a bkpt. on his own petition.—*Re* PURSER, *Ex p.* STEVENSON (1868), 19 L. T. 23.

226. —— **Infant in custody for debt.**]—An infant who is in custody for debt may petition for an adjudication against himself under 1861 Act, s. 69. —*Re* HANDS, *Ex p.* HANDS (1867), 15 W. R. 1089.

227. Commission against partnership—One partner infant—Superseded.]—A partnership of three becoming solvent, & one being an infant, a joint commission of bkpcy. against the other two was superseded.—*Ex p.* HENDERSON (1798), 4 Ves. 163; 31 E. R. 84.

Annotation :—**Mentd.** *Re* Chambers, *Ex p.* Chambers (1835), 1 Deac. 197.

228. —— —— ——.]—A joint commission of bkpcy. was superseded on the ground of the infancy of one partner on the petition of the assignees under a separate commission.—*Ex p.* BARWIS (1802), 6 Ves. 601; 31 E. R. 1216.

229. ——.]—Where one partner is an infant there could not (before 6 Geo. 4, c. 16, s. 16) be a joint commission against the others (LORD ELDON, C.).—*Ex p.* LAYTON, *Ex p.* HARDWICKE (1801), 6 Ves. 434; 31 E. R. 1131.

Annotations :—**Mentd.** *Re* Gouldwell, *Ex p.* Squire (1868), 4 Ch. App. 47, L. JJ.; *Re* Farnham, [1895] 2 Ch. 799, C. A.

230. Receiving order against partnership—One partner infant—Must be made against firm other than infant partner.]—If an act of bkpcy. is committed by a firm, of which it appears that one partner is an infant, a receiving order cannot be made against the firm simply, but may be made against the firm "other than" the infant partner; & if a receiving order has been made against the firm simply, the proceedings may be amended under 1883 Act, s. 105.—LOVELL & CHRISTMAS *v.* BEAUCHAMP, [1894] A. C. 607; 63 L. J. Q. B. 802; 71 L. T. 587; 43 W. R. 129; 1 Mans. 467; 11 R. 45; *sub nom. Re* BEAUCHAMP BROTHERS, *Ex p.* BEAUCHAMP, 10 T. L. R. 682, H. L.

Annotations :—**Refd.** *Re* Farnham (1896), 3 Mans. 109, C. A.; Leslie *v.* Sheill, [1914] 3 K. B. 607, C. A. **Mentd.** *Re* Low, *Ex p.* Gibson (1895), 72 L. T. 450, C. A.; *Re* Handford, *Ex p.* Handford (1899), 68 L. J. Q. B. 386, C. A.

231. Fraudulent misrepresentation as to age.]—Where bkpt. applied to annul the fiat on the ground of infancy, & it appeared that on the occasion of his marriage a year before the fiat issued, he had made an affidavit that he was then of age, his petition was dismissed with costs.—*Re* BATES, *Ex p.* BATES (1841), 2 Mont. D. & De G. 337; 11 L. J. Bcy. 4, Ct. of R.

Annotations :—**Expld.** R. *v.* Robinson (1867), 10 Cox, C. C. 467, C. C. R. **N.F.** *Re* Jones, *Ex p.* Jones (1881), 45 L. T. 193, C. A. **Refd.** *Re* Purser, *Ex p.* Stevenson (1868), 19 L. T. 23.

232. ——.]—One of two partners executed, together with his partner & another person, a joint & several bond, to secure money lent to the partnership. As part of the security, he agreed to effect a policy of assurance on his life, & for that purpose signed a declaration that he was of the age of twenty-two years. He was, in fact, an infant, & after he attained twenty-one he became bkpt.:—*Held :* the fraudulent misrepresentation of bkpt. as to age, rendered him, although an infant, liable in equity to the debt, & a proof for the loan was properly admitted.—*Re* KING, *Ex p.* UNITY JOINT STOCK MUTUAL BANKING ASSOCN. (1858), 3 De G. & J. 63; 27 L. J. Bcy. 33; 31 L. T. O. S. 242; 4 Jur. N. S. 1257; 6 W. R. 640; 44 E. R. 1192, L.J J.

Annotations :—**Consd.** Miller *v.* Blankley (1878), 38 L. T. 527. **Folld.** *Re* Jones, *Ex p.* Jones (1881), 18 Ch. D. 109, C. A. **Consd.** Levene *v.* Brougham (1909), 25 T. L. R. 265, C. A.; Stocks *v.* Wilson, [1913] 2 K. B. 235. **Expld.** Leslie *v.* Shiell (1913), 29 T. L. R. 554. **Consd.** Leslie *v.* Sheill, [1914] 3 K. B. 607, C. A. **Refd.** Wright *v.* Leonard (1861), 11 C. B. N. S. 258; Burton *v.* Levey (1891), 7 T. L. R. 248. **Mentd.** *Re* Collie, *Ex p.* Adamson (1878), 8 Ch. D. 807, C. A.

233. ——.]—An infant entered into partnership with two adults. During the absence of all the partners, a clerk, who had a power of attorney from the two adult partners, signed a bill on behalf of the firm The holders obtained an adjudication of insolvency against the infant & his partners :—*Held :* an infant could not be adjudicated insolvent, as the cases only established that an infant might be made bkpt. where he had obtained credit & contracted debts by means of a false & fraudulent assertion that he was of age.—MACLEAN *v.* DUMMETT (1870), 22 L. T. 710, P. C.

Annotation :—**Refd.** Leslie *v.* Sheill, [1914] 3 K. B. 607, C. A.

234. Infant trader—Holding out as adult.]—A bkpt., praying to supersede his commission on the ground of infancy, was left to his action, having traded two years as an adult, & the creditors resisting. —*Ex p.* WATSON (1809), 16 Ves. 264; 33 E. R. 985.

Annotations :—**Consd.** Belton *v.* Hodges (1832), 9 Bing. 365. **Expld.** *Re* Lees, *Ex p.* Lees (1836), 1 Deac. 705. **Consd.** *Re* Bates, *Ex p.* Bates (1841), 2 Mont. D. & De G. 337; Stikeman *v.* Dawson (1847), 1 De G. & Sm. 90. **Refd.** *Re* Smedley (1864), 10 L. T. 432; *Re* Purser, *Ex p.* Stevenson (1868), 19 L. T. 23; *Re* Jones, *Ex p.* Jones (1881), 18 Ch. D. 109, C. A. **Mentd.** *Re* Landon, *Ex p.* Hodgson (1874), De Colyar's County Ct. Cases, 227.

235. —— ——.]—An infant who has traded cannot be adjudicated a bkpt. on the petition of a person who has supplied him with goods on credit for trade purposes, but to whom he has made no express representation that he is of full age, even though he has previously filed a petition, the proceedings under which have become abortive. *Qu.:*

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224 i. *Adjudication on infant's own petition.*]—*Re* HANSRAJ MALGI, *Ex p.* DEWAR & CO. (1883), I. L. R. 7 Bom. 411.—**IND.**

227 i. *Adjudication against infant partner.*]—In India, as in England, an infant partner of a firm cannot as such be adjudicated an insolvent.—SANYASI CHARAN MANDAL *v.* ASUTOSH GHOSE (1914), I. L. R. 42 Calc. 225.—**IND.**

234 i. *Infant trader—No misrepresentation as to age.*]—An infant who has traded, but has made no express representation that he is of full age, is not liable to become bkpt.; &, although he has filed his petition for the benefit of Insolvency Act & his schedule, he should be allowed, on proof of his infancy, to withdraw from the proceedings.—*Re* HANSRAJ MALGI, *Ex p.* DEWAR & CO. (1883), I. L. R. 7 Bom. 411.—**IND.**

234 ii. —— *Proof.*]—The statement of the official assignee that an arranging trader is a minor is sufficient evidence for the ct. to show that it cannot act without the authority of the Ct. of Ch. —*Re* ARRANGING TRADER (1871), 5 I. L. T. 125.—**IR**

234 iii. —— *Effect of laws of foreign country.*]—If a minor may trade by the laws of a foreign country, he may be also made an insolvent there, & the Irish ct., upon demurrer, will assume the law of the colony to be so.—STEPHENS *v.* M'FARLAND (1845), 8 I. Eq. R. 444.—**IR.**

PART I. SECT. 3, SUB-SECT. 5.

w. *Cannot be served with debtor's summons.*]—The service of a debtor's summons on a lunatic is a nullity.—RITCHIE *v.* FITZPATRICK (1892), 26 I. L. T. Jo. 521.—**IR.**

Sect. 3.—What persons are subject to bankruptcy laws: Sub-sects. 4, 5 & 6.]

whether, if the infant had expressly represented to petitioning creditor that he was of full age, an adjudication could be made.—*Re* JONES, *Ex p.* JONES (1881), 18 Ch. D. 109; 50 L. J. Ch. 673; 45 L. T. 193; 29 W. R. 747, C. A.

Annotations :—**Consd.** Duncan *v.* Dixon (1890), 44 Ch. D. 211. **Expld.** Leslie *v.* Shiell (1913), 29 T. L. R. 554. **Refd.** Taylor *v.* Johnston (1882), 19 Ch. D. 603; Stocks *v.* Wilson, [1913] 2 K. B. 235; Leslie *v.* Sheill, [1914] 3 K. B. 607, C. A. **Mentd.** Woolf *v.* Woolf, [1899] 1 Ch. 343.

236. —— —— Name printed on door.]—An infant trading does not, by the mere circumstance of his name being painted over the door, hold himself out to the world as an adult, & is entitled to an order annulling the fiat (ERSKINE, C.J.).—*Re* LEES & SMITH, *Ex p.* LEES; *Ex p.* HEATHERLY (1836), 1 Deac. 705.

237. Infant as petitioning creditor.]—A commission cannot be supported upon a petitioning creditor's debt, made up of debts due to several persons, if one of them is an infant & a separate creditor of the trader.—*Re* MORTON, *Ex p.* MORTON (1817), Buck, 42.

Annotations :—**Consd.** *Re* Ayre, *Ex p.* Potts (1840), 10 L. J. Bcy. 26. **Mentd.** *Re* Mogg, *Ex p.* Mogg (1828), 6 L. J. O. S. Ch. 162.

SUB-SECT. 5.—LUNATICS

238. Whether lunatic can commit act of bankruptcy.]—A lunatic, while under the influence of that dreadful visitation, cannot commit an act of bkpcy.—*Ex p.* PRIDDEY (1793), Cooke's Bankrupt Laws, 7th ed. p. 43.

239. —— 5 & 6 Vict. c. 122, s. 13—Omission to pay or give security.]—*Semble :* a lunatic could not commit an act of bkpcy. under the above sect. by omitting to pay or give security.—*Re* SPENCE, *Ex p.* STAMP (1846), De G. 345.

Annotation :—**Refd.** *Re* Farnham (1895), 73 L. T. 231, C. A.

240. Bankruptcy is species of action—Lunacy no defence.]—A commission of lunacy will not protect the lunatic against an action; & a commission of bkpcy. is a species of action against which lunacy cannot be a defence (LORD ELDON, C.).—ANON. (1807), 13 Ves. 590; 33 E. R. 415.

Annotation :—**Refd.** *Re* Farnham (1895), 64 L. J. Ch. 717, C. A.

241. No joint commission against partnership—Where one partner lunatic.]—Where one partner is a lunatic there could not (before 6 Geo. 4, c. 16, s. 16) be a joint commission against the others (LORD ELDON, C.).—*Ex p.* LAYTON, *Ex p.* HARDWICKE (1801), 6 Ves. 434; 31 E. R. 1131.

Annotations :—**Refd.** *Re* Farnham, [1895] 2 Ch. 799, C. A. **Mentd.** *Re* Gouldwell, *Ex p.* Squire (1868), 4 Ch. App. 47, L. JJ.

242. Brother of lunatic proving.]—The ct. allowed the brother of a lunatic to prove & vote in the choice of assignees.—*Re* FARRINGDON, *Ex p.* AYLWIN (1842), 11 L. J. Bcy. 31.

243. Lunatic so found—Adjudication under direction of committee—Consent of Court in Lunacy.]—A lunatic so found can be adjudicated a bkpt. under the direction of his committee with the consent of the Ct. in Lunacy. *Qu. :* whether he can be made a bkpt. without that consent.

Upon a person being found lunatic, the jurisdiction of the Ct. in Lunacy immediately attaches to his property, & the discretionary powers vested in the ct. under Lunacy Act, 1890 (c. 5), of applying his property for his benefit cannot be vested by a subsequent adjudication in bkpcy. made without the consent of the Ct. in Lunacy (even assuming such adjudication to be valid); & the trustee in bkpcy. taking the lunatic's property under such an adjudication can only do so subject to the jurisdiction in lunacy.—*Re* FARNHAM, [1895] 2 Ch. 799; 64 L. J. Ch. 717; 73 L. T. 231; 11 T. L. R. 556; 3 Mans. 109; 12 R. 554, C. A.

Annotations :—**Expld. & Distd.** *Re* Farnham, [1896] 1 Ch. 836, C. A. **Refd.** Farnham *v.* Milward, [1895] 2 Ch. 730. **Mentd.** *Re* Sims, *Ex p.* Sheffield (1896), 45 W. R. 189; *Re* Tankard, *Ex p.* Official Receiver, [1899] 2 Q. B. 57; Lister *v.* Hooson, [1908] 1 K. B. 174, C. A.

244. —— —— ——.]—A man having been found lunatic by inquisition, his committee carried on his business, & therein incurred debts, in respect of some of which judgments had been recovered, & of others of which actions were pending. A petition in bkpcy. having been presented against the lunatic, & the registrar in bkpcy. having refused to adjudicate on the ground that the lunatic could not commit an act of bkpcy. without the sanction of the master in lunacy, the Ct. of Appeal, under its lunacy jurisdiction, gave leave to the committee to consent to the lunatic being adjudicated a bkpt. —*Re* LEE (1883), 23 Ch. D. 216; 48 L. T. 193; 31 W. R. 802, C. A.

245. —— —— ——.]—The committee of a lunatic debtor ought not to consent to an adjudication in bkpcy. against him without first obtaining the sanction of the Ct. in Lunacy.—*Re* R. S. A., [1901] 2 K. B. 32; 70 L. J. K. B. 475; 84 L. T. 477; 8 Mans. 164; *sub nom. Re* DEBTOR, *Ex p.* DEBTOR, 45 Sol. Jo. 342, C.A.

246. —— —— —— When for lunatic's benefit.]—Where it appears to be for the benefit of a lunatic that he should be made bkpt. the ct. will give leave to the committee in the name of the lunatic to file a declaration of insolvency or to present a bkpcy. petition.—*Re* JAMES (1884), 12 Q. B. D. 332; 53 L. J. Q. B. 575; 50 L. T. 471, C. A.

Annotation :—**Refd.** *Re* Farnham (1895), 73 L. T. 231, C. A.

247. Person of unsound mind—Not lunatic so found—Discharged from asylum—Can be made bankrupt.]—A person of unsound mind, not being a lunatic so found, on obtaining his discharge from an asylum, is deemed to have recovered his sanity, & can be made a bkpt., notwithstanding that an order appointing a receiver of the dividends, interest & income of his property is still in force.—*Re* BELTON (1913), 108 L. T. 344; 29 T. L. R. 313; 57 Sol. Jo. 343.

248. Lunatic not so found—Liquidation petition—Cannot be signed by next friend.]—A liquidation petition cannot be signed by a next friend on behalf of a lunatic not so found by inquisition. *Semble :* in case of a lunatic so found by inquisition, the Ct. in Lunacy might have jurisdiction to direct that a liquidation petition should be signed on his behalf.—*Re* CAHEN, *Ex p.* CAHEN (1879), 10 Ch. D. 183; 39 L. T. 645; 27 W. R. 387, C. A.

249. —— Receiving order to protect property.]—Where an order had been made under Lunacy Act, 1890 (c. 5), appointing a receiver of debtor's income, a receiving order was made, on the grounds; (1) it would prevent debtor (who was not a lunatic so found), if sane from charging the corpus of the property, subject to the order; (2) there might be property available for distribution in bkpcy.—*Re* A DEBTOR (No. 21 of 1912), THE DEBTOR *v.* PETITIONING CREDITOR, [1913] W. N. 63.

250. Power of Court of Lunacy—Funds in control of Bankruptcy Court.]—The Ct. in Lunacy has no power to deal with funds which are under the control of the Bkpcy. Ct.

The Ct. in Lunacy will not authorise the committee of a bkpt. lunatic to apply in the bkpcy. for payment to him of moneys of the lunatic which are in the hands of the trustee in bkpcy., or to take proceedings to annul the adjudication where such proceedings are likely to fail & would not be for the

benefit of the lunatic.—*Re* FARNHAM, [1896] 1 Ch. 836 ; 65 L. J. Ch. 456 ; 74 L. T. 214 ; 60 J. P. 389 ; 44 W. R. 465 ; 12 T. L. R. 287 ; 40 Sol. Jo. 371 ; 3 Mans. 123, C. A.

Annotation :—**Refd.** *Re* Clarke, [1898] 1 Ch. 336, C. A.

See further, LUNATICS & PERSONS OF UNSOUND MIND. *Also* 1914 Act, s. 149, & 1915 Rules, r. 297.

SUB-SECT. 6.—MARRIED WOMEN.

See note, p. 16, *ante*.

251. Trading in London—Liability to be made bankrupt.]—The daughter of a freeman of London, if she trades separately from her husband, may be a bkpt.—*Ex p.* CARRINGTON (1739), 1 Atk. 206; 26 E. R. 134.

Annotation :—**Refd.** *Re* Franks, *Ex p.* Franks (1831), 1 Moo. & S. 1.

252. —— —— Husband's prior bankruptcy—Effect on assignees.]—A wife, being a sole trader in City of London, is liable to a commission of bkpcy. & her assignees shall come in, paramount the assignees of the husband, though his was the prior bkpcy.—LA VIE *v.* PHILIPS (1765), 1 Wm. Bl. 570 ; 3 Burr. 1776 ; 96 E. R. 329.

Annotation :—**Consd.** Beard *v.* Webb (1800), 2 Bos. & P. 93, Ex. Ch.

253. Trading before marriage—No commission of bankruptcy.]—Commission of bkpcy. cannot be against a married woman, upon a trading, etc., prior to marriage.—*Ex p.* MEAR (1787), 2 Bro. C. C. 266 ; 29 E. R. 146.

Annotation :—**Refd.** R. *v.* Robinson (1867), 36 L. J. M. C. 78, C. C. R.

254. Debts before marriage.]—A *feme covert* having separate estate may be adjudged bkpt. in respect of debts incurred by her before marriage. —*Re* BUTLER (1863), 1 New Rep. 538 ; 7 L. T. 866 ; *subsequent proceedings* (1864), 9 L. T. 660.

255. —— Judgment obtained—Could not be adjudicated bankrupt.]—A married woman was sued at law by a creditor for a debt contracted by her before her marriage, which took place in 1872, & a judgment was obtained against her. The creditor then sued out a debtor's summons, & the debt not being satisfied, filed a petition for adjudication of bkpcy. against her. She had no separate property :—*Held :* the married woman could not be adjudicated a bkpt.—*Re* HENEAGE *Ex p.* HOLLAND (1874), 9 Ch. App. 307 ; 43 L. J. Bcy. 85 ; 30 L. T. 106 ; 38 J. P. 548 ; 22 W. R. 425, L. C. & L. JJ.

Annotations :—**Consd.** Summers *v.* City Bank (1874), L. R. 9 C. P. 580. **Apld.** *Re* Grissell, *Ex p.* Jones (1879), 12 Ch. D. 484, C. A. **Refd.** Day *v.* Freund (1876), 35 L. T. 551 ; *Re* Debtor, *Ex p.* Debtor (1898), 67 L. J. Q. B. 820, C. A.

256. Having protection order—Under 20 & 21 Vict. c. 85, s. 21—Liability to be made bankrupt.]—A married woman, who has a protection order under the above sect., is liable to be made bkpt.—*Re* GRIMSHAW (1882), 72 L. T. Jo. 317.

257. Convict's wife—Becoming trader.]—The wife of a convict sentenced to transportation is liable to be made a bkpt. if she becomes a trader, although her husband remains in this country.—*Re* FRANKS, *Ex p.* FRANKS (1831), 7 Bing. 762 ; 1 Moo. & S. 1 ; 9 L. J. O. S. C. P. 209 ; 131 E. R. 295.

Annotations :—**Refd.** Coombs *v.* Queen's Proctor (1852), 2 Rob. Eccl. 547. **Mentd.** *In the Goods of* Coward (1865), 4 Sw. & Tr. 46.

258. Effect of Married Women's Property Acts—Married women not liable to be made bankrupt.]—A married woman is not liable to the bkpt. law, even though she has separate estate & has contracted engagements after her marriage. Married Women's Property Act, 1870 (c. 93), has made no difference in this respect.—*Re* GRISSELL, *Ex p.* JONES (1879), 12 Ch. D. 484 ; 48 L. J. Bcy. 109 ; 40 L. T. 790 ; 44 J. P. 55 ; 28 W. R. 287, C. A.

Annotations :—**Consd.** *Re* A Debtor, *Ex p.* The Debtor, [1898] 2 Q. B. 576, C. A. **Refd.** *Re* Gardiner, *Ex p.* Coulson (1887), 20 Q. B. D. 249.

259. Trading separately—With separate property—Cannot be made bankrupt.]—Upon the true construction of Married Women's Property Act, 1882, (c. 93), s. 1 (5), two conditions must be present before a married woman can be made subject to the bkpcy. laws as a *feme sole :* (1) she must carry on a trade separately from her husband, *i.e.*, have no common interest in partnership or otherwise with him in the business ; (2) she must have separate property.—*Re* HELSBY, *Ex p.* HELSBY (1893), 63 L. J. Q. B. 261 ; 69 L. T. 864 ; 10 T. L. R. 87 ; 1 Mans. 12 ; 10 R. 49.

Annotations :—**Expld.** *Re* Edwards, *Ex p.* Harvey (1895), 2 Mans. 182. **Dbtd.** *Re* A Debtor (1908), 25 T. L. R. 140, C. A.

260. —— —— ——.]—A married woman, possessed of separate estate, but not carrying on a trade separately from her husband, is not subject to the operation of the bkpcy. laws, & cannot commit an act of bkpcy. under 1883 Act, s. 4.—*Re* GARDINER, *Ex p.* COULSON (1887), 20 Q. B. D. 249 ; 57 L. J. Q. B. 149 ; 58 L. T. 119 ; 36 W. R. 142 ; 5 Morr. 1.

Annotations :—**Consd.** *Re* A Debtor, *Ex p.* The Debtor, [1898] 2 Q. B. 576, C. A. **Refd.** *Re* Helsby, *Ex p.* Helsby (1893), 63 L. J. Q. B. 261.

See 1914 Act, s. 125.

261. —— Business managed by husband.]—A married woman can be made a bkpt. in respect of a business carried on by her, but entirely managed by her husband, provided that he has no control over the money in, or assets of, the business.—*Re* EDWARDES, *Ex p.* EDWARDES (1895), 43 W. R.

PART I. SECT 3, SUB-SECT 6.

254 i. *Debts before marriage—Separate property.*]—A woman who was made insolvent in New South Wales, afterwards married & came to Victoria. It was endeavoured to make her insolvent in Victoria, under 1861 Act, s. 218 :—*Held :* it was not sufficient to show that she had separate property in Victoria, without also showing that she acquired such property before her insolvency, & before contracting the debts upon which she had been made insolvent in New South Wales.—*Re* DICKSON (otherwise WALLACE) (1868), 5 W. W. & A.'B. 14.—**AUS.**

y. 1908 *Act, s.* 176.]—A married woman is by the above sect. made subject to the provisions of that Act.—*Re* SOMERVILLE, *Ex p.* ZOHRAB (1911), 30 N. Z. L. R. 499.—**N.Z.**

259 i. *Trading separately—With separate property.*]—Order for protection from process, under 1857 Act, s. 343, granted on the petition of a married woman carrying on trade separately from her husband, having separate estate, & having obtained a protection order under 28 Vict. c. 43.—*Re* F. (1876), I. R. 11 Eq. 24.—**IR.**

259 ii. —— ——.]—A married woman carrying on a farm separately from her husband cannot be adjudicated a bkpt. in Ireland.—*Re* LONG, [1905] 2 I. R. 343 ; 39 I. L. T. 97.—**IR.**

259 iii. —— ——.]—A sale of an insolvent's estate was made to his wife, to enable the husband to continue the business. The same sign-board remained over the door, & the business appeared to be carried on precisely as before. Purchases of goods were made in her name, for which she signed notes, but the orders were always given by her husband, & the correspondence, although conducted in her name was written & signed by him without any communication with her :—*Held :* even if the stock-in-trade was her separate property she never employed it in trade separate from her husband, but allowed him to employ it in a business really his own, & she was not a trader within Insolvent Act, 1875.—*Re* GEARING (1879), 4 A. R. 173.—**CAN.**

259 iv. —— —— *Erroneous statement of no separate estate.*]—A married woman became bkpt. upon her own petition, & an application was made to annul her bkpcy. on the ground that at the time of filing she was not possessed of any separate estate, & was not subject to the bkpcy. laws. The facts disclosed in her statement before the official assignee showed that she was possessed of separate estate, though she stated erroneously that she was not. The application was dismissed.—*Re* WARMOLL (E.), *Ex p.* PUBLIC TRUSTEE (1888), 7 N. Z. L. R. 84 (6).—**N.Z.**

Sect. 3.—What persons are subject to bankruptcy laws: Sub-sects. 6 & 7.]

509; 11 T. L. R. 338; 39 Sol. Jo. 398; 2 Mans. 182, D. C.

See 1914 Act, s. 125.

262. —— No separate property.]—Married Women's Property Act, 1882 (c. 93), s. 1 (5), imposes only one condition precedent to the jurisdiction of the ct. to make a married woman a bkpt., namely, that she shall be carrying on a trade separately from her husband. The existence of separate property at the date when the receiving order is applied for is not a condition precedent to the jurisdiction of the ct. although the absence of separate property is a matter to be considered by the ct. in the exercise of its jurisdiction.—*Re* SIMON, [1909] 1 K. B. 201; 78 L. J. K. B. 392; 100 L. T. 133; 53 Sol. Jo. 117; 16 Mans. 96; *sub nom. Re* A DEBTOR, 25 T. L. R. 140, C. A.

See 1914 Act, s. 125.

263. —— Power of appointment—Life interest under settlement.]—Real property was by a marriage settlement vested in a trustee in trust for the married woman for life for her separate use without restriction on anticipation, with remainder to such persons for such estates as she might, whether covert or sole, by deed or will appoint, & in default of appointment to her children in fee. The settlement also contained a provision under which the property could be sold or mtged. by her direction, & the proceeds paid to her:—*Held:* she was subject to the provisions of the bkpcy. laws in respect of such property as being her separate property under Married Women's Property Act, 1882, s. 1 (5), & should be directed to exercise the power of appointment in favour of the trustee in bkpcy. of her estate under 1883 Act, s. 24.—*Re* ARMSTRONG, *Ex p.* GILCHRIST (1886), 17 Q. B. D. 521; 55 L. J. Q. B. 578; 55 L. T. 538; 34 W. R. 709; 2 T. L. R. 745; 3 Morr. 193, C. A.

Annotations:—**Mentd.** *Re* Roper, Roper *v.* Doncaster (1888), 39 Ch. D. 482; *Re* Rose, Rose *v.* Rose, [1904] 2 Ch. 348; Tremayne *v.* Rashleigh, [1908] 1 Ch. 681; Goatley *v.* Jones, [1909] 1 Ch. 559.

264. —— Judgment against separate estate & bankruptcy notice.]—A bkpcy. notice under 1883 Act, s. 4 (1) (*g*), cannot be issued against a married woman who is carrying on a trade separately from her husband, & against whom a creditor has recovered a judgment in the form settled by the Ct. of Appeal in *Scott* v. *Morley* (1887), 20 Q. B. D. 120.—*Re* LYNES, *Ex p.* LESTER & Co., [1893] 2 Q. B. 113; 62 L. J. Q. B. 372; 68 L. T. 739; 58 J. P. 5; 41 W. R. 488; 9 T. L. R. 449; 37 Sol. Jo. 480; 10 Morr. 124; 4 R. 416, C. A.

Annotations:—**Follď.** *Re* Hewett, *Ex p.* Levene, [1895] 1 Q. B. 328. **Refd.** Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559, C. A. **Mentd.** *Re* Clark, *Ex p.* Beyer, Peacock, [1896] 2 Q. B. 476, C. A.

See 1914 Act, s. 125.

265. —— —— Receiving order.]—A receiving order cannot be made against a married woman trading separately from her husband under a firm name, on the ground of non-compliance with a bkpcy. notice founded upon a judgment obtained against her in the firm name.—*Re* HANDFORD, FRANCES & Co., *Ex p.* HANDFORD, FRANCES & Co., [1899] 1 Q. B. 566; 68 L. J. Q. B. 386; 80 L. T. 125; 47 W. R. 391; 15 T. L. R. 197; 43 Sol. Jo. 259; 6 Mans. 131, C. A.

Annotations:—**Dbtd.** *Re* Clark, *Ex p.* Pope & Owles, [1914] 3 K. B. 1095, C. A. 1913 Act, s. 12 (2) reverses the rule that was laid down by *Re Handford, Frances & Co., Ex p. Handford Frances & Co.* (SWINFEN EADY, L.J.).

See 1914 Act, s. 125.

266. Judgment debt—Effect of husband's death.]—A judgment recovered against a married woman does not, upon the death of her husband, render her personally liable to pay the judgment debt so as to entitle the judgment creditor to issue a bkpcy. notice against her upon such judgment.—*Re* HEWETT, *Ex p.* LEVENE, [1895] 1 Q. B. 328; 64 L. J. Q. B. 185; 72 L. T. 60; 43 W. R. 237; 11 T. L. R. 164; 39 Sol. Jo. 182; 1 Mans. 517; 15 R. 162.

See, now, 1914 Act, s. 125 (2).

267. Carrying on business—Debts unpaid after sale of business—Receiving order may be made.]—A married woman sold her business, & afterwards gave notice that she was about to suspend payment:—*Held:* (1) she continued to carry on trade until she had paid all her trade debts; (2) a receiving order might be made against her.—*Re* DAGNALL, *Ex p.* SOAN & MORLEY, [1896] 2 Q. B. 407; 65 L. J. Q. B. 666; 75 L. T. 142; 45 W. R. 79; 40 Sol. Jo. 731; 3 Mans. 218, D. C.

Annotations:—**Consd.** *Re* Worsley, [1901] 1 K. B. 309, C. A.; *Re* A Debtor (1912), 28 T. L. R. 386. **Apld.** *Re* A Debtor (1915), 31 T. L. R. 150. **Refd.** *Re* Clark, *Ex p.* Pope & Owles, [1914] 3 K. B. 1095, C. A.; *Re* Reynolds, *Ex p.* White, [1915] 2 K. B. 186, C. A. **Mentd.** *Re* Midgeley (1913), 57 Sol. Jo. 247, D. C.

268. —— —— ——.]—A married woman who has sold her business is deemed to be still carrying it on so long as debts incurred in the business remain unpaid, & a receiving order may be made against her at the instance of a trade creditor.—*Re* WORSLEY, *Ex p.* LAMBERT, [1901] 1 K. B. 309; 70 L. J. Q. B. 93; 84 L. T. 100; 49 W. R. 182; 17 T. L. R. 122; 45 Sol. Jo. 116; 8 Mans. 8, C. A.

Annotation:—**Consd.** *Re* Clark, *Ex p.* Pope & Owles, [1914] 3 K. B. 1095, C. A.

269. —— Spinster—Married during adjournment of hearing of petition.]—Judgment having been obtained against a spinster, she committed an act of bkpcy. & the creditor presented a petition against her. She promised to settle the demand & prevailed on the registrar to adjourn the petition. Before the hearing of the petition came on again debtor got married. Debtor was not carrying on a trade separately from her husband. A receiving order having been made against her:—*Held:* debtor was not subject to the bkpcy. laws & the receiving order must be discharged.—*Re* A DEBTOR, *Ex p.* THE DEBTOR, [1898] 2 Q. B. 576; 67 L. J. Q. B. 820; 78 L. T. 824; 46 W. R. 675; 14 T. L. R. 508; 42 Sol. Jo. 657; 5 Mans. 122, C. A.

Annotations:—**Consd.** *Re* Simon, [1909] 1 K. B. 201, C. A.; *Re* Reynolds, *Ex p.* White (1915), 84 L. J. K. B. 1346, C. A.

270. —— 1913 Act—Debt incurred before Act—Judgment after Act.]—Before the above Act came into force a debt was incurred by L., a married

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262 i. —— *No separate property.*]—*Qu.:* whether a married woman, who is not alleged on the face of the proceedings to have any separate property, can petition for the sequestration of the estate.—*Re* RITCHIE (1882), 8 V. L. R. 1.—**AUS.**

264 i. —— *Judgment against separate estate & debtor's summons.*]—Judgment was obtained against A., a married woman, on foot of certain bills of exchange, the original consideration for which was trade debts incurred by her while carrying on her first husband's business. Such judgment was against her separate property, & it was thereby ordered that execution therein should be limited to her separate property not subject to any restriction against anticipation, unless by reason of Married Women's Property Act, 1882 (c. 75), s. 19, the property should be liable to execution notwithstanding such restriction:—*Held:* the judgment could not be made the foundation of a debtor's summons, & the adjudication which had been founded thereon must be set aside.—*Re* A. B. (1900), 34 I. L. T. 104.—**IR.**

264 ii. —*Judgment in absolute terms & bankruptcy notice.*]—A judgment against a married woman, which is absolute in form, & contains no directions as to the limited mode of realising same, is a valid judgment, upon which a bkpcy. notice can issue against her.—*Re* NALL, *Ex p.* PERMEWAN, WRIGHT & Co., LTD. (1899), 20 N. S. W. B. 5.—**AUS.**

woman, carrying on business, & final judgment was obtained against her on Apr. 3, 1914, after the Act had come into force:—*Held:* L. was within s. 12 of the Act, & a receiving order was rightly made.—*Re* HOLLIS & SON, *Ex p.* LAWRENCE (1914), 112 L. T. 135; 30 T. L. R. 680; 58 Sol. Jo. 784, D. C.

Annotation:—**Consd.** *Re* Clark, *Ex p.* Pope (1914), 84 L. J. K. B. 89, C. A.

271. —— —— —— ——.]—A married woman carried on business, & after the coming into operation of the above Act a final judgment was obtained against her in respect of a debt incurred before the Act:—*Held:* the judgment was a good foundation for proceedings against her by a bkpcy. notice.

A married woman who owned & managed a private hotel sold it to a co., formed to acquire it, in consideration of shares therein, & became managing director thereof. She subsequently acquired or became interested in two other hotels which were transferred to companies in which she obtained large holdings of shares & of which she became managing director. She then promoted another co. to acquire a site & build a fourth hotel. She was nominally vendor to this co., & a large proportion of the share capital was to be allotted to her in consideration of her services in the formation of the co., of which she was also to be the managing director. This co. was not a success, & the hotel was never built. In connection with its promotion she incurred a debt, in respect of which judgment was obtained & a bkpcy. notice issued against her by the judgment creditors:—*Held:* she was "carrying on business" within s. 12 of the above Act, & was liable to bkpcy. proceedings thereunder.—*Re* CLARK, *Ex p.* POPE & OWLES, [1914] 3 K. B. 1095; 84 L. J. K. B. 89; 112 L. T. 873; 59 Sol. Jo. 44; [1915] H. B. R. 1, C. A.

Annotation:—**Mentd.** *Re* Reynolds, *Ex p.* White (1915), 112 L. T. 1049, C. A.

272. —— —— —— **Fresh action on judgment to found bankruptcy proceeding.**]—Where a judgment had been given before 1913 against a married woman, execution being limited to her separate property, & no stay had been granted, & the judgment remained unsatisfied:—*Held:* it was open to pltf. to bring a fresh action on the judgment & to recover judgment thereon for the purpose of founding bkpcy. proceedings against the married woman under s. 12 of the above Act.—SHAW *v.* ALLEN (1914), 30 T. L. R. 631.

273. —— —— **Judgment obtained while carrying on business—Trade obligation.**]—A married woman while carrying on business incurred a liability in damages in respect of an accident caused by the negligence of her servant in the business. Judgment having been signed against her for the amount of the damages, she ceased to carry on her business & discharged all her trade debts, but failed to satisfy the judgment debt:—*Held:* the liability under the judgment was a trade obligation, & not having discharged it, debtor was still carrying on business & was liable to bkpcy. proceedings under s. 12 of the above Act.—*Re* ALLEN, *Ex p.* SHAW, [1915] 1 K. B. 285; 84 L. J. K. B. 271; 112 L. T. 194; 59 Sol. Jo. 130; [1915] H. B. R. 39, C. A.

274. —— —— **Trading before marriage—Act of bankruptcy after marriage.**]—S., a spinster, carried on business till June, 1914. After that date she ceased to trade actively, & on July 25 she married. After her marriage she continued to realise the assets of the business & get in debts due to it. On July 29 she committed an act of bkpcy. by stating at a meeting of her creditors that she could not pay her debts. A creditor, whose debt was contracted by her before marriage, having presented a bkpcy. petition against her:—*Held:* she must be taken to have carried on the business after her marriage, & was subject to the bkpcy. laws as if she were a *feme sole* within s. 12 (1) of the above Act.—*Re* REYNOLDS, *Ex p.* WHITE BROTHERS, LTD., [1915] 2 K. B. 186; 84 L. J. K. B. 1346; 112 L. T. 1049; 59 Sol. Jo. 270; [1915] H. B. R. 174; *sub nom. Re* A DEBTOR, 31 T. L. R. 216, C. A.

See, now, 1914 Act, s. 125, &, *generally,* HUSBAND & WIFE.

SUB-SECT. 7.—MISCELLANEOUS.

275. Agent—No jurisdiction to make delivery order.]—The ct. has no jurisdiction under 1883 Act, s. 27 (5), to make an order for the delivery of the goods in the possession of a person as agent for another. *Qu.:* whether such order could be made if the principal were made resp. to the application.—*Re* DAVIS, *Ex p.* GOODMAN (1898), 15 T. L. R. 40; 5 Mans. 329.

276. Ambassador's entourage—British subject—Exempt.]—A British subject, accredited to Great Britain by a foreign Govt., as a member of its embassy (apart from an express condition to the contrary), is exempt from the local jurisdiction of his own country.—MACARTNEY *v.* GARBUTT (1890), 24 Q. B. D. 368; 62 L. T. 656; 54 J. P. 437; 38 W. R. 559; 6 T. L. R. 214.

Annotation:—**Distd.** *Re* Cloete, *Ex p.* Cloete (1891), 65 L. T. 102, C. A.

277. —— —— **Appointment obtained to protect him against creditors—Not exempt.**]—Debtor, a British subject, had carried on business in London. He was appointed by the Persian Ambassador an honorary attaché of the embassy, & his name was sent in to the Foreign Office as a member of the ambassador's suite. His appointment had in no way been recognised by the British Govt. A judgment was obtained against him, by consent, & a petition in bkpcy. was presented against him founded upon that judgment debt, & debtor claimed immunity from all civil process as a member of the Embassy:—*Held:* debtor was not entitled to the privilege claimed, his appointment having been obtained for the purpose of protecting him against his creditors.—*Re* CLOETE, *Ex p.* CLOETE (1891), 65 L. T. 102; 55 J. P. 758; 7 T. L. R. 565; 8 Morr. 195, C. A.

See, further, CONSTITUTIONAL LAW.

278. Clergyman—Not exempt.]—A commission of bkpcy. was taken out against the petitioner, who insisted that, as he was a clergyman, he was not liable to become bkpt. within the intent of any of bkpt. stats. LORD HARDWICKE, C., refused to supersede the commission.—*Ex p.* MEYMOT (1747), 1 Atk. 196; 26 E. R. 127.

Annotations:—**Consd.** Arbuckle *v.* Cowtan (1803), 3 Bos. & P. 321. **Mentd.** Cobb *v.* Symonds (1822), 5 B. & Ald. 516; Newcastle *v.* Morris (1870), L. R. 4 H. L. 661, H. L.; *Re* South Wales Atlantic S.S. Co. (1876), 2 Ch. D. 763, C. A.

See, further, ECCLESIASTICAL LAW.

279. Convict.]—A convict is liable after his conviction, as much as before, to be made a bkpt.; & where a convict has been served with a debtor's summons in prison he can be made a bkpt. upon a petition alleging & proving that he has for three weeks after service of the summons neglected to pay the debt. The power of the Crown to intervene & appoint an administrator is for the benefit of the convict & his family, but does not affect the ordinary rights of the convict's creditors.—*Re* HARRIS, *Ex p.* GRAVES (1881), 19 Ch. D. 1; 51 L. J. Ch. 1; 45 L. T. 397; 46 J. P. 70; 30 W. R. 51; 15 Cox, C. C. 118, C. A.

Annotation:—**Refd.** *Re* Levy & Debenture Corpn. (1894), 8 R. 820.

Sect. 3.—What persons are subject to bankruptcy laws: Sub-sect. 7. Sect. 4: Sub-sect. 1.]

See, further, CRIMINAL LAW & PROCEDURE.

280. Crown—Whether exempt.]—*Qu.:* whether the Crown is bound by Bkpts. stats.—A.-G. *v.* STRANYFORTH (1721), Bunb. 97; 145 E. R. 608.

281. —— ——.]—The Crown is not bound by Bkpcy. Acts.—*Ex p.* DICK (1744), cited 2 Wm. Bl. at p. 1142; 96 E. R. 673.

Annotation:—**Follo.** *Re* Temple, *Ex p.* Temple (1814), 2 Rose, 22.

282. —— ——.]—Bkpt. stats. do not bind the Crown.—*Ex p.* RUSSELL (1812), 19 Ves. 163; 1 Rose, 278; 34 E. R. 479.

Annotations:—**Consd.** *Re* Temple (1814), 2 Ves. & B. 391. **Mentd.** *Re* Helsby (1832), 1 L. J. Bcy. 5.

283. —— ——.]—The Crown is not bound by bkpcy. stats. by implication (LORD ELDON, C.) —*Re* TEMPLE, *Ex p.* TEMPLE (1814), 2 Ves. & B. 391; 2 Rose, 22; 35 E. R. 367.

284 — ——.]—The Crown is not bound by bkpcy. stats.—CRAUFURD *v.* A.-G., DUTCH COMRS.' CASE (1817), 7 Price, 1; 146 E. R. 884.

Annotation:—**Mentd.** Deare *v.* A.-G. (1835), 1 Y. & C. Ex. 197.

285. —— ——.]—Bkpcy. Acts do not apply to the Crown (COTTON, L. J.).—*Re* HENLEY & Co. (1878), 9 Ch. D. 469; 48 L. J. Ch. 147; 39 L. T. 53; 26 W. R. 885; 1 Tax Cas. 209, C. A.

Annotations:—**Consd.** *Re* Oriental Bank Corpn., *Ex p.* The Crown (1884), 28 Ch. D. 643; New South Wales Taxation Comrs. *v.* Palmer, [1907] A. C. 179, P. C.

286. —— ——.]—Though the Crown is named in some sects. of 1869 Act, it is not bound by the other provisions of the Act.—*Re* BONHAM, *Ex p.* POSTMASTER GENERAL (1879), 10 Ch. D. 595; 48 L. J. Bcy. 84; 40 L. T. 16; 27 W. R. 325, C. A.

Annotations:—**Mentd.** Mersey Docks & Harbour Board *v.* Lucas (1881), 51 L. J. Q. B. 114, C. A.; *Re* Utley (1901), 17 T. L. R. 349; *Re* De Keyser's Royal Hotel, De Keyser's Royal Hotel *v.* R., [1919] 2 Ch. 197, C. A.

See, now, 1914 Act, s. 151.

See, further, CONSTITUTIONAL LAW.

287. Executor—Selling testator's stock.]—An exor. selling off the stock of his testator, though it consists of wines, & he buys some others to mix with & fine them, will not make him a bkpt.; otherwise if he buys wines entire & sells them entire to his customers.—*Ex p.* NUTT (1743), 1 Atk. 102; 26 E. R. 67.

288. —— **Carrying on testator's business.**]—An exor., who carries on a business for the benefit of testator's children, may be made a bkpt.—VINER *v.* CADELL (1800), 3 Esp. 88.

Annotation:—**Mentd.** Caffrey *v.* Darby (1801), 6 Ves. 488.

289. —— ——.]—An exor. & trustee for the payment of debts, & afterwards to pay over the residue, who, with the consent of the residuary legatee, permits the partnership trade of testator to be continued, & receives a share of the profits for the purposes of the trust, is a trader within the bkpcy. laws.—LONGUET *v.* HOCKLEY (1836), Donnelly, 3; 5 L. J. Ex. Eq. 21; 47 E. R. 187.

290. —— ——.]—Exors., carried on their testator's business under the powers of his will in the same firm name in which he had carried it on. Subsequently a receiving order was made against them in the firm name on a bkpcy. petition by a creditor who had recovered judgment against them in the K. B. Div. in the firm name on two dishonoured bills of exchange accepted in the firm name:—*Held:* (1) the exors. were not partners; (2) they could not be adjudicated bkpt. as such. *Semble:* they could be proceeded against as joint debtors.—*Re* FISHER & SONS, [1912] 2 K. B. 491; 81 L. J. K. B. 1246; 106 L. T. 814; 55 Sol. Jo. 553; 19 Mans. 332.

See, further, EXECUTORS & ADMINISTRATORS.

291. —— **Member of Parliament—Not exempt.**]—*Held:* a member of parliament might become bkpt. under 1849 Act, s. 72.—*Re* MOSTYN, *Ex p.* GRIFFITHS (1853), 3 De G. M. & G. 174; 22 L. J. Bcy. 50; 1 W. R. 236; 43 E. R. 69, L. JJ.

Annotations:—**Mentd.** *Re* Mostyn, *Ex p.* Mostyn (1853), 1 W. R. 375, C. A.; *Re* Tyler, *Ex p.* Higgins (1858), 39 De G. & J. 33, L. JJ.; *Re* King & Beesley, *Ex p.* King & Beesley, [1895] 1 Q. B. 189; *Re* Raatz, *Ex p.* Raatz, [1897] 2 Q. B. 80.

See, further, PARLIAMENT.

292. Non-trader.]—A partner, not a trader, was indebted to the partnership & also to some of the partners separately. By deeds executed by debtor after 1861 Act had received the Royal assent, but supposed to have been executed before it came into operation, he covenanted to pay to trustees for the other partners a sum fixed upon as principal, & to pay interest thereon, & he gave a mtge. as security. A debtor's summons was issued for the money covenanted to be paid:—*Held:* (1) the debt was not contracted within s. 118 until the execution of the deed of covenant; (2) the time defined by the words "passing of 1861 Act" in same sect. was the time when the Act received the Royal assent, & not the time when it came into operation, & the non-trader might be adjudicated bkpt. on a debtor's summons issued for payment of the debt so contracted.—*Re* DALZELL, *Ex p.* RASHLEIGH (1875), 2 Ch. D. 9; 45 L. J. Bcy. 29; 34 L. T. 193; 24 W. R. 495, C. A.

Annotation:—**Consd.** R. *v.* Smith, R. *v.* Weston, [1910] 1 K. B. 17, C. C. A.

293. Peer of Parliament—Not exempt.]—A peer of Parliament is capable of being adjudicated a bkpt. under 1861 Act, & no privilege exists exempting a member of Parliament from liability to be made a bkpt. The privilege which such persons have at common law of freedom from arrest is not affected by Bkpcy. Acts.—NEWCASTLE (DUKE) *v.* MORRIS (1870), L. R. 4 H. L. 661; 40 L. J. Bcy. 4; 23 L. T. 569; 35 J. P. 548; 19 W. R. 26, H. L.

See, further, PARLIAMENT.

294. Shareholder in joint-stock bank—Debt due from bank—No judgment against public officer.]—A creditor of a joint-stock banking co. may sue out a fiat against any individual member of the co., without proceeding in the first instance against the public officer of the co. under Country Bankers Act, 1826 (c. 46).—*Re* WOOD, *Ex p.* WOOD (1840), 1 Mont. D. & De G. 92; 9 L. J. Bcy. 20; 4 Jur. 251, Ct. of R.

Annotation:—**Overd.** Davison *v.* Farmer (1851), 6 Exch. 242. We overrule *Ex p. Wood;* but that decision took place before the nature of the liability of joint stock companies had been fully understood (PARKE, B.).

295. —— —— ——.]—A shareholder in a joint-stock banking copartnership established under the above Act, cannot be proceeded against in bkpcy. upon a debt due from the copartnership, where no judgment has been obtained against the public officer of the copartnership, although the business has been relinquished,

PART I. SECT. 3, SUB-SECT. 7.

287 i. *Executor or administrator.*]—Insolvent Act, 1865, s. 27, does not enable the creditors of a deceased person to put his exors. or administrators into insolvency in their representative character.—*Re* SHARPE (1869), 20 C. P. 82.—CAN.

a. *Person in custody under civil judgment.*]—Prisoner, an apprentice, charged in execution on a judgment for criminal conversation with his master's wife:—*Held:* not within Insolvent Act, but under the exemption of debtors for fraudulent debts.—*Re* STRANGE (1801), Rowe, 677.—IR

& an order has been obtained to wind up the affairs of the co. under the 11 & 12 Vict. c. 45, prior to the proceedings in bkpcy. The rule is the same, although there be not any public officer of the co.

A fiat in bkpcy. issued against pltf. dated July 20, 1849, upon a debt due from a banking copartnership, of which pltf. was a member, to G., petitioning creditor, no proceedings having been taken against the public officer of the co. A warrant of seizure was issued to F., the messenger of the Ct. of Bkpcy., dated July 30, 1849. The creditors' assignee was appointed on Aug. 21. 12 & 13 Vict. c. 106 came into operation on Oct. 11, &. Oct. 18 pltf.'s goods were seized, & sold by the messenger under the warrant :—*Held :* the fiat was invalid.—DAVISON *v.* FARMER & GRACE (1851), 6 Exch. 242 ; 20 L. J. Ex. 177 ; 15 J. P. 691 ; 155 E. R. 531.

Annotations :—**Mentd.** O'Flaherty *v.* McDowell (1857), 6 H. L. Cas. 142, H. L. ; Mather *v.* Brown (1876), 1 C. P. D. 596.

296. Trustee removed from office.]—*Held :* although a trustee under a scheme of arrangement had been removed from office, the Board of Trade had power to demand a statement of his receipts & payments as such trustee, & to apply to the ct. under 1883 Act, s. 102 (5), to enforce that order in case of neglect or refusal to comply with it.—*Re* ROGERS, *Ex p.* BOARD OF TRADE (1887), 4 Morr. 67 ; 35 W. R. 457.

See, further, Part VII., Sect. 9, *post.*

SECT. 4.—JURISDICTION OF COURTS OF BANKRUPTCY.

SUB-SECT. 1.—IN GENERAL.

As to jurisdiction in particular matters, *see* Parts, *passim.*

297. Bankruptcy Court—Court of Equity.]—The Ct. of Bkpcy. has always been regarded as a Ct. of Equity (COZENS-HARDY, M.R.).—*Re* HART, *Ex p.* GREEN, [1912] 3 K. B. 6 ; 81 L. J. K. B. 1213 ; 107 L. T. 368 ; 19 Mans. 334, C. A.

Annotations :—**Mentd.** *Re* Shrager (1913), 108 L. T. 346 ; *Re* Branson, *Ex p.* Moore (1914), 111 L. T. 741, C. A.

298. Lord Chancellor in bankruptcy.]—In equity the whole order & disposition of bkpt.'s affairs are placed under the authority which the Lord Chancellor exercises in bkpcy (LORD ELDON, C.).—BENFIELD *v.* SOLOMONS (1803), 9 Ves. 77 ; 32 E. R. 530.

Annotations :—**Mentd.** Yewens *v.* Robinson (1840), 11 Sim. 105 ; Heath *v.* Chadwick (1848), 2 Ph. 649 ; Rochfort *v.* Battersby (1849), 2 H. L. Cas. 388, H. L. ; Smith *v.* Moffatt (1865), L. R. 1 Eq. 397 ; Payne *v.* Dicker (1871), 24 L. T. 492.

299. ——.]—It was the intention of the legislature, in giving jurisdiction to the Chancellor in bkpcy., to give him power to use in bkpcy. the authority used in causes in Ch., where no specific authority is given by the stat. (LORD ELDON, C.).—*Re* TOWNSEND, *Ex p.* BRADLEY (1812), 1 Rose, 202.

Annotations :—**Consd.** *Re* Barrington, *Ex p.* Sidebotham (1834), 3 Deac. & Ch. 818 ; Pennell *v.* Roy (1853), 3 De G. M. & G. 126, L. JJ. **Refd.** *Re* Chambers, *Ex p.* Davy (1834), 4 Deac. & Ch. 322.

300. ——.]—The Lord Chancellor exercises in bkpcy. both a legal & an equitable jurisdiction (SHADWELL, V.C.).—*Re* CHAMBERS & SON, *Ex p.* BERNASCONI (1828), 2 Gl. & J. 381.

301. —— Powers of committal for contempt.]—Contumacious obstruction of the messenger under a commission of bkpcy. treated as a contempt, though acting under the authority of the commissioners, given by statute, & not under the Lord Chancellor's order in bkpcy., as in the case of commitment, upon which the Lord Chancellor can do no more than grant the writ of *habeas corpus*, as holding the Great Seal, not by his authority in bkpcy.—*Ex p.* PAGE (1810), 17 Ves. 59 ; 34 E. R. 23 ; *sub nom. Re* DYSON, *Ex p.* PAGE, 1 Rose, 1.

Annotations :—**Consd.** Cooper *v.* Asprey (1863), 3 B. & S. 932. **Mentd.** Day *v.* Carr (1852), 7 Exch. 883.

302. —— ——.]—*Held :* if parties, who were not bound to submit to the jurisdiction of the Lord Chancellor sitting in bkpcy., waived the benefit of the objection & afterwards refused obedience to the orders, the Lord Chancellor could commit them.—*Re* PALMER, *Ex p.* HALL (1810), 1 Rose, 13.

Annotations :—**Refd.** *Re* Gibson, *Ex p.* Gibson (1853), 21 L. T. O. S. 9. **Mentd.** *Re* Mills, *Ex p.* Reid (1832), 1 Deac. & Ch. 250, Ct. of R. ; *Re* Barrington, *Ex p.* Sidebotham (1834), 1 Mont. & A. 655, Ct. of R.

303. To order distribution of testator's estate among creditors.] — Bkpts., J. & S., bankers, were indebted to W. at the death of W. By his will W. appointed J. his sole exor. Under an order of the Ct. of Review made on the petition of certain creditors of W. " on behalf of themselves & all other the unsatisfied creditors of W. deceased," J. proved against bkpts. debts to a large amount the dividends on which amounting to £3,081 16s. 6d. less £1,000 expended by J. as exor., were

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PART I. SECT. 4, SUB-SECT. 1.

297 i. *Bankruptcy Court—Court of Equity—Jurisdiction limited by Irish 1857 Act.*]—Although the Bkpcy. Ct. is a ct. of law & equity, it cannot exercise its equitable jurisdiction, even in favour of creditors, in any way that would not be warranted by the above Act.—*Re* CRAIG (1869), I. R. 4 Eq. 158.—**IR.**

b. *Debtor with double domicil.*]—Where there is a double domicil, with a double set of creditors, the bkpcy. should proceed in the ct. in which bkpcy. proceedings are first commenced.—HOWSE, SONS & CO.'S TRUSTEE *v.* HOWSE, SONS & CO.'S TRUSTEES, JOCELYNE *v.* SHEARER & HINE (1884), 3 S. C. 14.—**S. AF.**

c. *To punish criminal offences of bankrupt in trade.*]—The Insolvency Ct. has no power to punish criminally for fraudulent practices in trade. That is left to the action of creditors through the channel of the criminal law.—*Re* JANSSEN *v.* REUSS (1864), Cor. 13.—**IND.**

d. *To decide question of title to copyright.*]—A mere question of title between an author & a bkpt. publisher, as to which is owner of a portion of a copyright, cannot be decided in the bkpcy. matter.—*Re* CURRY (1848), 12 I. Eq. R. 382.—**IR.**

e. *To decide questions necessary to making complete distribution—Setting aside lease.*]—*Held :* although the lessee refused to appear & submit to its jurisdiction, the Ct. of Bkpcy. had power to set aside a lease, & to grant an injunction restraining the lessee from prosecuting an action of trespass against the messenger—it being expedient & necessary for the ct. to decide the questions involved, for the purpose of doing complete justice, & making a complete distribution of property, in the matter of the lessor's bkpcy.—*Re* DOMVILE (1874), 8 I. L. T. 196 ; *affd.* (1875), I. R. 9 Eq. 456.—**IR.**

f. *Under Irish 1857 Act.*]—*Held :* Irish 1857 Act, s. 31, although it gave the ct. exclusive jurisdiction in certain cases, was not the sect. that gave the Bkpcy. Ct. its general jurisdiction.—*Re* HAZLETON, [1915] 2 I. R. 425 ; 49 I. L. T. 29.—**IR.**

g. *Power to discharge—Person in prison under Chancery attachment.*]—Although the Ct. of Bkpcy. has jurisdiction to discharge a person in prison under an attachment out of Ch to enforce payment of a sum of money, yet it declined, in the absence of satisfactory explanation, to exercise that jurisdiction where it had been charged in Ch., & there by default confessed, that the money had been obtained by fraud.—*Re* WALKER (1873), I. R. 7 Eq. 178.—**IR.**

h. *To lend bankrupt's books—To assist foreign court.*]—Bkpt.'s books may be lent by the ct. to a foreign Govt. for the purposes of a criminal prosecution.—*Re* STEWART, *Ex p.* BURNETT (1899), 33 I. L. T. 48.—**IR.**

j. *To appoint guardian ad litem.*]—*Re* DARCY (1876), I. R. 11 Eq. 13.—**IR.**

k. *To enforce foreign sequestration.*]—The cts. of Scotland will recognise & give effect to a decree pronounced by the ct. of a foreign country sequestrating the estates of debtor, who, though trading in that country, has a Scottish domicil of succession.—OBERS *v.* PATON'S TRUSTEES (1897), 24 R. (Ct. of Sess.) 719 ; 34 Sc. L. R. 538 ; 4 S. L. T. 350.—**SCOT.**

l. *Non-interference with judicial acts.*]—*Semble :* the Ct. of Q. B. will not interfere with a judicial act of the Insolvent Ct.—CAMPBELL *v.* REGAN (1845), 8 I. L. R. 191.—**IR.**

Sect. 4.—Jurisdiction of courts of bankruptcy: Subsects. 1 & 2.]

paid by the assignees into the Bank of England in the name of the Accountant in Bkpcy. to an account called "The account of unsatisfied creditors of testator, W. deceased." Same petitioners then petitioned the Ct. of Review that it might be referred to the registrar to take an account of what was due to petitioners respectively & to apportion & divide the £2,081 16*s.* 6*d.* among them, or that the accountant in bkpcy. might be directed to pay the sum to J. as the personal representative of W., upon his giving security duly to administer & divide same amongst the creditors of testator:—*Held:* there was no jurisdiction in bkpcy. to order the funds of testator to be divided amongst his creditors, but a bill must be filed in the Ct. of Ch. for that purpose. Form of order.—*Re* KNIGHT, *Ex p.* WILLIAMS (1838), 3 Deac. 378; Mont. & Ch. 91, Ct. of R.

See, now, 1914 Act, s. 130.

304. To order inquiry into circumstances of mortgage—Before London commissioners.]—The Ct. of Review has jurisdiction to direct an inquiry into the circumstances of a mtge., to be taken before one of the London comrs., not as being one of the officers of the ct., but as being part of his duty as comr., to take such references.—*Re* RIDGE, *Ex p.* ROLFE (1837), 3 Mont. & A. 305; 2 Deac. 421; 6 L. J. Bcy. 84; 1 Jur. 313, Ct. of R.

Annotation:—**Mentd.** Stammers *v.* Elliott (1867), L. R. 4 Eq. 675.

305. To make bankrupt sign examination—After petition dismissed.]—The ct. has no jurisdiction to make an order on bkpt. after his petition has been dismissed to sign an examination taken pending the proceedings in bkpcy.—*Re* SPILLER (1870), 18 W. R. 295, Ct. of R.

306. To entertain personal claim against debtor—No property to be administered.]—The Ct. of Bkpcy. has no jurisdiction to entertain a claim for a personal demand against the debtor himself when there is no property for the ct. to administer.—*Re* LACEY, *Ex p.* LACEY (1880), 16 Ch. D. 131; 50 L. J. Ch. 207; 43 L. T. 579; 29 W. R. 299, C. A.

307. To make charging order under Solicitors Act, 1860 (c. 127).]—Any judge of the High Ct., whether sitting in bkpcy. or not, can make a charging order under Solrs. Act, 1860, s. 28:—*Semble:* so also can a judge who is a judge of the Ct. of Bkpcy. alone, where in the course of bkpcy. proceedings property has been "recovered or preserved."—*Re* DEAKIN, *Ex p.* DANIELL, [1900] 2 K. B. 489; 69 L. J. Q. B. 725; 82 L. T. 776; 48 W. R. 678; 44 Sol. Jo. 553; 7 Mans. 302, C. A.

See, further, Part XVI., Sect. 5, *post*.

308. Under 1869 Act—To decide all questions affecting distribution of estate.]—*Held:* 1869 Act, s. 72, gave any Ct. of Bkpcy. jurisdiction to determine as matter of fact the expediency or necessity for entertaining & deciding any question which affected the realisation & distribution of the property of bkpt., subject only to the appeal given to the chief judge in bkpcy. & the Ct. of Appeal in Ch. by s. 71.—HALLIDAY *v.* HARRIS (1874), L. R. 9 C. P. 668; 43 L. J. C. P. 350; *sub nom.* HARRIS *v.* HALLIDAY, 30 L. T. 680; 22 W. R. 756.

Annotations:—**Expld.** *Re* Lowenthal, *Ex p.* Beesty (1884), 13 Q. B. D. 238. **Consd.** *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169, C. A.; *Re* Mansel, *Ex p.* Trustee (1888), 4 T. L. R. 410, C. A. **Mentd.** Lea *v.* Thursby (1904), 73 L. J. Ch. 518.

309. —— —— All powers of Court of Chancery.]—The terms of 1869 Act, s. 72, gave the ct. complete jurisdiction to decide every question that it might be considered necessary to decide with a view to the distribution of bkpt.'s estate. It was the intention of the legislature that the bkpcy. cts. should be complete & sufficient in themselves; & that they should, for the purpose of making a complete distribution of bkpt.'s property, exercise at least all the powers possessed by any judge of the Ct. of Ch.—*Re* ANDERSON, *Ex p.* ANDERSON (1870), 5 Ch. App. 473; 39 L. J. Bcy. 49; 22 L. T. 361; 18 W. R. 715, L. J.

Annotations:—**Consd.** *Re* Anderson, *Ex p.* Anderson (1870), 39 L. J. Bcy. 32. **Distd.** Ellis *v.* Silber (1872), 8 Ch. App. 83, L. C. **Apld.** Halliday *v.* Harris (1874), L. R. 9 C. P. 668. **Consd.** *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169, C. A. **Refd.** *Re* Wood, *Ex p.* Musgrave (1878), 10 Ch. D. 94, C. A. **Mentd.** *Re* Taylor & Rumboll, *Ex p.* Rumboll (1871), 6 Ch. App. 842, L. JJ.; *Re* Davies, *Ex p.* Williams (1872), 26 L. T. 303; *Re* Mead, *Ex p.* Cochrane (1875), L. R. 20 Eq. 282; *Re* Harrison, *Ex p.* Butters (1880), 14 Ch. D. 265, C. A.; *Re* Learoyd, Wilton, *Ex p.* Armitage (1881), 17 Ch. D. 13, C. A.; *Re* Johnstone, *Ex p.* Abrams (1884), 50 L. T. 184.

310. —— To enforce decree of another court.]—*Held:* 1869 Act, s. 72, did not enable the Ct. of Bkpcy. to draw within its jurisdiction property or the owners of property not vested in the trustee, & not originally subject to the administration in bkpcy., & *a fortiori* did not authorise that ct. to work out a decree which had been made in Ch. against such persons.—*Re* MOTION, MAULE *v.* DAVIS (1873), 9 Ch. App. 192; 43 L. J. Bcy. 59; 29 L. T. 757; 22 W. R. 225, L. C. & L. JJ.

Annotations:—**Refd.** *Re* England, *Ex p.* Pannell (1877), 6 Ch. D. 335, C. A.; *Re* Lowenthal, *Ex p.* Beesty (1884), 13 Q. B. D. 238. **Mentd.** Halliday *v.* Harris (1874), L. R. 9 C. P. 668.

311. —— To make interpleader order — All powers of superior courts of common law.]—Goods seized by a sheriff under a writ of *fi. fa.*, issued by the London Ct. of Bkpcy., were claimed adversely:—*Held:* (1) that ct. has jurisdiction on the application of the sheriff, to make an interpleader order; (2) 1869 Act, s. 65, conferred on the London Ct. of Bkpcy., for the purpose of the Act, all the jurisdiction formerly possessed by the superior cts. of common law.—*Re* BUCK, *Ex p.* MIDDLESEX (1879), 10 Ch. D. 575; 48 L. J. Bcy. 33, C. A.

See, further, sub-sect. 4, *post*.

312. —— Trustee having higher title than bankrupt — Fraudulent preference.] — Where a trustee in bkpcy. claims only the same right as bkpt. himself would have had, the Ct. of Bkpcy. ought not to assume jurisdiction, but ought to leave the matter to be dealt with by the ordinary tribunals. But where, by the operations of the law of bkpcy. the trustee has a higher & better title than bkpt. (where, for instance, a transaction is impeached as a fraudulent preference or an act of bkpcy.), the Ct. of Bkpcy. ought to decide the matter itself.—*Re* YATES, *Ex p.* BROWN (1879), 11 Ch. D. 148; 48 L. J. Bcy. 78; 40 L. T. 402; 27 W. R. 651, C. A.

Annotations:—**Folld.** *Re* Harrison, *Ex p.* Harrison (1880), 49 L. J. Bcy. 30. **Expld.** *Re* Learoyd, Wilton, *Ex p.* Armitage (1881), 17 Ch. D. 13, C. A.; *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169, C. A. **Consd.** Sharp *v.* McHenry, Sharp *v.* Brown (1886), 55 L. T. 747. **Refd.** *Re* Lowenthal, *Ex p.* Beesty (1884), 13 Q. B. D. 238.

313. —— —— Discretion.] — Although as a general rule, cases in which the trustee in bkpcy. is asserting a claim to property by a higher title than that of bkpt. himself ought to be tried in the Ct. of Bkpcy., yet the rule is not an inflexible one, & the ct. has a judicial discretion to be exercised with regard to all the circumstances of the case.—*Re* LEAROYD, WILTON & CO., *Ex p.* ARMITAGE (1881), 17 Ch. D. 13; 44 L. T. 262, C. A.

Annotations:—**Folld.** *Re* Roberts, *Ex p.* Price (1882), 21 Ch. D. 553, C. A. **Apld.** *Re* Barnett, *Ex p.* Reynolds

(1885), 15 Q. B. D. 169, C. A. **Follid.** Sharp *v.* McHenry; Sharp *v.* Brown (1886), 55 L. T. 747; *Re* Beswick, *Ex p.* Hazlehurst (1888), 58 L. T. 591, D. C. **Refd.** *Re* Lowenthal, *Ex p.* Beesty (1884), 13 Q. B. D. 238.

See, also, No. 316, *post.*

314. Under Debtors Act, 1869 (c. 62)—To imprison debtor.]—The provisions of s. 9 of Debtors Act, 1869, were only intended to preserve to the Ct. of Bkpcy. the special powers of imprisonment conferred upon it by such sects. as ss. 19, 70, & 93 of 1869 Act, & not to preserve any powers of imprisonment for debt which have been taken away from other cts. by Debtors Act, 1869.—*Re* CHAPMAN & SHAW, *Ex p.* HOOSON (1872), 8 Ch. App. 231; 42 L. J. Bcy. 19; 28 L. T. 4; 21 W. R. 152, L. JJ.

Annotations:—**Mentd.** *Re* Hind, *Ex p.* Sharp (1877), 37 L. T. 168; *Re* Bishop, *Ex p.* Claxton (1891), 7 T. L. R. 610, D. C.

See, also, Part XXII., *post.*

315. Under 1883 Act.]—The Bkpcy. Ct. has authority to issue a judgment summons on a judgment of the High Ct. when debtor does not reside within its jurisdiction. The judge in bkpcy. is now a judge of the High Ct., & the jurisdiction is the jurisdiction of the High Ct., & extends over the whole of England, & the jurisdiction given by 1883 Act, s. 103 (4), is not an exclusive but a concurrent jurisdiction.—*Re* STONE, *Ex p.* NICHOLSON, *Re* PHILBY, *Ex p.* NICHOLSON (1884), 1 Morr. 177.

See, now, 1914 Act, s. 107 (4).

316. —— Trustee having higher title than bankrupt—Discretion.]—There is no absolute rule that a question relating to the estate of bkpt. ought to be determined by the Ct. of Bkpcy., & not by the High Ct., whenever the trustee in the bkpcy. is, by virtue of the bkpcy. law, claiming by a higher title than that of bkpt. himself. It is a matter of judicial discretion in each case how the question shall best be tried. In such a matter the Ct. of Appeal ought not readily to overrule the discretion of the bkpcy. judge.—*Re* BARNETT, *Ex p.* REYNOLDS (1885), 15 Q. B. D. 169; 54 L. J. Q. B. 354; 53 L. T. 448; 33 W. R. 715; 1 T. L. R. 433; 2 Morr. 147, C. A.

Annotations:—**Refd.** Sharp *v.* McHenry, Sharp *v.* Brown (1886), 55 L. T. 747. **Mentd.** *Re* Bassett's Plaster Co., *Ex p.* Bassett (1894), 1 Mans. 297, D. C.; *Re* Richardson & Cook, *Ex p.* Grime (1902), 86 L. T. 690.

See, also, No. 313, *ante.*

—— To proceed after death of bankrupt.]—*See* Part III., Sect. 3, sub-sect. 8, *post.*

317. Under Judicature Act, 1873 (c. 66)—To appoint receiver.]—The Ct. of Bkpcy. has jurisdiction under s. 25 (8) of the above Act to appoint a receiver by way of equitable execution for the purpose of enforcing orders for the payment of money to the trustees in bkpcy.; but such an order will not, as a general rule, be made on an *ex p.* application.—*Re* GOUDIE, *Ex p.* OFFICIAL RECEIVER, [1896] 2 Q. B. 481; 65 L. J. Q. B. 671; 75 L. T. 277; 45 W. R. 80; 23 Mans. 224.

To restrain or transfer actions or other legal proceedings by or against bankrupt or trustee.]—*See* Part XXI., *post.*

318. As regards property found on fugitive offender—Becoming bankrupt in England.]—When a fugitive offender, arrested in England on an extradition warrant, becomes bkpt. in England, pending the hearing of the charge, the competent authority to decide what property found on the prisoner must be delivered up with him to be used as evidence of the crime is the ct. which hears the charge & makes the committal order.—*Re* BOROVSKY & WEINBAUM, *Ex p.* SALAMAN, [1902] 2 K. B. 312; 71 L. J. K. B. 992; 87 L. T. 184; 51 W. R. 48; 9 Mans. 346.

As regards composition deeds.]—*See* Part XXIII., *post.*

As regards foreigners.]—*See* Nos. 193 *et seq.*, *ante.*

SUB-SECT. 2.—DISTRICT JURISDICTION.

319. Which court has jurisdiction—Debtor residing or trading in London & outside London district.]—The ct. in London has jurisdiction to entertain applications under 10 & 11 Vict. c. 102, s. 8, & allot petitions for hearing in cases where insolvents have resided for the six months immediately preceding the application, both in its own district & in the districts of the county cts.—ANON. (1849), 13 L. T. O. S. 216.

See, now, 1914 Act, s. 98 & 1915 Rules, r. 147.

320. —— ——.]—Manufacturers carried on business at Sheffield. They were also the tenants of three rooms in London used as offices, where an agent received orders for them:—*Held:* the Bkpcy. Ct. of Sheffield, & not the Bkpcy. Ct. in London, had jurisdiction in the matter.—*Re* CHARLES, *Ex p.* CHARLES (1872), L. R. 13 Eq. 638; 41 L. J. Bcy. 43; 20 W. R. 524.

See, now, 1914 Act, s. 98 & 1915 Rules, r. 147.

321. —— ——.]—Where a petition in bkpcy. was preferred under 1869 Act in a county ct. against a person as residing within its district, & he was adjudicated bkpt. thereon:—*Held:* such adjudication, not being rescinded or appealed against, was final & conclusive, though it turned out that he traded within the London district.—REVELL *v.* BLAKE (1873), L. R. 8 C. P. 533; 42 L. J. C. P. 165; 29 L. T. 67; 22 W. R. 96, Ex. Ch.; *affg.* (1872), L. R. 7 C. P. 300.

Annotations:—**Apld.** *Re* Buckland (1873), L. R. 15 Eq. 221; *Re* Foulds, *Ex p.* Learoyd (1878), 10 Ch. D. 3, C. A. **Mentd.** *Re* Trim, *Ex p.* French (1882), 52 L. J. Ch. 48.

PART I. SECT. 4, SUB-SECT. 2.

319 i. *Which court has jurisdiction—Debtor carrying on business in one county—Having property in another county.*]—Where a trader in Ontario becomes insolvent & an attachment in insolvency is issued to the sheriff of the county in which he resides, the county judge can issue another attachment to the sheriff of any county in Ontario, or of any district in Quebec, in which the insolvent has property.—*Re* BEARD (1868), 15 Gr. 441.—**CAN.**

319 ii. —— *Debtor residing & trading in another county.*]—The county ct. judge of the county in which the demand on debtor to assign is made, is the proper party to hear the petition, although debtor may reside & do business in another county.—*Ex p.* THOMAS (1870), 2 Han. 163.—**CAN.**

319 iii. —— *Debtor domiciled in Ontario—Assignee residing in Quebec—Business at Montreal.*]—The judge having jurisdiction is the judge of the domicil of the insolvent.—*Re* MCDONNELL, TIRE *v.* KENNY (1871), 15 L. C. J. 145.—**CAN.**

319 iv. —— *Insolvency in Ontario—Property in Quebec.*]—GRANT *v.* EDDY (1874), 21 Gr. 45, 568.—**CAN.**

319 v. —— *Concurrent proceedings in two Insolvent Courts.*]—On Apr. 23, 1896, A. was adjudged insolvent under Indian Insolvency Act, s. 9, by the Insolvency Ct. at Bombay at the instance of Bombay creditors. On Apr. 9, A. had already been adjudged an insolvent by the Insolvency Ct. at Madras:—*Held:* the prior adjudication of the Madras Ct. did not deprive the Bombay Ct. of jurisdiction to adjudicate him an insolvent at the instance of a Bombay creditor.—*Re* ARANVAYAL SABHAPATHY, MOODLIAR *Ex p.* KARAMALLI JOOSUB (1897) I. L. R. 21 Bom. 297.—**IND.**

319 vi. —— ——.]—The Insolvent Cts. in India have a discretion in making an adjudication order notwithstanding the existence of a prior adjudication order in another ct., provided the conditions of Insolvency Act are satisfied & there is no valid reason to the contrary, but where there is a conflict, having regard to questions of convenience one ct. should yield to another, as it may not be just or equitable to allow the proceedings in all the cts. to go on concurrently.—*Re* WATSON (1904), I. L. R. 31 Calc. 761.—**IND.**

Sect. 4.—Jurisdiction of courts of bankruptcy: Subsects. 2 & 3.]

322. —— ——.]—*Held:* a debtor, employed as a clerk in a bank, the office of which was within the district of the London Bkpcy. Ct., was, within 1870 Rules, r. 17, "carrying on business" within the district of that ct., & that ct. had jurisdiction to grant a debtor's summons against him.

Debtor's private residence was in one of the suburbs outside the district of the London Ct.:—*Held:* he was within the meaning of r. 17, "residing" within the district of the London Ct. (JAMES, L.J.).—*Re* BOWIE, *Ex p.* BREULL (1880), 16 Ch. D. 484; 50 L. J. Ch. 384; 43 L. T. 580; 29 W. R. 299, C. A.

Annotations:—**Expld.** & **Distd.** Graham *v.* Lewis (1888), 22 Q. B. D. 1, C. A. **Distd.** *Re* Bright (1901), 18 T. L. R. 37, C. A.; Cain *v.* Butler (1916), 85 L. J. K. B. 804. **Refd.** Goerz *v.* Bell, [1904] 2 K. B. 136. **Mentd.** *Re* Clarke, *Ex p.* Pope *v.* Owles, [1914] 3 K. B. 1095, C. A.

323. —— —— **Simultaneous receiving orders.**]—In Feb., 1885, a petition was presented against debtor in the London Bkpcy. Ct., but the hearing of such petition was subsequently adjourned from time to time with the consent of petitioning creditor, & on Jan. 5, 1886, a receiving order was made in the High Ct. at eleven-thirty o'clock. On the same day at one o'clock, a receiving order was also made against debtor in the Swansea County Ct. at the instance of another creditor. On an appeal by the creditor presenting the petition in London to set aside such order of the county ct.:—*Held:* as it appeared clear that the legitimate business of debtor was carried on in Swansea, which was *primâ facie* the place where his business transactions ought to be investigated, & as petitioning creditor in London had for his own purposes delayed for several months to proceed with his petition, the proper course for the ct. to pursue was not to interfere with the order of the county ct., & to let an application be made to the London Ct. to stay the proceedings there.—*Re* STRICK, *Ex p.* MARTIN (1886), 3 Morr. 78, D. C.

See, also, 1914 Act, ss. 98, 100, & 110, & 1915 Rules, rr. 18—24.

324. —— **Debtor residing outside London district.**]—A trader-debtor, residing & carrying on business beyond the twenty-mile circle of the metropolitan district, & owing debts under £300, must file his petition in the proper county ct. under 1861 Act, s. 94, such a case coming directly within the exception of s. 88.—ANON. (1861), 5 L. T. 368.

325. —— **Debtor trading out of district.**]—A trading out of any district will support an adjudication in the district.—*Re* CLELAND (1867), 2 Ch. App. 466; 36 L. J. Bcy. 33; 16 L. T. 403; 15 W. R. 525, L. JJ.

See, now, 1914 Act, s. 98 & 1915 Rules, r. 147.

326. —— **Debtor leaving district to escape service.**]—If a debtor leave the county ct. district in which he carries on business in order to avoid service, he does not thereby deprive the county ct. of jurisdiction.—*Re* WILLIAMS (1873), 8 Ch. App. 690, L. J.

Annotation:—**Mentd.** *Re* Bowie, *Ex p.* Breull (1880), 16 Ch. D. 484, C. A.

327. Proceedings in wrong court—Mistake—Transfer to proper court.]—A petition for liquidation was by mistake presented by a debtor to the wrong ct. A receiver was appointed, & all proceedings were carried on with perfect regularity till just before the second meeting of creditors, when the error was discovered. At the second meeting a resolution was passed transferring the proceedings to the proper ct. The registrar having refused to register the resolution, on the ground that the proceedings were a nullity, was directed to register the resolution, & the proceedings were ordered to be transferred to the proper ct.—*Re* BUCKLAND, *Ex p.* BUCKLAND (1873), L. R. 15 Eq. 221; 42 L. J. Bcy. 32; 21 W. R. 291.

Annotation:—**Consd.** Revell *v.* Blake (1873), L. R. 8 C. P. 533, Ex. Ch.

328. —— —— ——.]—When a bkpcy. petition has by inadvertence been presented in the wrong ct., that ct. has jurisdiction to make a receiving order, & the proceedings can afterwards be transferred to the proper ct.—*Re* FRENCH, *Ex p.* FRENCH (1889), 24 Q. B. D. 63; 62 L. T. 93; 38 W. R. 52; 6 T. L. R. 1: 6 Morr. 258, C. A.

See, now, 1915 Rules, r. 24.

329. —— **Inadvertence.**]—If a bkpcy. petition is by inadvertence presented in a wrong bkpcy. ct., the ct. to which it is presented has jurisdiction to make a receiving order. If, however, the petition is wilfully presented in a wrong ct., that is a ground for dismissing it.

The Divisional Ct. made a receiving order, which it held that the county ct. ought to have made, & to which debtor had raised no other objection than want of jurisdiction, giving leave to debtor to apply afterwards to the Divisional Ct. to discharge the order on any ground arising since the hearing in the county ct.—*Re* BRIGHTMORE, *Ex p.* MAY (1884), 14 Q. B. D. 37; 51 L. T. 710; 33 W. R. 598; 1 Morr. 253, D. C.

Annotations:—**Consd.** *Re* French, *Ex p.* French (1889), 24 Q. B. D. 63, C. A.; *Re* Arkell, *Ex p.* Arkell (1889), 6 Morr. 182, D. C.

330. —— ——.]—When a bkpcy. petition has by inadvertence been presented in the wrong ct., that ct. has jurisdiction to make a receiving order, & the proceedings can afterwards be transferred to the proper ct.—*Re* FRENCH, *Ex p.* FRENCH (1889), 24 Q. B. D. 63; 62 L. T. 93; 38 W. R. 52; 6 T. L. R. 1; 6 Morr. 258, C. A.

331. —— **Adjudication—Not void but irregular.**]—A bkpcy. petition in the form required by the bkpcy. rules containing, among other necessary allegations, a statement that debtor did not reside or carry on business in the London district, was presented to the county ct. of the district in which debtor resided, accompanied by the usual affidavit of verification required by the rules. Debtor did not appear on the hearing, & the county ct. adjudicated him a bkpt. in the usual form. Debtor did, in point of fact, carry on business within the London district under an assumed name:—*Held:* the adjudication was not void, notwithstanding that bkpt. did in fact carry on business in London, but merely irregular, & could only be questioned by proceedings in the way of application or appeal to the Ct. of Bkpcy. itself.—

326 i. —— *Debtor departing from district.*]—Q. & F., who carried on business as contractors in the Wellington District in copartnership, left the district. Certain creditors, having obtained separate judgments against Q. & F. for a debt, made some inquiries in the district to which Q. & F. had gone as to their whereabouts, &, not being able to find them, presented a petition to the Supreme Ct. in Wellington:—*Held:* the petition had not been presented in the right district.—*Re* QUINLAN & FOSTER (1907), 26 N. Z. L. R. 513.—**N.Z.**

PART I. SECT. 4, SUB-SECT. 3.

m. *Has same power as Supreme Court judge — As to discharge.*]—A county ct. judge has power to discharge debtor in any county within his district, or to bring debtor from any county within his district, & possesses the same power as a Supreme Ct. judge to discharge.—*Ex p.* JARDINE (1869), 1 Han. 582.—**CAN.**

n. *To order meeting outside jurisdiction.*]—District No. 2, Lunenburg, etc., passed an order ordering a meeting of creditors to be held at Halifax:—*Held:* the county ct. judge could not order a meeting of creditors out of his own jurisdiction.—*Re* SUTHERLAND (1878), 3 R. & C. 89.—**CAN.**

REVELL *v.* BLAKE (1873), L. R. 8 C. P. 533 ; 42 L. J. C. P. 165 ; 29 L. T. 67 ; 22 W. R. 96, Ex. Ch.

Annotations :—**Apld.** *Re* Buckland (1873), L. R. 15 Eq. 221. **Consd.** *Re* Foulds, *Ex p.* Learoyd (1878), 10 Ch. D. 3, C. A. ; *Re* Trim, *Ex p.* French (1882), 52 L. J. Ch. 48.

Removal of proceedings from one district to another.]—*See* Part III., Sect. 13, *post.*

SUB-SECT. 3.—COUNTY COURTS.

Jurisdiction in particular matters, *see* particular Parts, *post.*

332. Have jurisdiction of District Court of Bankruptcy.]—*Held :* by the effect of 1869 Act, s. 130, & the orders made thereunder, the jurisdiction of the district ct. of bkpcy. was transferred to the county ct., & all the jurisdiction & authority which the district cts. of bkpcy. had respecting trust deeds registered or in course of registration on Dec. 31, 1869, was vested in the county cts.—*Re* BROOKSBANK, *Ex p.* ATKINSON (1870), L. R. 9 Eq. 736 ; 39 L. J. Bcy. 10 ; 22 L. T. 279 ; 18 W. R. 598.

Annotations :—**Consd.** Benecke *v.* Whittall (1877), 2 App. Cas. 602, P. C. **Mentd.** Glegg *v.* Rees (1871), 25 L. T. 261.

333. Have all powers of High Court—Certiorari.]—A county ct. judge exercising bkpcy. jurisdiction has all the powers of the High Ct., & *certiorari* will not lie to bring up an order made within such jurisdiction into the Q. B. Div.—SKINNER *v.* NORTHALLERTON COUNTY COURT JUDGE, [1899] A. C. 439 ; 68 L. J. Q. B. 896 ; 80 L. T. 814 ; 63 J. P. 756 ; 15 T. L. R. 433 ; 6 Mans. 274, H. L.

334. To commit for contempt—Under 1869 Act.]—On Oct. 8 the creditors of two debtors, who were partners in trade, resolved on a liquidation, & appointed trustees, & on Nov. 5 they granted debtors their discharge in respect of their partnership liabilities. The trustees employed debtors as their servants, at a weekly salary, to realise the estate. After the order of discharge was granted one of debtors received moneys on account of the partnership estate, & applied them in paying his separate creditors. An order was made by the county ct. that he should refund the moneys thus misapplied, & he failed to obey the order :—*Held :* there was jurisdiction under s. 19 to commit him for contempt of ct.—*Re* WATERS, *Ex p.* WATERS (1874), L. R. 18 Eq. 701 ; 43 L. J. Bcy. 128 ; 30 L. T. 766 ; 22 W. R. 796.

335. —— ——.]—*Held :* the provisions of s. 66, gave to the judge of a county ct. sitting in bkpcy. the power to commit for a contempt of ct.—*R. v.* SURREY COUNTY COURT JUDGE (1884), 13 Q. B. D. 963, C. A.

Annotation :—**Mentd.** *Re* Bassett's Plaster Co., [1894] 2 Q. B. 96.

336. —— Under 1883 Act.]—An order was made against bkpt., who was in receipt of a salary, by a county ct. sitting in bkpcy. under s. 53 (2) for the payment by him by monthly instalments of a portion of his salary to the trustee for the benefit of his creditors. A sealed copy of the order was served on bkpt. by being sent by post by registered letter to his address in accordance with s. 142, & 1886 & 1890 Rules, r. 92. Bkpt. having made default in payment of the instalments under the order, the trustee applied in the county ct. to commit him for contempt of ct. The sealed copy of the order had not been indorsed with a notice stating that unless bkpt. obeyed the order, he would be guilty of a contempt of ct. & liable to be committed to prison, & had not been personally served upon him, as required by C. C. R. Ord. 25, r. 58 :—*Held :* the county ct. judge sitting in bkpcy. had power, either under 1883 Act, s. 24 (4), or under his general jurisdiction, to make an order of committal.—*Re* PICKARD, *Ex p.* OFFICIAL RECEIVER, [1912] 1 K. B. 397 ; 81 L. J. K. B. 330 ; 105 L. T. 832 ; 56 Sol. Jo. 144 ; 19 Mans. 58, D. C.

Annotation :—**Consd.** Savill *v.* Dalton, [1915] 3 K. B. 174, C. A.

337. To restrain enforcement of lien—1869 Act.]—Where a judge of a county ct. had "deemed it expedient" to restrain a person trading in London from enforcing in a Vice-Admlty. Ct. abroad a claim of lien on a ship (part of bkpt.'s estate) for necessaries supplied abroad on the orders of the captain after the filing of the petition, & to direct an issue to try the matter in his ct., the ct. refused to grant a prohibition, the county ct. having, by its decision, given itself jurisdiction, subject only to appeal.—HALLIDAY *v.* HARRIS (1874), L. R. 9 C. P. 668 ; 43 L. J. C. P. 350 ; *sub nom.* HARRIS *v.* HALLIDAY, 30 L. T. 680 ; 22 W. R. 756.

Annotations :—**Expld.** *Re* Lowenthal, *Ex p.* Beesty (1884), 13 Q. B. D. 238. **Apprvd.** *Re* Mansel, *Ex p.* Trustee (1888), 4 T. L. R. 410, C. A. **Refd.** *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169, C. A. **Mentd.** Lea *v.* Thursby (1904), 73 L. J. Ch. 518.

338. To enforce order for payment made in High Court.]—Where the High Ct. has simply made an order for the payment of costs, or given judgment for the payment of a sum of money, a county ct. can, by virtue of Debtors Act, 1869 (c. 62), s. 5, & 1883 Act, s. 103 (4), enforce that order or judgment by directing payment of the amount thereof by instalments.—*Re* IVES, *Ex p.* ADDINGTON (1886), 16 Q. B. D. 665 ; 55 L. J. Q. B. 246 ; 54 L. T. 877 ; 34 W. R. 593 ; 3 Morr. 83.

Annotations :—**N.F.** Montgomery *v.* De Bulmes, [1898] 2 Q. B. 420, C. A. **Refd.** Woodham Smith *v.* Edwards, Haslam (1908), 77 L. J. K. B. 1056, C. A.

See also, Part XXII., *post.*

339. To request aid of High Court—Under 1914 Act.]—A county ct. judge exercising bkpcy. jurisdiction cannot make an order under 1914 Act, s. 122, requesting the High Ct. to act in aid of the county ct. in a matter properly triable in the county ct. & of which the county ct. judge is seised.—*Re* HUNTLY (MARQUIS), *Ex p.* GOLDSTEIN, [1917] 2 K. B. 729 ; 87 L. J. K. B. 735 ; 117 L. T. 792 ; [1917] H. B. R. 209, D. C.

See, further, Sect. 7, *post.*

To enter up judgment—On granting bankrupt conditional discharge.]—*See* Part XVIII., Sect. 5, sub-sect. 3, *post.*

340. To order retention of documents outside jurisdiction.]—Neither a registrar nor a county ct. judge has jurisdiction to order a witness, summoned under 1883 Act, s. 27, to hand over documents to the official receiver, acting as trustee, to be retained by him out of the jurisdiction of the ct. The official receiver is not the deputy of the judge, & his custody is not the custody of the ct.—*Re* ASH (1913), 110 L. T. 48 ; 21 Mans. 15, D. C.

See, further, Parts VII., XIX., *post.*

341. Large amount at stake — Questions of character involved — 1869 Act, s. 72.]—The fact that a large amount was at stake, & that questions of character were involved : — *Held :* sufficient grounds for refusing to allow a case, in which the trustee in a liquidation was seeking to set aside some transactions of debtors as fraudulent under the bkpcy. law, to be tried in a county ct.—*Re* LEAROYD, WILTON & Co., *Ex p.* ARMITAGE (1881), 17 Ch. D. 13 ; 44 L. T. 262, C. A.

Annotations :—**Folld.** *Re* Roberts, *Ex p.* Price (1882), 21 Ch. D. 553, C. A. **Consd.** *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169, C. A. ; Sharp *v.* McHenry, Sharp *v.* Brown (1886), 55 L. T. 747. **Folld.** *Re* Beswick, *Ex p.* Hazlehurst (1888), 58 L. T. 591. **Refd.** *Re* Lowenthal, *Ex p.* Beesty (1884), 13 Q. B. D. 238.

Sect. 4 —Jurisdiction of courts of bankruptcy: Subsects. 3 & 4.]

342. —— —— ——.]—When the trustee in a bkpcy. which is proceeding in a county ct. impeaches a deed executed by bkpt. as fraudulent under 27 Eliz., c. 4, if the amount at stake is beyond the ordinary jurisdiction of a county ct. & serious questions of character are involved, & the person interested under the deed desires that the question should not be tried in the county ct., the judge ought to decline to exercise the jurisdiction conferred by s. 72, & ought to leave the matter to be tried in an action in the High Ct. in the ordinary way.—*Re* ROBERTS, *Ex p.* PRICE (1882), 21 Ch. D. 553 ; 52 L. J. Ch. 131 ; 47 L. T. 402 ; 31 W. R. 104, C. A.

Annotations :—**Consd.** *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169, C. A. **Folld.** *Re* Beswick, *Ex p.* Hazlehurst (1888), 58 L. T. 591. **Refd.** *Re* Lowenthal, *Ex p.* Beesty (1884), 13 Q. B. D. 238 ; Sharp *v.* McHenry, Sharp *v.* Brown (1886), 55 L. T. 747.

343. —— —— ——.]—Trustees in bkpcy. sought to set aside a deed by which P. H. agreed to sell to J. H. his brother, certain property for £5,000, on the ground of prior acts of bkpcy. & fraudulent preference. At the hearing of the motion, objection was taken to the registrar of the county ct. trying the case on the ground of its importance. The registrar overruled the objection :—*Held :* he was wrong in insisting on his jurisdiction, & the proper tribunal was a branch of the High Ct. & a jury of twelve, & the objection must prevail.—*Re* HONYWOOD, *Ex p.* GUEDALLA, [1883] W. N. 142.

344. —— —— **1883 Act, s. 102.**]—A. was tenant under a lease to H., who was also his mtgee. In May, 1885, certain transactions were entered into between H. & A. with a view to assisting A., who was then in money difficulties. A. became bkpt., & a motion was made in the county ct. by his trustee in bkpcy. to have these transactions declared fraudulent & void as against the trustee. The amount at stake was £13,700. On the hearing objection was taken that the county ct. had no jurisdiction as the amount at stake was very large, & a question of character was involved. The county ct. judge having decided that he had jurisdiction :—*Held :* (1) assuming the county ct. judge had jurisdiction, yet he ought not to exercise it unless there were special circumstances showing him he ought to do so : (2) here there were no such special circumstances.—*Re* BESWICK, *Ex p.* HAZLEHURST (1888), 58 L. T. 591 ; 5 Morr. 105.

345. —— **Amount over £200 — 1883 Act, s. 102.**]—A county ct. judge has not jurisdiction (except by consent) under the above sect. to refer a claim exceeding £200, not arising out of the bkpcy. to his registrar to ascertain by taking an account the amount really due.—*Re* HEALEY, *Ex p.* HEALEY *v.* OFFICIAL RECEIVER (1905), 93 L. T. 704.

See 1914 Act, s. 105, *and, further,* COUNTY COURTS.

Over stranger — "Claims arising out of the bankruptcy."]—*See* sub-sect. 4, *post.*

SUB-SECT. 4.—OVER STRANGERS TO THE BANKRUPTCY.

346. General rule—Court of Bankruptcy will not interfere—Conflicting claims between strangers—Estate of bankrupt having no interest.] — The ct. will not interfere between two adverse claimants, one claiming as equitable mtgee., & the other under a prior lease made by bkpt. of the same property, when the estate of bkpt. has no interest in the question.—*Re* ROBINSON, *Ex p.* ROYDS (1833), 3 Deac. & Ch. 294, Ct. of R.

See, also, Nos. 312, 313, *ante.*

347. —— —— ——.]—The jurisdiction conferred on the Ct. of Bkpcy. by 1883 Act, s. 102 (1), is identical with that conferred on that ct. by 1869 Act, s. 72 ; & where there are conflicting claims to any part of bkpt.'s property, between parties who are strangers to the bkpcy., & in which the trustee in bkpcy. has no interest, the Ct. of Bkpcy. will decline to adjudicate upon the questions at issue.—*Re* LOWENTHAL, *Ex p.* BEESTY (1884), 13 Q. B. D. 238 ; 53 L. J. Q. B. 524 ; 51 L. T. 431 ; 33 W. R. 138 ; 1 Morr. 117.

See, also, Nos. 311, *ante*, 354, 355, *post.*

348. —— —— **Money demand against stranger.**]—A trader opened with a railway co. a credit account for freight, by which it was agreed that the co. should have a general lien for all moneys due by him to them on any account on all goods belonging to him in their hands. He afterwards filed a liquidation petition, under which a receiver of his property & manager of his business was appointed. In order to carry on the business the receiver bought some goods, which he paid for with his own money, & sent them to the co. consigned to the trader. The co. claimed the benefit of the agreement, & refused to deliver the goods until they were paid the amount which the trader owed them for freight due at the time of the filing of the petition. The receiver in order to obtain the goods paid the co. £50 under protest, & then applied to the Ct. of Bkpcy. to order the co. to repay him the £50, & an order was made accordingly :—*Held :* that the Ct. of Bkpcy. had no jurisdiction to make the order.—*Re* BUSHELL, *Ex p.* GREAT WESTERN RY. CO. (1882), 22 Ch. D. 470 ; 52 L. J. Ch. 734 ; 48 L. T. 196 ; 31 W. R. 419, C. A.

See, also, Nos. 369, 370, *post.*

349. —— —— —— **Unless stranger has tendered proof.**]—A money claim by a trustee under a liquidation against a person, who had tendered a proof, was ordered to be tried in the Bkpcy. Ct.—*Re* MANSEL, *Ex p.* THE TRUSTEE (1888), 4 T. L. R. 410, C. A.

350. —— —— **Unless "claim arising out of the bankruptcy."**]—Bkpt. contracted to perform joiner's work, & to receive payment upon an architect's certificate. Certain stable fittings were by the contract to be supplied for £95, & to be procured from M. & Co. Subsequently, that amount was by the architects' direction increased to £137. Neither of those sums had been paid by bkpt. to M. & Co., who, on the bkpcy. occurring, applied to the building owner & received from him £95, upon their giving him an indemnity. The trustee in bkpcy. then applied to the building owner for the whole £137, & refused to accept the balance, after deducting the £95 handed to M. & Co., which the building owner was ready to pay. The architects also refused to give their certificate for any sum other than the balance between the £95 & the £137. Upon the trustee's motion for an order directing the architects to certify that £137 was due from the building owner to bkpt.'s estate,

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PART I. SECT. 4, SUB-SECT. 4.

348 i. *General rule—Court of Bankruptcy will not interfere—Money demand against stranger.*] — The ct. has no jurisdiction in bkpcy. to make an order to recall money paid in contemplation of bkpcy. from a third person, who has received it from his accountable debtor. —*Re* ATKINSON, *Ex p.* STEPHENSON (1828), 1 Mol. 416.—IR.

a. —— —— *Valid declaration of trust for infant.*] — The Ct. of Bkpcy. will not set aside a fraudulent agreement executed by a bkpt. where same comprises a valid declaration of trust in favour of infant children, the ct. not having jurisdiction to appoint guardians for the infants, or to bind their rights by an order setting aside the instrument.—*Re* FLYNN (1874), 8 I. L. T. 112.—IR.

& that he should be directed to pay it accordingly :—*Held :* the county ct. judge had jurisdiction under 1883 Act, s. 102 (1), & the proviso contained in it, to entertain the application, & he ought to have exercised it.—*Re* HOLT, *Ex p.* GRAY (1888), 58 L. J. Q. B. 5, D. C.

351. —— —— ——.] — Bkpt. carried on business as a corn merchant at Southampton, where his stores were under the charge of a manager. On June 8, applts., to whom bkpt. was largely indebted for wheat then in his stores, were informed that bkpt. was in difficulties, & thereupon arranged with the manager to repurchase the wheat on credit at a price exceeding £200. The wheat was accordingly delivered to them on the following day. This sale was unknown to bkpt., who on June 8 sent out by post notices of suspension, which were delivered to the manager at Southampton & to applts. on the following morning :—*Held :* under 1883 Act, s. 102, it was competent for the county ct. acting in bkpcy. to adjudicate upon a claim by bkpt.'s trustee for the return of the wheat by applts. or payment of its value, for it must be taken to be "a claim arising out of the bkpcy."—*Re* HAWKE, *Ex p.* SCOTT (1885), 16 Q. B. D. 503 ; 55 L. J. Q. B. 302 ; 54 L. T. 54 ; 34 W. R. 167 ; 3 MORR. 1.

352. —— —— ——.]—Debtor having left his farm, the landlord took possession of it, together with all the stock, etc., left on the premises. Debtor became bkpt., & his trustee assigned to U., for £60, all his rights as trustee to sue for & recover debtor's property, including the right to use the trustee's name in any proceedings. The trustee was released & the official receiver became trustee, & subsequently U., in the name of the official receiver as trustee, applied to the county ct. for a declaration that the property left by debtor on the farm belonged to him as assignee of the trustee. The county ct. judge having refused to exercise his jurisdiction, & dismissed the motion : —*Held :* the decision was correct, as it was not necessary either for the purpose of doing complete justice or of making a complete distribution of the property for him to decide the question, the application being made for the benefit of one creditor alone, & not for the creditors generally.—*Re* ARNOLD, *Ex p.* OFFICIAL RECEIVER (1891), 66 L. T. 121 ; 40 W. R. 288 ; 36 Sol. Jo. 80 ; 9 Morr. 1, D. C.

353. —— —— **Except as regards property of stranger seized by messenger.**]—The power of the Ct. of Bkpcy. to order restitution of goods of strangers, seized by the messenger, is not derived from any general jurisdiction in questions of tort, but arises incidentally out of its general superintendence & control in matters of bkpcy., by virtue of which it exercises a summary jurisdiction over all the parties to proceedings in bkpcy., interposing its authority even upon the application of strangers, where the inadequacy of the ordinary legal remedies requires an extraordinary intervention.—*Re* HEATH, *Ex p.* HEATH (1832), Mont. & B. 169 ; 2 L. J. Bcy. 8, Ct. of R.

See, also, No. 359, *post.*

354. —— **Property not subject to bankruptcy.**]—1869 Act, s. 72, did not enable the Ct. of Bkpcy. to draw within its jurisdiction property or the owners of property not vested in the trustee, & not originally subject to the administration in bkpcy.—*Re* MOTION, MAULE *v.* DAVIS (1873), 9 Ch. App. 192 ; 43 L. J. Bcy. 59 ; 29 L. T. 757 ; 22 W. R. 225, L. C. & L. JJ.

Annotations :—**Apld.** *Re* Lowenthal, *Ex p.* Beesty (1884), 13 Q. B. D. 238. **Mentd.** Halliday *v.* Harris (1874), L. R. 9 C. P. 668 ; *Re* England, *Ex p.* Pannell (1877), 6 Ch. D. 335, C. A.

355. —— —— **Claimed by stranger.**]—It was not the intention of 1869 Act that the Ct. of Bkpcy. should draw within its jurisdiction all property that may be claimed as against the trustee of a bkpcy. by a third party (JAMES, L.J.).—*Re* ENGLAND, *Ex p.* PANNELL (1877), 6 Ch. D. 335 ; 47 L. J. Bcy. 21 ; 37 L. T. 450 ; 26 W. R. 194, C. A.

Annotation :—**Refd.** *Re* Lowenthal, *Ex p.* Beesty (1884), 13 Q. B. D. 238.

356. May be exercised by consent.]—When a stranger to a bkpcy. is willing to submit to the Ct. of Bkpcy. the determination of his rights in relation to property of bkpt., it is improper for the trustee in the bkpcy. to raise objections to the exercise of jurisdiction by that ct. Such a person ought to be encouraged to submit to the jurisdiction.—*Re* HART, *Ex p.* FLETCHER (1878), 9 Ch. D. 381 ; 39 L. T. 187 ; 26 W. R. 843, C. A.

357. —— **Dispute as to sale of lease.**]—Where a dispute has arisen in respect of title on a contract for the sale of a lease, the matter would, as a general rule, be decided in the Ch. Div. on a vendor & purchaser summons, but where the estate of the vendor has subsequently become vested in a trustee in bkpcy. a judge of the K. B. Div. sitting in bkpcy. may, for the convenience of the parties & with their consent, hear the application.—*Re* MARTIN, *Ex p.* DIXON *v.* TUCKER (1912), 106 L. T. 381.

358. —— **Unless consent given in ignorance of facts.**]—Consent to the jurisdiction was given in ignorance of the fact that an order for summary administration had been made :—*Held :* the consent to the jurisdiction was vitiated by the fact that it had been given under a mistaken impression of facts not easily to be ascertained.—*Re* SANDARS, *Ex p.* SERJEANT (1885), 52 L. T. 516.

See 1914 Act, s. 105 ; Judicature Act, 1873, s. 24 (7).

Waiver of objection to jurisdiction.]—*See* Nos. 193, *ante,* 386, 387, *post.*

359. Property purchased by stranger—From bankrupt—Seized by messenger.]—There is no jurisdiction in bkpcy. to order goods, seized by a messenger, to be delivered up to a person claiming them as his as purchaser from bkpt. under a *bonâ fide* sale. —*Re* DYSON, *Ex p.* CRAGGS (1810), 1 Rose, 25.

Annotation :—**Consd.** *Re* Heath, *Ex p.* Heath (1832), 2 L. J. Bcy. 8.

See, also, No. 353, *ante.*

360. —— **From assignee under commission—Right to property.**]—The ct. has not jurisdiction to try a right to property purchased by a stranger to the commission, although that property was bkpt.'s, & sold by his assignee.—*Re* HOLDER, *Ex p.* HOLDER (1834), 3 L. J. Bcy. 78.

361. Property assigned, mortgaged or pledged by bankrupt—Belonging to third party.]—A broker &

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361 i. *Property assigned, mortgaged or pledged by bankrupt—Claim for judgment to be assigned.*]—A. petitioned that a bkpt. or his assignees should assign a judgment against B. agreed before bkpcy. to be assigned by bkpt. to A. for securing a debt due to him :—*Held :* (1) the ct. would not determine such a case in bkpcy. ; (2) A. should file a bill.—*Re* MOSELEY (1827), 2 Mol. 454.—**IR.**

361 ii. —— *Fraudulent lease.*]—On Mar. 23 C. D., the tenant for life of a mansion house & lands demised same, for the rest of his life, at a gross undervalue, to a confidential servant, & seven days afterwards left Ireland, taking his servant with him. On June 15 C. D. was adjudicated a bkpt. : —*Held :* in the circumstances, the Ct. of Bkpcy. had jurisdiction to decide on the validity of the lease.—*Re* DOMVILE (1875), 23 W. R. 369.—**IR.**

361 iii. —— *Intricate questions of account between mortgagor & mortgagee.*] —The Ct. of Bkpcy. is not the ct. for deciding intricate questions of account between a mtgor. & mtgee. in possession, & a debtor's summons in which the question arose was dismissed with costs & witnesses' expenses.—*Re* M. (1889), 23 I. L. T. Jo. 566.—**IR.**

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warehouseman, who had affected to pledge goods in his custody to a bank to secure advances to himself, became bkpt. The true owner applied in the county ct. under the bkpcy. to have the goods delivered up to him. The trustee at first made some claim to the goods, but abandoned it at the hearing, insisting only on his right to be paid rent & warehouse charges. Thereupon the bank objected that the ct. had no jurisdiction; but this objection was overruled, & a decision on the merits given against him:—*Held:* the ct. had no jurisdiction, & the original order must be discharged.—*Re* SLEE, *Ex p.* NORTH WESTERN BANK (1872), 41 L. J. Bcy. 72; 20 W. R. 980.

362. —— To secure costs of composition deed.]—On May 5, 1871, L. filed a petition for liquidation by arrangement. On May 9, B. was appointed receiver, & took possession of debtor's goods. On June 9, the creditors passed resolutions appointing B. trustee, & accepting a composition for which promissory notes were to be given & handed to B. for distribution among the creditors. On July 27, B. having a lien on the goods for his costs, L. gave him a memorandum by which, in consideration of B.'s satisfying a distress for rent, & giving time for payment of the costs, he agreed to give B. a charge on the goods for the cost, & to execute any deed required for giving effect to that charge. B. delivered his bill of costs, & in Aug. L. gave him a bill of sale of the goods for the amount, upon which the goods were delivered to L. L. afterwards applied to the Ct. of Bkpcy. for taxation of B.'s charges & an account of the moneys received by him, & to have the bill of sale set aside as obtained by pressure:—*Held:* the Ct. of Bkpcy. had no jurisdiction to set aside the bill of sale, & no relief could be given on the application. *Semble:* there would have been jurisdiction to settle the amount of B.'s charges if it had not been settled between the parties, that being a matter incident to the composition.—*Re* LYONS, *Ex p.* LYONS (1872), 7 Ch. App. 494; 41 L. J. Bcy. 41; 26 L. T. 491; 20 W. R. 566, L. JJ.

Annotations:—**Consd.** *Re* Dixon, *Ex p.* Shepherd (1876), 2 Ch. D. 430; *Re* Lowenthal, *Ex p.* Beesty (1884), 13 Q. B. D. 238. **Refd.** *Re* Slee, *Ex p.* North-Western Bank (1872), 41 L. J. Bcy. 72.

363. —— With intent to defeat creditors—More than twelve months before adjudication.]—The trustee in a bkpcy. applied to a county ct. to set aside as fraudulent a mtge. which bkpt. had executed. The ct. directed the trial of certain issues by a jury, & the jury found that the deed was executed by bkpt. without consideration, & with intent to defeat & delay his creditors. The county ct. then declared the deed to be void, & ordered it to be delivered up to be cancelled. The mtgee. applied for a new trial, but the application was refused. He appealed to the Chief Judge from the order which declared the deed void, but did not appeal from the refusal of a new trial. On the hearing of the appeal, the objection was taken that the case was not one in which the Ct. of Bkpcy. ought to exercise its extraordinary jurisdiction under s. 72:—*Semble:* the ct. had jurisdiction.—*Re* HARRISON, *Ex p.* BUTTERS (1880), 14 Ch. D. 265; 43 L. T. 2; 28 W. R. 876, C. A.

364. —— Entry by mortgagee—Claim to set aside mortgage after.]—H., having borrowed £120 from P., for the repayment of which sum & interest T. was surety, an agreement was entered into in Sept., 1875, between H. & T., that H. should execute a mtge. of certain premises to P., to secure the repayment of the loan & interest. The agreement contained a proviso that if T. should at any time be called upon & compelled to pay the £120 & interest, or if H. should become bkpt. or file a petition for liquidation, it should be lawful for T. immediately to enter upon the premises so agreed to be mtged. T. having been served with a writ, jointly with H., to pay the £120 & interest, paid the money in Aug., 1876, & immediately entered upon the premises agreed to be mtged., which were in the occupation of H., & upon which H. had expended considerable sums. In Sept., 1876, H. filed a liquidation petition, & in June, 1882, the trustee in the liquidation sought to have the agreement set aside as fraudulent & void, & that T. might be ordered to withdraw from possession upon payment into ct. by the trustee of £125 in respect of the debt & interest:—*Held:* the provision for re-entry upon the bkpcy. of H., not having come into operation, the Ct. of Bkpcy. had no jurisdiction to decide the matter.—*Re* HOLT, *Ex p.* HUTCHINSON (1882), 47 L. T. 483.

365. —— Assignee dealing with property—Injunction.]—Under 1869 Act, the Ct. of Bkpcy. has jurisdiction to grant, in a summary way, an injunction to restrain a person not a party to the bkpcy. proceedings from dealing with property alleged to have been fraudulently assigned before the bkpcy.; & such an injunction may be granted *ex p.* on such a case being made as would induce the Ct. of Ch. to grant it upon bill filed to impeach the assignment.—*Re* ANDERSON, *Ex p.* ANDERSON (1870), 5 Ch. App. 473; 39 L. J. Bcy. 49; 22 L. T. 361; 18 W. R. 715, L. J.

Annotations:—**Consd.** *Re* Taylor & Rumboll, *Ex p.* Wood (1871), 24 L. T. 400; Ellis *v.* Silber (1872), 8 Ch. App. 83, L. C.; *Re* Wood, *Ex p.* Musgrave (1878), 10 Ch. D. 94, C. A. **Folld.** *Re* Johnstone, *Ex p.* Abrams (1884), 50 L. T. 184. **Consd.** *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169, C. A. **Refd.** *Re* Taylor & Rumboll, *Ex p.* Rumboll (1871), 6 Ch. App. 842, L. JJ.; Halliday *v.* Harris (1874), L. R. 9 C. P. 668; *Re* Mead, *Ex p.* Cochrane (1875), L. R. 20 Eq. 282; *Re* Learoyd, Wilton, *Ex p.* Armitage (1881), 17 Ch. D. 13, C. A. **Mentd.** *Re* Davies, *Ex p.* Williams (1872), 26 L. T. 303, L. JJ.; *Re* Harrison, *Ex p.* Butters (1880), 14 Ch. D. 265, C. A.

See, also, Part II., Sect. 2, sub-sect. 2, *post.*

366. —— Mortgagee selling property—Injunction.]—An undischarged bkpt. mtged. a contingent reversion to which he was entitled. The mtgees., being unable to obtain payment of the mtge.-debt, put up the reversion for sale, subject to the rights of the trustee & of the creditors under the bkpcy. The trustee thereupon obtained from the judge of the county ct. having jurisdiction in the bkpcy. a perpetual injunction restraining the mtgees. from proceeding with such sale:—*Held:* the county ct. judge had no jurisdiction to grant such an injunction.—*Re* EVELYN, *Ex p.* GENERAL PUBLIC WORKS & ASSETS CO., LTD., [1894] 2 Q. B. 302; 63 L. J. Q. B. 658; 70 L. T. 692; 42 W. R. 512; 10 T. L. R. 456; 38 Sol. Jo. 479; 1 Mans. 195; 10 R. 238.

Annotation:—**Mentd.** Bird *v.* Philpot (1900), 82 L. T. 110.

367. —— Mortgagee by demise—Disclaimer by trustee—Application by landlord for vesting order.]—Where a lessee is adjudicated bkpt. in a county ct., & his trustee disclaims the lease, an application by the landlord for an order putting mtgees. by demise to their election to take a vesting order of the lease *cum onere*, or be excluded from all interest, is an application to enforce a claim arising out of the bkpcy., which could not have been enforced by action in the High Ct. prior to 1883 Act, & by virtue of s. 102 (1), the county ct. has jurisdiction, without any consent of the parties, to decide all questions of law or fact arising on

the application, including the question whether the lease is subsisting, or whether it was merged by a temporary coalescence of the freehold & leasehold estates in the lessee.—LEA *v.* THURSBY, [1904] 2 Ch. 57 ; 73 L. J. Ch. 518 ; 90 L. T. 667 ; 20 T. L. R. 470 ; 11 Mans. 151.

Annotation :—**Mentd.** *Re* Fletcher, Reading *v.* Fletcher, [1917] 1 Ch. 339, C. A.

368. Questions between principal & agent.]—Goods were sold & delivered on credit to C. & Co., who became bkpts. before the time for payment arrived, & the goods passed into the possession of the trustee in the bkpcy. Afterwards the vendors commenced an action against S. & Co., for the price of the goods, alleging that C. & Co. had been authorised by S. & Co. to order them either on the joint account of C. & Co. & S. & Co., or on account of S. & Co. as undisclosed principals. S. & Co. then, under R.S.C. 1875, Ord. 16, r. 18, served notice upon the trustee of the action, & that they claimed to be indemnified by him as trustee against all liability. Upon the application of the trustee one of the registrars sitting as Chief Judge granted an injunction restraining S. & Co. from taking further proceedings, under Ord. 16 ; but upon appeal the order for an injunction was discharged, on the ground that the Ct. of Bkpcy. could not, as between pltfs. & S. & Co., try the question of the latter's liability.—*Re* COLLIE, *Ex p.* SMITH (1876), 2 Ch. D. 51 ; 45 L. J. Bcy. 116 ; 34 L. T. 603 ; 24 W. R. 310 ; 3 Char. Pr. Cas. 26, C. A.

Annotations :—**Apld.** *Re* Lowenthal, *Ex p.* Beesty (1884), 13 Q. B. D. 238. **Refd.** Child *v.* Henning (1877), 5 Ch. D. 695. **Mentd.** Hale *v.* Boustead (1881), 8 Q. B. D. 453.

369. —— Money demand against stranger.]—The Ct. of Bkpcy., even if it possesses jurisdiction under 1869 Act, s. 72, to enforce a simple money demand by the trustee of a bkpt.'s property against a third party (as to which *qu.*), ought not to exercise the jurisdiction, but ought to leave the demand to be enforced by the trustee in an action in the ordinary way.

Commission agents accepted bills drawn upon them by their principals for part of the value of goods consigned to the agents for sale. After the principals had filed a liquidation petition the agents sold the goods in order to reimburse themselves the amount of one of the bills which they had paid, & to provide funds to meet the others which were soon to become due. Before the latter bills were paid the agents filed a liquidation petition. They had spent all the proceeds of the sale. Their creditors agreed to accept a composition, which was paid to the holders of the bills, some of whom claimed to prove in the liquidation of the principals. The principal's trustee applied to a county ct. in bkpcy. for an order that the agents should pay to him the balance of the proceeds of sale, after deducting the amount of the bill which they had paid in full, & the composition which they had paid in respect of the others :—*Held :* the trustee's demand against the agents was a mere demand for a debt due to the principal's estate, & the Ct. of Bkpcy. ought not to assume jurisdiction to try it.—*Re* POLLARD, *Ex p.* DICKIN (1878), 8 Ch. D. 377 ; 48 L. J. Bcy. 36 ; 38 L. T. 860 ; 26 W. R. 731, C. A.

Annotations :—**Expld.** *Re* Hart, *Ex p.* Fletcher (1878), 39 L. T. 187, C. A. **Apld.** *Re* Wood, *Ex p.* Musgrave (1878), 10 Ch. D. 94, C. A. ; *Re* Harrison, *Ex p.* Harrison (1880), 49 L. J. Bcy. 30 ; Sharp *v.* McHenry, Sharp *v.* Brown (1886), 55 L. T. 747. **Refd.** *Re* Cliffe, *Ex p.* Eatough (1880), 28 W. R. 433 ; *Re* Learoyd, Wilton, *Ex p.* Armitage (1881), 17 Ch. D. 13, C. A. ; *Re* Lowenthal, *Ex p.* Beesty (1884), 13 Q. B. D. 238. **Mentd.** *Re* Roberts, *Ex p.* Price (1882), 21 Ch. D. 553, C. A.

See, now, 1914 Act, s. 105.

370. —— ——.]—A liquidating debtor had consigned goods to commission merchants for sale, & they had made advances to him. They alleged that a balance was due to them from his estate, & the trustee in the liquidation alleged that a balance was due from them to the estate. They had not, however, tendered any proof or made any formal claim against the estate :—*Held :* inasmuch as, if the trustee was right, there was a mere money demand by him against a stranger to the liquidation, the Ct. of Bkpcy. ought not, on the application of the trustee, to order accounts to be taken of the dealings between debtor & the commission merchants, but the trustee ought to proceed by action in the High Ct.—*Re* WOOD, *Ex p.* MUSGRAVE (1878), 10 Ch. D. 94 ; 48 L. J. Bcy. 39 ; 39 L. T. 647 ; 27 W. R. 372, C. A.

Annotation :—**Distd.** *Re* Sadler, *Ex p.* Davis (1881), 30 W. R. 237, C. A.

371. —— Delivery of goods held by agent.]—The ct. has no jurisdiction under 1883 Act, s. 27 (5), to make an order for the delivery of goods in the possession of a person as agent for another :—*Qu. :* whether such order could be made if the principal were made resp. to the application.—*Re* DAVIS, *Ex p.* GOODMAN (1898), 15 T. L. R. 40 ; 5 Mans. 329, D. C.

372. Auctioneer declining to pay proceeds of sale to trustee.]—After the filing of a liquidation petition the holder of a registered bill of sale executed by debtor instructed an auctioneer to take possession of the chattels comprised in it. The auctioneer took possession & advertised the goods for sale on behalf of the bill of sale holder. The sale was stopped by injunction, & the auctioneer remained in possession of the goods on behalf of the receiver under the petition. On the appointment of a trustee the auctioneer held possession for him, & ultimately by his directions advertised the goods for sale, the advertisements & the catalogues of the goods being headed "In liquidation. By order of the trustee." The goods were sold, & the proceeds of sale were received by the auctioneer. The bill of sale holder gave him notice not to pay them to the trustee, & he declined to pay them over. The trustee applied to the Ct. of Bkpcy. for an order for payment to him, serving notice of his motion on the auctioneer only. On the hearing of this motion an order was made by consent, that the money should be paid into ct. & the hearing adjourned, notice being meanwhile given to the bill of sale holder. Notice was served on him, but not a four days' notice as required by 1870 Rules, r. 50, & he did not appear on the adjourned hearing. He had meanwhile commenced an action against the auctioneer for the proceeds of sale :—*Held :* the Ct. of Bkpcy. ought to exercise its jurisdiction under 1869 Act, s. 72, & the money must be paid out to the trustee, on the ground that the auctioneer had, with full knowledge of the adverse claim, deliberately elected to sell the goods for the trustee, & was therefore estopped from denying his title.—*Re* SADLER, *Ex p.* DAVIES (1881), 19 Ch. D. 86 ; 45 L. T. 632 ; 30 W. R. 237, C. A.

See, now, 1915 Rules, r. 369.

373. Execution creditor — Injunction — After annulment of bankruptcy.]—A trader was adjudicated bkpt. on the petition of a creditor who was, under an execution, in possession of chattels belonging to the trader. Under orders of the ct., the bkpcy. was afterwards annulled, & the property of debtor was assigned by him to the same person who was trustee in the bkpcy., on trust to secure payment of a composition which the majority of the creditors had agreed to accept. The execution creditor then threatened to proceed with his execution :—*Held :* (1) as the assignment had been made and the composition had been accepted with the

Sect. 4.—Jurisdiction of courts of bankruptcy: Subsects. 4 & 5. Sect. 5.]

approval of the ct., the ct. retained jurisdiction over the execution creditor, though the bkpcy. had been annulled; (2) the creditor ought to be restrained from proceeding with the execution.—*Re* CHIDLEY, *Re* LENNARD (1875), 1 Ch. D. 177; 45 L. J. Bcy. 49; 33 L. T. 553; 24 W. R. 182, C. A.

Annotation:—**Distd.** Crew *v.* Terry (1877), 2 C. P. D. 403.

See, further, Part XX., Sect. 10, *post.*

374. —— Who has taken proceedings at law.]—A judgment creditor levied against his debtor, & the sheriff took possession of debtor's goods, but before the sale took place debtor filed a petition for liquidation, & a receiver was appointed, who obtained an injunction restraining the sale on giving the usual undertaking to abide by any order as to damages. The liquidation proceedings became abortive, & a petition for adjudication was presented, under which debtor was adjudicated bkpt., & the sheriff gave up the goods to the trustee. The execution creditor then brought an action against the sheriff for damages sustained by his parting with the goods. The action was determined in the sheriff's favour, on the ground that debtor was a trader, & had committed an act of bkpcy. by suffering the execution. Afterwards, the execution creditor made an application in bkpcy. for damages under the undertaking given by the receiver, in which he relied on the same point as in the action, namely, that debtor was not a trader:—*Held:* as the creditor had elected to take his remedy at law against the sheriff, the Ct. of Bkpcy. could not entertain the question.—*Re* BREMNER, *Ex p.* HARPER (1875), 10 Ch. App. 379; 44 L. J. Bcy. 57; 32 L. T. 317; 23 W. R. 433, L. JJ.

See, further, Part XX., Sect. 10, *post.*

375. Landlord—Recovery of distress levied before bankruptcy.]—On Dec. 3, 1878, a brewing co., in pursuance of a power contained in an agreement for letting, entered upon the premises of their tenant & levied a distress. On Dec. 7 the tenant committed an act of bkpcy. by filing a declaration of insolvency, upon which he was subsequently adjudicated a bkpt. Upon the application of the trustee in the bkpcy., the county ct. judge directed the brewing co. to pay to the trustee the amount so levied by them, & damages for the distress, as being excessive:—*Held:* the Ct. of Bkpcy. had no jurisdiction to make the order.—*Re* CLIFFE, *Ex p.* EATOUGH & CO., LTD. (1880), 42 L. T. 95; 28 W. R. 433.

See, further, Part XX., Sect. 17, *post.*

376. Solicitor—Claiming lien—Jurisdiction to order delivery.]—A solr., claiming to have a lien on a deed of bkpt. for professional business done for him, was summoned to attend before the comr. acting in the prosecution of the fiat, to be examined touching the estate of bkpt., & to produce the deed. The solr. produced the deed, when the comr., being of opinion that he had no lien, ordered him to deliver up the deed to the solr. of the fiat, &, on his declining to do so, unless his lien was first discharged, directed an officer of the ct. to seize the deed:—*Held:* the comr. in making such an order exceeded his jurisdiction.—*Re* WRIGHT, *Ex p.* LLEWELLYN (1844), 8 Jur. 816, Ct. of R.

377. —— —— —— Or to commit on refusal.]—Before bkpcy., bkpts. deposited with petitioner, a solr., books of account, to enable him to arrange with their creditors, & by their direction the books were left with an accountant, that he might prepare statements of their affairs. Terms were agreed, but bkpts. were unable to comply with them, upon which petitioner refused to act further as their solr., & adjudication in bkpcy. then took place. The bills of petitioner remained unpaid, & he refused to deliver up the books. The district ct. by its orders directed him to do so, & on his omitting to comply committed him to prison. Petitioner appealed against such order, denying the jurisdiction of the Bkpcy. Ct., & insisting upon his lien:—*Qu.:* whether such a jurisdiction as the commissioner claimed to exercise really existed.—*Re* LEAH, *Ex p.* JABET (1860), 2 L. T. 72: 6 Jur. N. S. 387, C. A.

See 1915 Rules, r. 383, & *see, further,* Part XIX., *post.*

378. —— —— Priority over mortgagee by deposit.]—Bkpt. deposited with A. the title-deeds of premises which he had previously mortgaged to R. & Co. After the bkpcy. it was agreed between R. & Co., A. & the assignees, that the assignees should sell the premises & apply the proceeds in payment of R. & Co. & A. Upon the petition of bkpt.'s solr. claiming a lien by deposit of the title-deeds of the premises prior to A.:—*Held:* the ct. had no jurisdiction in the matter.—*Re* DOWNING, *Ex p.* ALLISON (1822), 1 Gl. & J. 210.

Annotations:—**Refd.** *Re* Robinson, *Ex p.* Royds (1833), 3 Deac. & Ch. 294, Ct. of R. **Mentd.** *Re* Mills, *Ex p.* Reid (1832), 1 Deac. & Ch. 250, Ct. of R.; *Re* Gibson, *Ex p.* Gibson (1853), 21 L. T. O. S. 9.

379. —— Retaining money.]—On an application for an order that N., formerly debtor's solr., might be ordered to pay to the trustee in the liquidation a sum of £3,342, shown by N.'s account to be wrongfully withheld by him from the trustee, it was objected on behalf of N. that, it being a mere money demand by the trustees, not arising out of the liquidation, the Ct. of Bkpcy. ought not to exercise the jurisdiction given to it by the above sect., but ought to leave the matter to be dealt with by the High Ct. in an action:—*Held:* the Ct. of Bkpcy. had clearly jurisdiction under 1869 Act, s. 72, & in the circumstances of the case the registrar had exercised his judicial discretion rightly in deciding to deal with the matter himself.—*Re* MANSEL, *Ex p.* THE TRUSTEE (1888), 4 T. L. R. 410, C. A.

380. —— Taxation of bill of costs.]—The solr. to the fiat having delivered his bill of costs, & retained the amount of it before the end of 1850, was discharged in July, 1851. No application for taxation was made before Oct., 1852:—*Semble:* the ct. had no jurisdiction to order taxation in a summary way.—*Re* TYTHER, *Ex p.* PEMBERTON (1852), 2 De G. M. & G. 960; 22 L. J. Bcy. 76; 42 E. R. 1147, L. JJ.

Annotation:—**Consd.** *Re* Wellborne, [1901] 1 Ch. 312, C. A.

See, further, Part XVI., *post.*

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375 i. *Landlord—Claim for rent—Defence that conveyance fraudulent preference.*]—In the course of a reference to the master in ordinary in winding-up proceedings under R. S. C. c. 129, s. 77 (2), as amended by 52 Vict. c. 32, s. 20 (D.), a claim was made for rent, & the liquidator contended that the conveyance under which claimant assumed to be owner of the demised premises was a fraudulent preference & that the alleged lease was never executed:—*Held:* the master had no jurisdiction to adjudicate upon this contention, & the liquidator should be left to proceed under R. S. C. c. 129, s. 31, by way of action.—*Re* SUN LITHOGRAPHING CO., FARQUHAR'S CLAIM (1892), 22 O. R. 57. —**CAN.**

375 ii. —— *Application that debtor should give possession to official assignee.*]—On an application by the insolvent's landlord, an admitted creditor in respect of arrears of rent, for an order that the insolvent should make over possession of the premises to the Official Assignee:—*Held:* there was nothing in Insolvency Act (11 & 12 Vict. c. 21), which enabled the ct., sitting in insolvency, on a summary proceeding, to make what was virtually an order for ejectment against the tenant.—*Re* ANDERSON (MAUD) (1909), I. L. R. 36 Calc. 489.—**IND.**

381. Witness in arbitration—Between trustee & third party—Power to issue subpœna for attendance.]—A matter in dispute between a trustee in a liquidation & a third party was, by an order made by consent, referred to arbitration. A witness refused to attend before the arbitrator:—*Held:* the ct. could issue a subpœna, under 1870 Rules, r. 166, for the attendance of the witness before the arbitrator.—*Re* ACKARY, *Ex p.* BOLLAND (1876), 3 Ch. D. 125; 45 L. J. Bcy. 133; 34 L. T. 666; 24 W. R. 932.

SUB-SECT. 5.—OBJECTIONS TO JURISDICTION.

See, generally, COURTS.

382. Time for taking—Earliest opportunity.]—An objection to the exercise of the extraordinary jurisdiction conferred on the Ct. of Bkpcy. by 1869 Act, s. 72, ought to be taken at the earliest opportunity, & it is too late to take such an objection after the objecting party has taken the chance of a decision in his favour on the merits; but the ct. itself may at any time decline *mero motu* to exercise the jurisdiction.—*Re* SHANKS, *Ex p.* SWINBANKS (1879), 11 Ch. D. 525; 48 L. J. Bcy. 120; 40 L. T. 825; 27 W. R. 898, C. A.

Annotations:—**Folld.** *Re* Harrison, *Ex p.* Butters (1880), 14 Ch. D. 265, C. A. **Mentd.** *Re* Cliffe, *Ex p.* Eatough (1880), 42 L. T. 95; Gordon *v.* James (1885), 30 Ch. D. 249, C. A.

383. —— ——.]—Objections to the jurisdiction should be taken at the earliest opportunity.—*Re* CLIFFE, *Ex p.* EATOUGH & Co., LTD. (1880), 42 L. T. 95; 28 W. R. 433.

384. —— ——.]—The trustee in a bkpcy. applied to a county ct. to set aside as fraudulent a mtge., which bkpt. had executed. The ct. having directed the trial of certain issues by a jury, declared the deed to be void, & ordered it to be delivered up to be cancelled. The mtgee. applied for a new trial, but the application was refused. He appealed to the chief judge from the order which declared the deed void, but did not appeal from the refusal of a new trial. On the hearing of the appeal, the objection was taken that the case was not one in which the Ct. of Bkpcy. ought to exercise its extraordinary jurisdiction under 1869 Act, s. 72:—*Held:* the objection was raised too late after the mtgee. had taken his chance of a decision in his favour on the merits in the county ct.—*Re* HARRISON, *Ex p.* BUTTERS (1880), 14 Ch. D. 265; 43 L. T. 2; 28 W. R. 876, C. A.

Annotation:—**Consd.** *Re* Learoyd Wilton, *Ex p.* Armitage (1881), 17 Ch. D. 13, C. A.

385. How taken—Foreigner—Application for discharge of order for service of petition.]—A foreigner properly raises his objection to the jurisdiction by applying to have an order for service of a bkpcy. petition on him discharged.—*Re* SAWERS, *Ex p.* BLAIN (1879), 12 Ch. D. 522; 41 L. T. 46; 28 W. R. 334, C. A.

Annotations:—**Mentd.** *Re* Pearson, *Ex p.* Pearson, [1892] 2 Q. B. 263, C. A.; *Re* Clark, *Ex p.* Beyer, Peacock, [1896] 2 Q. B. 476, C. A.; *Re* Clark, *Ex p.* Clark (1897), 77 L. T. 417, C. A.; *Re* Clarke, *Ex p.* Schultze (1897), 4 Mans. 231, C. A.; *Re* A. B., [1900] 1 Q. B. 541, C. A.; Cooke *v.* Vogeler Co., [1901] A. C. 102, H. L.; Dulaney *v* Merry, [1901] 1 K. B. 536.

386. Waiver—What amounts to.]—A creditor, resting upon a common law lien, without proving under the commission, previous to Bkpcy. Ct. Act, 1831 (c. 56), appeared as a resp., in opposition to a petition before the Vice-Chancellor, who ordered that the matter should be referred to the comrs., to ascertain the rights of the several parties, & that the creditor should have his costs. The creditor attended the inquiry before the comrs, but did not draw up the order of the Vice-Chancellor:—*Held:* (1) this was not enough to bring him within the jurisdiction of the ct.; (2) filing an affidavit was not a waiver of any objection to the jurisdiction.—*Re* MILLS, *Ex p.* REID (1832), 1 Deac. & Ch. 250, Ct. of R.

387. —— ——.]—A notice of motion was served out of the jurisdiction on resp. No order authorising the service had been obtained from the ct. Resp. appeared on the hearing of the motion, & objected to the jurisdiction of the ct. On his objection being overruled, he asked for & obtained an adjournment to enable him to answer the case on its merits:—*Held:* there had been a mere irregularity in the service, & it had been waived.—*Re* MORTON, *Ex p.* ROBERTSON (1875), L. R. 20 Eq. 733; 44 L. J. Bcy. 99; 32 L. T. 697; 23 W. R. 906.

See, also, Sect. 3, sub-sect. 2, *ante.*

SECT. 5.—EFFECT OF BANKRUPTCY OUTSIDE JURISDICTION.

388. Effect on—Bankruptcy proceedings—Power of Court to make adjudication—Bankruptcy proceedings in Ireland.]—A bkpcy. petition having been presented in an English ct. against a trader, who carried on business in England & Ireland, & had creditors & assets in both countries, he obtained an adjudication against himself on his own petition in the Irish Bkpcy. Ct. before the English petition could be heard. It was alleged

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PART I. SECT. 4, SUB-SECT. 5.

382 i. *Time for taking.*]—Where, in a petition for sequestration presented by a creditor, edictal citation of debtor, who was absent on military service, had been omitted but appearance had been entered, & debtor had compeared at a diet & had been given an award of expenses:—*Held:* that objection to the citation came too late.—GARDNER *v.* MACARTHUR (1918), 56 Sc. L. R. 20.—**SCOT.**

382 ii. ——.]—When a surplus of an insolvent's estate is claimed by third parties, strangers to the insolvency, it is too late for either party to object to the jurisdiction of the ct. to deal with the fund, after they have agreed to a reference to report on their respective rights.—*Re* NAGHTEN (1859), 12 Ir. Jur. 196.—**IR.**

PART I. SECT. 5.

388 i. *Effect on—Bankruptcy Proceedings—Power of Scottish court to award sequestration—Bankruptcy proceedings in England.*]—A., B., C., D., E. & F. entered into partnership as bankers & insurance brokers, & had two establishments, one in London under the firm of X. & Co. & the other in Edinburgh under the firm of Y. & Co. B. & D. were also distillers of whisky. The banking houses became insolvent, & B. & D. having committed acts of bkpcy. in England, a commission of bkpcy. issued there against X. & Co. & the individual partners thereof, & the comrs. transferred to the assignees all the estates of bkpts. including the real & personal, heritable & movable, property in Scotland. Subsequently a petition was presented for sequestration of the estates of Y. & Co. & of the partners as individuals wheresoever situated:—*Held:* in the circumstances a Scottish sequestration must be refused.—ROYAL BANK OF SCOTLAND *v.* SCOTT, SMITH, STEIN & Co. (1813), Buchan. 320; 17 Fac. Coll. 72.—**SCOT.**

388 ii. ——.]—A domiciled Scottish merchant contracted debts in Scotland, went to England, & committed an act of bkpcy. there. A petition for sequestration having been presented to the Ct. of Session, & a deliverance having been written on the petition prior to the issuing of a regular commission of bkpcy.:—*Held:* the sequestration was preferable to the commission of bkpcy.—GEDDES *v.* MOWAT (1824), 2 Sh. Sc. App. 230.—**SCOT.**

388 iii. ——.]—The subsistence of an English adjudication in bkpcy. is a good ground for recall of sequestration afterwards awarded in Scotland.—YOUNG *v.* BUCKEL (1864), 2 Macph. (Ct. of Sess.) 1077; 36 Sc. Jur. 527.—**SCOT.**

388 iv. ——.]—An action of reduction of a Scotch sequestration was brought against the discharged trustee in the sequestration, because there was at its date a bkpcy. of debtor's estate depending in the London Bkpcy. Ct. It was not averred that there was fraud, or error, or misstatement. There was £2,000, or thereabouts, of undistributed estate deposited in bank, but the bank refused to hand it over to the English trustee, because, although the Scotch trustee was discharged, the Scotch sequestration was not concluded, & might revive at any moment:—*Held:*

Sect. 5.—Effect of bankruptcy outside jurisdiction. Sects. 6, 7, 8.]

that if an adjudication was made on the English petition, the title of the trustee would relate back so as to avoid certain transactions of bkpt. which could not be avoided under the Irish adjudication. No one but debtor opposed the English petition :—*Held :* an adjudication ought to be made on the English petition for what it was worth, leaving for future determination the question in which ct. the assets ought ultimately to be administered.—*Re* McCULLOCH, *Ex p.* McCULLOCH (1880), 14 Ch. D. 716 ; 43 L. T. 161 ; 28 W. R. 935, C. A.

Annotations :—**Refd.** *Re* Robinson, *Ex p.* Robinson (1883), 22 Ch. D. 816, C. A. ; *Re* Pinfold, *Ex p.* Pinfold, [1892] 1 Q. B. 73 ; *Re* Outram, *Ex p.* Ashworth & Outram (1893), 63 L. J. Q. B. 308 ; *Re* Thurlow, *Ex p.* Official Receiver, [1895] 1 Q. B. 724, C. A.

389. —— —— —— Sequestration in Scotland.]—Though the ct. has jurisdiction to adjudge bkpt. a debtor, against whom there is existing a prior unclosed Scottish sequestration in which he has not obtained a discharge, the ct. has a discretion in the matter, & it will decline to make an adjudication if it does not appear that debtor has any assets in England, or any debts contracted since the commencement of the sequestration.

Primâ facie the existence of a Scottish sequestration is a reason for declining to make an adjudication (JESSEL, M.R.).—*Re* ROBINSON, *Ex p.* ROBINSON (1883), 22 Ch. D. 816 ; 48 L. T. 501 ; 31 W. R. 553, C. A.

Annotations :—**Expld. & Distd.** *Re* Leonard, *Ex p.* Leonard, [1896] 1 Q. B. 473, C. A. **Distd.** *Re* Scott, *Ex p.* Paris-Orleans Ry. Co. (1913), 58 Sol. Jo. 11, C. A. **Refd.** *Re* Artola Hermanos, *Ex p.* André Châle (1890), 24 Q. B. D. 640, C. A. ; *Re* Otway, *Ex p.* Otway, [1895] 1 Q. B. 812, C. A. ; *Re* Birkin (1896), 3 Mans. 291, C. A.

390. —— —— Power to make receiving order—Bankruptcy proceedings in foreign country—Not country of debtor's domicil.] — The jurisdiction of the ct. to make a receiving order against a debtor under 1883 Act, is not taken away by reason of prior bkpcy. proceedings pending in a foreign country, at least where it is not the country of debtor's domicil.

The mere fact that prior bkpcy. proceedings, under which a representative of debtor's estate has been appointed, are pending in a foreign country, not being the country of debtor's domicil, is no ground for staying proceedings in bkpcy. in England. *Qu. :* whether the representative of the estate of a debtor under a prior bkpcy. in a foreign country has a *locus standi* to oppose the making of a receiving order in England under the 1883 Act.—*Re* ARTOLA HERMANOS, *Ex p.* ANDRÉ CHÂLE (1890), 24 Q. B. D. 640 ; 59 L. J. Q. B. 254 ; 62 L. T. 781, C. A.

Annotations :—**Consd.** *Re* Anderson, [1911] 1 K. B. 896. **Mentd.** *Re* Queensland Mercantile & Agency Co., *Ex p.* Australasian Investment Co., *Ex p.* Union Bank of Australia (1891), 66 L. T. 433, C. A.

—— Property of bankrupt.]—*See* Part XX., *post.*

—— Actions by & against bankrupt.] — *See* Part XXI., *post.*

391. —— Execution against bankrupt—Sequestration in Scotland.]—Deft. was arrested on a *ca. sa.* upon a judgment obtained against him in the Ct. of Common Pleas, & was discharged by order of a judge, on the ground that he had at the time of the arrest obtained his protection from process under a Scottish sequestration. Upon a motion to rescind that order, & for leave to issue another *ca. sa.* :—*Held :* it was not competent to such an action ought not to be entertained.

This ct. has jurisdiction to award sequestration for all the purposes it may effect, notwithstanding the fact that a liquidation process had been begun in another country for the same purpose, if this ct. saw fit to use its discretion in granting the sequestration (LORD YOUNG).—GIBSON *v.* MUNRO (1894), 2 S. L. T. 56.—**SCOT.**

388 v. —— —— —— *Bankruptcy proceedings abroad.*]—The mercantile sequestration of a bkpt. in a foreign country renders a subsequent award of sequestration in Scotland incompetent.—GOETZE *v.* ADERS (1874), 2 R. (Ct. of Sess.) 150.—**SCOT.**

388 vi. —— —— *Power of Irish court to make adjudication—Bankruptcy proceedings in England.*] — A trader residing & carrying on business exclusively in Ireland was, whilst within the district of an English Ct. of Bkpcy. adjudicated bkpt. by that ct. :—*Held :* such adjudication was void as against a subsequent adjudication by the Irish Ct. of Bkpcy.—*Re* ROGERS (1859), 9 I. Ch. R. 150.—**IR.**

388 vii. —— —— —— *Sequestration in Scotland.*]—A man was adjudicated bkpt. in Ireland the day after the date of the confirmation of the Scotch sequestration over his property & effects :—*Held :* the adjudication in Ireland should be annulled, & if any creditor objected, he should apply to the sheriff who had confirmed the sequestration to recall it, on showing the balance of convenience.—*Re* HECTOR (1870), 4 I. L. T. Jo. 652.—**IR.**

388 viii. —— —— *Power of Colonial court to continue proceedings in insolvency—Bankruptcy proceedings in England.*]—Although a commission of bkpcy. in England will not necessarily supersede a declaration of insolvency in Newfoundland, yet if, in the particular circumstances of a case, it shall appear that the claims of the creditors generally may be most satisfactorily arranged & adjusted in England, the Supreme Ct. will consider that a good ground for superseding the insolvency.—STABB, PRESTON & PROWSE'S ASSIGNEES *v.* STABB, PRESTON, PROWSE & CO.'S TRUSTEES (1821), 1 Nfld. L. R. 267.—**NFLD.**

388 ix. —— —— *Power of Colonial court to make adjudication—Bankruptcy proceedings in England.*]—A member of a firm carrying on business in London & Hong Kong, sent from London a pow r of attorney to his partners in Hong Kong, enabling them to petition the ct. at Hong Kong for an adjudication of bkpcy., or to make an assignment of all their estate in trust for creditors. Under this authority they petitioned the ct., which was, by the law of bkpcy., in force there, in itself an act of bkpcy., & they also assigned the property of the firm to a trustee, which was also an act of bkpcy. by that law. About the same time a partner of the firm resident in London was adjudicated bkpt. there, & a joint adjudication passed in Hong Kong against all the partners, the latter being subsequent in date to the former :—*Held :* it was not competent to the partner in London to dispute the validity of the joint adjudication. *Semble :* a separate adjudication in England against the English resident partner of a Hong Kong firm is no ground for refusing in Hong Kong a joint adjudication against all the partners, though one is not resident in the colony.—LYALL *v.* JARDINE (1870), L. R. 3 P. C. 318.—**HONG KONG.**

388 x. —— —— ——.]—On Jan. 30, 1904, a receiving order was made on W. & Co.'s application by the English Bkpcy. Ct. On Feb. 1 at 11 a.m. they were, on their own petition adjudged bkpts. in England, & on Feb. 16 a trustee in bkpcy. was appointed. The manager of the Calcutta office of the firm on the morning of Feb. 1 closed the place of business in Calcutta, locking the doors & affixing thereto a notice signed by himself, notifying that under telegraphic instructions W. & Co. had suspended payment. On Feb. 2 the firm were adjudged insolvents by the Calcutta High Ct., which made the usual vesting order :—*Held :* (1) the High Ct. had jurisdiction to make the vesting order ; (2) the English trustee in bkpcy. had no *locus standi* to make an application to have the adjudication & vesting orders of Feb. 2 set aside.—*Re* WATSON (WILLIAM) (1904), I. L. R. 31 Calc. 761.—**IND.**

388 xi. —— —— *Power of colonial court to award sequestration—Sequestration in another colony.*]—L., having compulsorily sequestrated the estate of G., in the Cape Colony, applied for the sequestration of G.'s estate in the Transvaal. G., who had assets in the latter country, was domiciled in the Cape Colony, & had committed no act of insolvency in the Transvaal :—*Held :* appct. must request the Cape trustee to secure the Transvaal assets offering at the same time to indemnify the latter against the costs of doing so, & prior to adopting such a course could not be heard by the ct.—*Ex p.* LISSACK (1903), T. S. 856.—**S. AF**

388 xii. —— —— —— ——.]—The estate of debtor, who had for three years been domiciled in the Transvaal & who owned movable property there, was sequestrated in Rhodesia where he had immovable property. Thereafter the Transvaal Supreme Ct. without knowledge of such sequestration accepted the surrender of his estate. The Rhodesian trustee, under letters of request, applied to have the Transvaal sequestration set aside :—*Held :* the ct. should in the exercise of its discretion refuse the application.—*Re* MORRIS' ESTATE (1907), T. S. 657.—**S. AF.**

388 xiii.——*Contract in England—Insolvent Act,* 1875, s. 136.]—PEEK *v.* SHIELDS (1881), 6 A. R. 639.—**CAN.**

391 i. —— *Execution against bankrupt—Bankruptcy proceedings in England.*]

the Ct. of Common Pleas to inquire into the trading upon which the sequestration was founded, although fraud was suggested.—O'BRIEN *v.* DON (1857), 1 C. B. N. S. 702; 26 L. J. C. P. 96; 28 L. T. O. S. 306; 3 Jur. N. S. 318; 5 W. R. 269; 140 E. R. 289.

See, also, Nos. 373, 374, *ante.*

SECT. 6.—**EFFECT OF BANKRUPTCY ON PROCEEDINGS OUTSIDE JURISDICTION.**

Effect of English order of discharge.]—*See* Part XVIII., Sect. 10, *post.*

Effect on — Property of bankrupt.]—*See* Part XX., *post.*

—— **Actions against bankrupt.**] — *See* Part XXI., *post.*

SECT. 7.—**AUXILIARY JURISDICTION OF ENGLISH AND COLONIAL COURTS.**

392. Order of English court — Whether enforceable in Ireland.] — A trustee in bkpcy. having, on appeal to the Div. Ct. in bkpcy., obtained an order that B. a creditor, should pay his costs of appeal, etc., moved for an order of request to the Bkpcy. Ct. at Dublin to enforce the order. The order was granted, with costs to come out of the estate.—*Re* BELL (1885), 2 Morr. 291.

393. —— Whether enforceable in Gold Coast.]—The Supreme Ct. of the Gold Coast, which had no bkpcy. jurisdiction in 1877, could not act as an auxiliary to the English Ct. under 1869 Act, s. 74. —CALLENDER SYKES & CO. *v.* LAGOS COLONIAL SECRETARY, WILLIAMS *v.* DAVIES, [1891] A. C. 460; 60 L. J. P. C. 33; 65 L. T. 297, P. C.

394. Limitations of jurisdiction—Effects of 1914 Act, s. 122.]—The above sect. does not enable one ct. to transfer its ordinary work to another ct.—*Re* HUNTLY (MARQUIS), *Ex p.* GOLDSTEIN, [1917] 2 K. B. 729; 87 L. J. K. B. 735; 117 L. T. 792; [1917] H. B. R. 209, D. C.

395. Appeal from auxiliary court—1869 Act, s. 74.]—*Held:* the chief judge in bkpcy. had power to review an order made by a county ct., under the above sect., as auxiliary to the London Ct.—*Re* VAUGHAN, *Ex p.* FLETCHER (1877), 6 Ch. D. 350; 37 L. T. 282; 25 W. R. 870, C. A.

SECT. 8.—**ABUSE OF PROCESS.**

See particular Parts, *post.*

—Debtor is not protected from personal diligence in Scotland by a commission of bkpcy. in England, when no certificate is issued.—ROBINSON *v.* COUPAR (1811), 16 Fac. Coll. 302.—**SCOT.**

391 ii. —— —— ——.]—*Held:* a personal protection granted under 1849 Act, to a party sequestrated in England, did not protect him when he came to be thereafter resident & domiciled in Scotland, from imprisonment under diligence used there at the instance of an English creditor, who had not claimed in the English bkpcy. —THOMAS *v.* PELLATT, MUSPRATT & STEPHENS (1861), 33 Sc. Jur. 660.—**SCOT.**

PART I. SECT. 7.

392 i. *Order of English court—Whether enforceable in Victoria—Terms of request.*]—Where the aid of a colonial ct. is sought, under 1883 Act, s. 118, the matters as to which aid is sought should be expressly stated, not necessarily *seriatim,* but describing the classes of acts required to be done:—*Qu.:* whether the above sect. referring to "British cts." refers at all to a ct. of the colony of Victoria.—*Re* MANN, STOGDALE & HENRY (1887), 13 V. L. R. 590.—**AUS.**

392 ii. —— *Whether enforceable in New Brunswick.*]—A. & B. carried on business in England & in New Brunswick, A. residing in England & B. in New Brunswick. The firm became insolvent, & petitioned the ct. in England for liquidation under 1869 Act, & a trustee of the estate was appointed. A judgment creditor in the province issued an execution, under which property belonging to the firm there was seized & sold by the sheriff, who refused to pay the proceeds to the trustee. On an application to the ct. for an order to the sheriff to pay the proceeds of the execution to the trustee:—*Held:* (1) even if the English Act applied to the province, the ct. had no jurisdiction as a Bkpcy. or Insolvent Ct.; (2) no sufficient application had been made to the ct. by the English Bkpcy. Ct. to justify the ct. in acting in aid of the English Bkpcy. Ct. in the matter; (3) the ct. would not interfere on a summary application.—*Re* MARITIME BANK *v.* CARVILL, *Ex p.* GLIDDON (1884), 24 N. B. R. 250.—**CAN.**

392 iii. —— *Whether enforceable in Ontario.*]—Pltfs. brought an action against defts. who became subject to proceedings in bkpcy., & pltfs. presented their claim & lodged it with the assignee in bkpcy., in England. The judge in bkpcy. in England made an order enjoining pltfs. from proceeding with the action in the high ct. of justice for Ontario, & an order was made by the master in chambers staying the proceedings for ever:—*Held:* the order of the master was right. *Qu.:* whether there was power under 1883 Act to grant the injunction.—MARITIME BANK *v.* STEWART (1889), 13 P. R. 86, 262, 491.—**CAN.**

392 iv. —— *Whether enforceable in India—Necessity for letter of request.*]—A. & Co. carrying on business in London & in Calcutta were adjudicated bkpt. in England, & it was ordered that the High Ct. of Judicature in Bengal be requested to act in aid of & be auxiliary to the English ct. The trustee having presented such order to the Bengal ct., obtained an order that that ct. & its officers should act in aid & be auxiliary to the English ct. & that B., the manager in Calcutta of A. & Co., should personally attend to be examined before the Bengal ct.:—*Held:* to get the jurisdiction to examine B. as a witness, there must be a request from the English ct. asking the Bengal ct. to act in aid, & a letter of request from the one ct. to the other ought to have been sent, & the order of the English ct. presented by the trustee was not sufficient to give jurisdiction.—*Re* KING (L.) & CO. (BANKRUPTS) (1911), I. L. R. 38 Calc. 542.—**IND.**

392 v. —— *Whether enforceable in Scotland.*]—In a competition between bkpt., against whom adjudication of bkpcy. issued in England, & his creditors' assignee, a plea by bkpt., that the English bkpcy. proceedings were null, in respect that he was not subject to the jurisdiction, being a domiciled Scotsman, & not at the time resident in England, repelled, & proof of his averments refused, as the proceedings, being under 1861 Act, an imperial Act, & *ex facie* regular, must be enforced by the ct. in terms of that Act, even assuming the truth of bkpt.'s averments as to his domicil.—WILKIE *v.* COOK & CATHCART (1870), 43 Sc. Jur. 88.—**SCOT.**

392 vi. —— ——.]—In a Scottish sequestration of a firm having a trading domicile both in Scotland & England a claim was lodged by a co., based (1) upon a decree of the Ct. of Ch. in England, finding that a sale was fraudulent & that the co. were at liberty to prove against bkpt.'s estate; & (2) upon the grounds which the English decree had proceeded, viz., that the sale was fraudulent:—*Held:* (1) as the Ct. of Session had exclusive jurisdiction in the distribution of the sequestrated estate the English decree could not receive effect in the sequestration.—PHOSPHATE SEWAGE CO. *v.* LAWSON & SON'S TRUSTEE (1878), 5 R. (Ct. of Sess.) 1125.—**SCOT.**

392 vii. ——*Whether enforceable in South Africa.*]—A firm domiciled in London & in the Cape Colony presented a petition for liquidation in London on Aug. 25, 1883, & a receiver was appointed on the same day. On Oct. 2, the firm surrendered in the Colony their estate there, consisting only of movables, & on Oct. 29, resps. were duly appointed as trustees of the estate situate there. On Nov. 23 appct. was duly appointed trustee of the estate in London. The London Bkpcy. Ct. having made an order requesting the aid of the colonial cts. having jurisdiction, to recognise the appointment of appct.:—*Held:* the appointment of resps. & all subsequent proceedings should be set aside, & all the movable assets of the firm should be vested in appct.—HOWSE, SONS & CO.'S TRUSTEE *v.* HOWSE, SONS & CO.'S TRUSTEES, JOCELYNE *v.* SHEARER & HINE (1884), 3 S. C. 14.—**S. AF.**

392 viii. —— ——.]—A request in aid from the English ct. is not essential in order to enable the ct. to recognise an English trustee of a person declared bkpt. in England, but possessing property in the Transvaal.—LESLIE'S TRUSTEE *v.* LESLIE (1903), T. S. 839. —**S. AF.**

o. *Order of Canadian Provincial Court—Where good throughout Canada.*]—A sequestration order granted in one province operates throughout the Union.—ROOS *v.* BODEN, [1918] C. P. D. 312.—**S. AF.**

p. *Order of English or colonial court—Whether enforceable in Queensland.*]—Whenever the Supreme Ct. of Queensland has authority upon a request made to it for its aid by any other ct., within Her Majesty's dominions, such request containing no mandatory words, but merely words of request, the ct. will give its aid so far as it has jurisdiction & power to do so.—*Re* TURNBULL (1886), 2 Q. L. J. 131.—**AUS.**

395 i. *Appeal from auxiliary court—Acting in aid of English Court.*]—A county ct. judge made an order in aid of & as auxiliary to the London Bkpcy. Ct. in relation to property of an English bkpt. situated in his district:—*Held:* no appeal would lie from such order to the Supreme Ct.—*Re* CARVELL, *Ex p.* GLIDDON (1885), 5 R. & G. 410.—**CAN.**

Part II.—Acts of Bankruptcy.

SECT. 1.—WHO CAN COMMIT AN ACT OF BANKRUPTCY.

Debtor—As to what debtors are subject jurisdiction of bankruptcy court.]—*See* Part I., *ante*.

396. Agent—With authority—Or assent subsequently given—Fraudulent delivery of goods.]—A fraudulent delivery of goods by an agent will not be an act of bkpcy., unless it be made by debtor's authority or receive his subsequent assent.—COTTON *v.* JAMES (1829), Dan. & Ll. 262; Mood. & M. 273; 7 L. J. O. S. K. B. 125; *subsequent proceedings* (1830), 1 B. & Ad. 128.

Annotations:—**Distd.** *Re* Hunt, *Ex p.* Simpson (1844), 14 L. J. Bcy. 1. **Apld.** Isitt *v.* Beeston (1869), L. R. 4 Exch. 159. **Mentd.** Mercer *v.* Whall (1845), 5 Q. B. 447.

397. —— —— Debtor not cognisant of act.]—An act of bkpcy. must be a personal act or default, & it cannot be committed through an agent, nor by a firm as such.

A man cannot commit an act of bkpcy. by a particular act of his agent which he has not authorised, & of which act he has had no cognizance (BRETT, L.J.).—*Re* SAWERS, *Ex p.* BLAIN (1879), 12 Ch. D. 522; 41 L. T. 46; 28 W. R. 334, C. A.

Annotations:—**Mentd.** *Re* Pearson, *Ex p.* Pearson, [1892] 2 Q. B. 263, C. A.; *Re* Clark, *Ex p.* Beyer, Peacock, [1896] 2 Q. B. 476, C. A.; *Re* Clark, *Ex p.* Clark (1897), 77 L. T. 417, C. A.; *Re* A. B., [1900] 1 Q. B. 541, C. A.; Cooke *v.* Vogeler Co., [1901] A. C. 102, H. L.; Dulaney *v.* Merry, [1901] 1 K. B. 536.

398. —— —— Notice of suspension of payment.]—A notice of suspension of payment can be issued by an agent acting under the authority of debtor.—*Re* LAMB, *Ex p.* GIBSON & BOLLAND (1886), 55 L. T. 817; *affd.* (1887), 3 T. L. R. 303; 4 Morr. 25, C. A.

Annotations:—**Refd.** Clough *v.* Samuel, [1905] A. C. 442, H. L. **Mentd.** Barr *v.* Kingsford, Oakley, Claimant (1887), 56 L. T. 861; Crook *v.* Morley, [1891] A. C. 316, H. L.; *Re* Entwistle, *Ex p.* Turner (1891), 65 L. T. 349, D. C.; *Re* Selwood, *Ex p.* Dash (1894), 1 Mans. 66.; *Re* Waite, *Ex p.* Bentley's Yorkshire Breweries (1894), 71 L. T. 778; *Re* Phillips, *Ex p.* Thomas (1897), 76 L. T. 531; *Re* Midgley (1913), 108 L. T. 45, D. C.

See, now, definition of "a debtor" in 1914 *Act, s.* 1 (2) (*c*). *An act of bankruptcy can now be committed by a person, whether a British subject or not, who was at the time carrying on business in England, personally, or by means of an agent, or manager, or, under s.* 1 (2) (*d*), *by a person who was a member of a firm or partnership, which carried on business in England. But it appears that the particular act must have been authorised by the debtor or he must have had cognizance of it.*

SECT. 2.—WHAT IS AN ACT OF BANKRUPTCY.

SUB-SECT. 1.—CONVEYANCES OR ASSIGNMENTS TO TRUSTEES FOR BENEFIT OF CREDITORS.

399. "In England or elsewhere"—Assignment in India.]—A general assignment of debtor at Madras is not an act of bkpcy. in England.—NORDEN *v.* JAMES (1777), Dick. 533; 21 E. R. 377.

400. —— ——.]—An assignment, by a person residing in India & trading there, & in the course of that trading contracting debts in England, of all his effects in trusts for creditors, in certain proportions, executed by him while resident in India, is not an act of bkpcy. within the bkpcy. laws.—INGLISS *v.* GRANT (1794), 5 Term Rep. 530; 101 E. R. 298.

401. —— Conveyance governed by English law.]—The words in 1869 Act, s. 6, "that debtor has, in England or elsewhere, made a conveyance or assignment of his property to a trustee for the benefit of his creditors generally" relate to a conveyance which is to operate according to English law, which a conveyance executed by a domiciled Englishman, although out of England, may do; but a conveyance executed by a domiciled foreigner in his own country must necessarily operate according to the foreign law, & it was never intended that such a conveyance should be an act of bkpcy.—*Re* CRISPIN, *Ex p.* CRISPIN (1873), 8 Ch. App. 374; 42 L. J. Bcy. 65; 28 L. T. 483; 37 J. P. 391; 21 W. R. 491, L. C. & L. J.

Annotations:—**Consd.** *Re* Myer, *Ex p.* Pascal (1876), 1 Ch. D. 509, C. A.; *Re* Trench, *Ex p.* Brandon (1884), 25 Ch. D. 500, C. A.; *Re* A. B. (1900), 82 L. T. 169, C. A.; Cooke *v.* Vogeler Co., [1901] A. C. 102, H. L. **Refd.** *Re* Gutierrez, *Ex p.* Guttierrez (1879), 11 Ch. D. 298, C. A.

402. "Conveyance or assignment"—Mere agreement to accept composition.]—An agreement to accept a composition, where there was no assignment of debtor's effects:—*Held*: not an act of bkpcy., but an arrangement which a man might enter into from the temporary pressure of his affairs, but would not make him a bkpt.—JOLLY *v.* WALLIS (1800), 3 Esp. 228.

Annotations:—**Mentd.** Smith *v.* Winter (1838), 1 Horn & H. 384; Forbes *v.* Limond (1853), 1 Sm. & G. 554; Kitchin *v.* Hawkins (1866), L. R. 2 C. P. 22.

403. —— Deed containing proviso for avoidance—If trustees think fit.]—A deed whereby bkpt. conveys all his property in trust to divide amongst his creditors, is an act of bkpcy., & is operative though it contain a proviso to be void if the trustees think fit.—TAPPENDEN *v.* BURGESS (1803), 4 East, 230; 1 Smith, K. B. 33; 102 E. R. 818.

Annotations:—**Refd.** Lee *v.* Hart (1856), 11 Exch. 880. **Mentd.** Fawcett *v.* Fearne (1844), 6 Q. B. 20.

PART II. SECT. 1.

396 i. *Agent—With authority.*]—A trader residing out of the jurisdiction, but carrying on business within the jurisdiction by a gomastah, can be adjudicated an insolvent, if his gomastah does any act which, if done by the trader himself, would have rendered him liable to be adjudicated an insolvent.—*Re* HURRUCK CHUND GOLICHA (1880), I. L. R. 5 Calc. 605; 6 C. L. R. 382.—**IND.**

396 ii. ——.]—Under Provincial Insolvency Act (III. of 1907), s. 4, debtor can be adjudicated an insolvent upon acts of insolvency committed by his agent.—KALIANJI SINGJI BHAI *v.* BANK OF MADRAS (1916), I. L. R. 39 Mad. 693.—**IND.**

See, also, cases in Sect. 2, sub-sect. 6, *post*.

398 i. —— —— *Notice of suspension of payment.*]—The giving notice by debtor's agent to a creditor that debtor is about to suspend payment is an act of insolvency.—MERCANTILE BANK OF INDIA, LTD. *v.* MADRAS OFFICIAL ASSIGNEE (1916), I. L. R. 39 Mad. 250.—**IND.**

a. Executor.]—The nature of the act of insolvency which must be committed by an exor. in order to make his testator's estate liable to sequestration under Insolvency Stat., 1871 (No. 379), s. 42, is an act of insolvency within s. 37, the natural effect of which is to defeat or delay creditors.—*Re* COHEN (1889), 15 V. L. R. 664.—**AUS.**

b. ——.]—An exor. or administrator cannot commit an act of bkpcy. under Bkpcy. Act, 1887 (51 Vict. No. 19), s. 4 (1) (*h*).—*Re* CRACKNELL, *Ex p.* OFFICIAL ASSIGNEE & AUSTRALIAN JOINT STOCK BANK, LTD. (1895), 16 N. S. W. B. 120.—**AUS.**

PART II. SECT. 2, SUB-SECT. 1.

402 i. "*Conveyance or assignment*"—*Assignment not in accordance with Insolvent Act.*]—An assignment for the benefit of creditors, not made in accordance with Insolvent Act, is an act of insolvency.—THORNE *v.* TORRANCE (1866), 16 C. P. 445; *affd.* 18 C. P. 29.—**CAN.**

402 ii. —— *Effect of non-registration.*]—A deed of assignment for the benefit of creditors generally is operative as an act of insolvency notwithstanding non-compliance with the provisions as to registration of Insolvency Act, 1897 (No. 1513), ss. 75, 76, 81, of the Act preserving the operation of the deed as an act of insolvency.—*Re* SMITH (1900), 26 V. L. R. 235.—**AUS.**

404. —— —— If creditors do not sign—Or commission issues.]—An assignment by partners by deed of all their property, in trust for their creditors, with a proviso to be void, if all the creditors for above £20 should not execute, or a commission of bkpcy. should issue within a certain time, is an act of bkpcy.—DUTTON *v.* MORRISON (1810), 17 Ves. 193 ; 1 Rose, 213 ; 34 E. R. 75.

Annotations :—**Consd.** Bowker *v.* Burdekin (1843), 11 M. & W. 128. **Distd.** *Re* Kelson, *Ex p.* Egyptian Commercial & Trading Co. (1868), 4 Ch. App. 125, L. C. **Refd.** Lindon *v.* Sharp (1843), 7 Scott, N. R. 730. **Mentd.** Brickwood *v.* Miller (1817), 3 Mer. 279 ; *Re* Houghton, *Ex p.* Robinson (1823), 1 Mont. & A. 18 ; Woodbridge *v.* Swann (1833), 4 B. & Ad. 633 ; Morgan *v.* Marquis (1853), 9 Exch. 145 ; *Re* A Disputed Adjudication (1861), 3 L. T. 634 ; Dibb *v.* Brooke, [1894] 2 Q. B 338.

405. —— —— —— Creditors & trustee not signing.]—An assignment by deed of all the effects of a trader to trustees for the benefit of his creditors, with a proviso that it should be void if all the creditors did not execute it, & that in the meantime the acts of the trustees should be good, is an act of bkpcy, although not executed by the trustees or creditors.—BACK *v.* GOOCH (1815), 4 Camp. 232 ; Holt, N. P. 13, N. P.

Annotation :—**Refd.** Marshall *v.* Barkworth (1833), 4 B. & Ad. 508.

406. —— Joint deed by partners—Only signed by one.]—An assignment by partners by deed of property, in trust for their creditors, is not an act of bkpcy. where the deed, being joint & not several, was never executed by one of the partners.—DUTTON *v.* MORRISON (1809), 17 Ves. 193 ; 1 Rose, 213 ; 34 E. R. 75.

Annotations :—**Refd.** Bowker *v.* Burdekin (1843), 11 M. & W. 128. **Mentd.** Brickwood *v.* Miller (1817), 3 Mer. 279 ; *Re* Houghton, *Ex p.* Robinson (1823), 1 Mont. & A. 18 ; Woodbridge *v.* Swann (1833), 4 B. & Ad. 633 ; Lindon *v.* Sharp (1843), 7 Scott, N. R. 730 ; Morgan *v.* Marquis (1853), 9 Exch. 145 ; *Re* A Disputed Adjudication (1861), 3 L. T. 634 ; *Re* Kelson, *Ex p.* Egyptian Commercial and Trading Co. (1868), 4 Ch. App. 125, L. C. ; Dibb *v.* Brooke, [1894] 2 Q. B. 338.

407. —— Inchoate arrangement—All deeds not executed.]—Where a trader, one of two partners, conveyed to trustees, not his creditors, all his freehold, leasehold & copyhold, but not his personal property (which formed but a small part of the whole) in trust by sale, mtge., or other disposition thereof, to raise money whereby the trader might be enabled to facilitate a settlement with his creditors, the pecuniary assets of the firm not being sufficient to cover the pecuniary engagements of the firm, & also gave to other persons, not creditors, a power of attorney enabling them in the fullest manner to act for him in this settlement, & afterwards prepared a deed for the purpose of conveying all his above mentioned landed property to two other trustees, with a view to raise £170,000 in negotiable bills, & to indemnify the drawers of those bills, but nothing was ever done under such latter deed :—*Held :* the circumstances did not constitute an act of bkpcy.—BERNEY *v.* DAVISON (1819), 1 Brod. & Bing. 408 ; 4 Moore, C. P. 126 ; 129 E. R. 780.

Annotations :—**Apld.** Greenwood *v.* Churchill (1833), 1 My. & K. 546. **Distd.** Robinson *v.* Carrington (1833), 1 Mont. & A. 1.

408. —— —— ——.]—The transfer of a trader's property, in circumstances similar to those stated in the case of *Berney* v. *Davison*, No. 407, *supra* :—*Held :* is no act of bkpcy., notwithstanding a difference from that case in the following particulars : (1) no mention of the trader's personal property ; (2) no statement that the trustees to the transfer were not creditors of the trader ; (3) no mention of the trader's motive ; (4) no mention of the abstract of the unexecuted deed furnished to the purchasers ; (5) an additional statement, that on or about the time of the execution of the transfer, the trader was insolvent, & stopped payment.—BERNEY *v.* VYNER (1820), 1 Brod. & Bing. 482 ; 4 Moore, C. P. 322 ; 129 E. R. 808.

Annotation :—**Refd.** Robinson *v.* Carrington (1833), 1 Mont. & A. 1.

409. —— Declaration of trust—Agreement as to disposal of property.]—In order to constitute an act of bkpcy. under 1883 Act, s. 4 (1) (*a*) (*see, now*, 1914 Act, s. 1 (1) (*a*)), there must be a " conveyance or assignment " in the proper sense of the term ; other modes of disposition, not properly conveyances or assignments, such as a declaration of trust by debtor, or a mere agreement by him that his property shall be dealt with for the benefit of creditors, will not suffice.—*Re* SPACKMAN, *Ex p.* FOLEY (1890), 24 Q. B. D. 728 ; 59 L. J. Q. B. 306 ; 62 L. T. 849, C. A.

Annotations :—**Consd.** *Re* Hughes, *Ex p.* Hughes, [1893] 1 Q. B. 595, C. A. **Refd.** *Re* Sharp, *Ex p.* Gundry *v.* Johnston (1900), 83 L. T. 416 ; Radcliffe *v.* Abbey Road & St. John's Wood Permanent Bldg. Soc. (1918), 87 L. J. Ch. 557. **Mentd.** *Re* Pollitt, *Ex p.* Minor, [1893] 1 Q. B. 175 ; *Re* Simonson, *Ex p.* Ball (1893), 1 Mans. 30 ; *Re* Whitlock, *Ex p.* Official Receiver (1893), 1 Mans. 33 ; *Re* David & Adlard, *Ex p.* Whinney, [1914] 2 K. B. 694.

410. —— —— Of property excepted from assignment.]—Debtor assigned all his property except leaseholds to trustees for the benefit of his creditors, & executed a declaration of trust as to the excepted property in favour of the same trustees :—*Held :* this was a " conveyance or assignment " of all his property within 1883 Act, s. 4 (1), & the deed was an act of bkpcy.

The words " conveyance or assignment " in the sect. must be construed as extending to & as including the various methods of dealing with such property to which conveyancers usually have recourse, although such methods may not be conveyances or assignments in the proper sense of those terms (LINDLEY, L.J.).—*Re* HUGHES, *Ex p.* HUGHES, [1893] 1 Q. B. 595 ; 62 L. J. Q. B. 358 ; 68 L. T. 629 ; 41 W. R. 466 ; 9 T. L. R. 373 ; 37 Sol. Jo. 388 ; 10 Morr. 91 ; 4 R. 368, C. A.

Annotations :—**Refd.** Radcliffe *v.* Abbey Road and St. John's Wood Permanent Bldg. Soc. (1918), 87 L. J. Ch. 557. **Mentd.** Gentle *v.* Faulkner, [1900] 2 Q. B. 267, C. A. ; Davis *v.* Petrie (1905), 93 L. T. 511.

411. —— General assignment of all effects.]—A general assignment of all effects is an act of bkpcy. —*Ex p.* SMITH (1813), 1 Ves. & B. 518 ; 35 E. R. 201.

412. —— —— All creditors assenting.]—An assignment of all a trader's effects for the benefit of all the creditors is an act of bkpcy., unless they all assent to the deed.—KETTLE, ETC. (ASSIGNEES OF EWING) *v.* HAMMOND (1787), 1 Cooke's Bankrupt Laws, 8th ed., p. 106.

Annotation :—**Refd.** *Ex p.* Bourne (1809), 16 Ves. 145.

413. —— —— Made for purpose of committing act of bankruptcy.]—An assignment of all estate & effects to trustees for the benefit of creditors is an act of bkpcy., although the assignment be made merely for the purpose of making an act of bkpcy.—SIMPSON *v.* SIKES (1817), 6 M. & S. 295 ; 105 E. R. 1253.

414. —— —— For purpose of conversion—With view to arrangement.]—A trader entitled to large freehold & leasehold estates, but greatly embarrassed, & having committed acts of bkpcy., conveyed his freehold & leasehold estates to trustees, upon trust to sell or mtge., & to apply the produce as he should direct. The trust deed was executed under advice, for the purpose of effecting a conversion of the trader's property, with a view to an arrangement with his creditors, to which he was himself considered incompetent from the state of his health :—*Held :* the trust deed was not an act of bkpcy.—GREENWOOD *v.* CHURCHILL (1833), 1 My. & K. 546 ; 39 E. R. 787 ; *sub nom.* CHURCHILL *v.* GREENWOOD, 2 L. J. Ch. 146.

415. —— —— —— ——.]—Debtor, a solr., while under great financial embarrassment, conveyed the bulk of his property comprising his freehold & leasehold estates to trustees, upon trust for sale & to dispose of the proceeds as he should direct. The deed was induced by the fact that the state of his affairs had so affected debtor's mind, that his friends considered he was unequal to the conversion of his property:—*Held:* the deed being executed solely for the purpose of relieving debtor from a trouble which, from his infirm state of health & age, he was incapable of undertaking, was not an act of bkpcy.—ROBINSON *v.* CARRINGTON (LORD) (1833), 1 Mont. & A. 1.

Annotation:—**Apld.** Baxter *v.* Pritchard (1834), 1 Ad. & El. 456.

416. —— —— **Not executed by trustees.**]—An assignment to trustees for the benefit of creditors, executed by the party, is an act of bkpcy., although none of the trustees execute it.—BOTCHERBY *v.* LANCASTER (1834), 1 Ad. & El. 77; 3 Nev. & M. K. B. 383; 3 L. J. K. B. 157; 110 E. R. 1136.

Annotation:—**Refd.** Brittain *v.* Brown & Millar (1871), 24 L. T 504.

417. —— —— **No intent to delay.**]—The assignment of all a trader's property in trust for the benefit of creditors is an act of bkpcy., though, in point of fact, he does not intend to delay or defeat his creditors, because, as that is its natural effect, he must, in law, be presumed to have so intended.—STEWART *v.* MOODY (1835), 1 Cr. M. & R. 777; 5 Tyr. 493; 4 L. J. Ex. 55; 149 E. R. 1294.

Annotations:—**Folld.** Woodhouse *v.* Murray (1867), L. R. 2 Q. B. 634. **Refd.** *Re* Hunt, *Ex p.* Simpson (1844) De G. 9, Ct. of R. **Mentd.** Goodricke *v.* Taylor (1863), 2 Hem. & M. 380.

418. —— —— **Delivered as escrow.**]—In the absence of anything to show that a deed of assignment for the benefit of creditors was delivered as an escrow:—*Held:* it amounted to an act of bkpcy.—BOWKER *v.* BURDEKIN (1843), 11 M. & W. 128; 12 L. J. Ex. 329; 152 E. R. 744.

Annotations:—**Folld.** Gudgen *v.* Besset (1856), 6 E. & B. 986; *Re* Douglas, *Ex p.* Snowball (1872), 6 Ch. App. 534, L. JJ.; Foundling Hospital *v.* Crane, [1911] 2 K. B. 367, C. A. **Mentd.** Pattle *v.* Hornibrook, [1897] 1 Ch. 25.

419. —— —— **Deed delivered to be used only in certain conditions.**]—A trader, being pressed by a particular creditor, who had issued execution against him, under which the sheriff had seized, executed an assignment of all his property for the benefit of his creditors & in the presence of the party to whom the assignment was made gave it to his attorney, for the purpose of being used as an act of bkpcy. only in case it should be necessary to use it in order to defeat the execution creditor:—*Held:* the execution of the deed was an act of bkpcy.—TURNER *v.* HARDCASTLE (1862), 11 C. B. N. S. 683; 31 L. J. C. P. 193; 5 L. T. 748; 142 E. R. 964.

Annotations:—**Mentd.** Johnson *v.* L. & Y. Ry. Co. & Wigan Waggon Co. (1878), 3 C. P. D. 499; The Winkfield, [1902] P. 42, C. A.; Royal Mail S.S. Co. *v.* Macintyre (1911), 16 Com. Cas. 231; Eastern Construction Co. *v.* National Trust Co. & Schmidt, A.-G. for the Province of Ontario Intervenant, [1914] A. C. 197, P. C.

420. —— —— **Deed destroyed before creditors signed.**]—Defts. executed an assignment of property to their creditors under 1861 Act, but the deed was destroyed before any of the creditors had signed it:—*Held:* the deed of assignment was an act of bkpcy.—LEES *v.* WHITELEY (1866), L. R. 2 Eq. 143; 35 L. J. Ch. 412; 14 L. T. 472; 14 W. R. 534.

Annotations:—**Mentd.** Rayner *v.* Preston (1881), 18 Ch. D. 1, C. A.; Sinnott *v.* Bowden, [1912] 2 Ch. 414.

421. **"Of his property"—Whole or substantially whole.**]—In order to constitute an act of bkpcy. under 1883 Act, s. 4 (1) (*a*), there must be a conveyance or assignment, by which the whole or substantially the whole of debtor's property is vested in trustees for the benefit of his creditors generally.—*Re* SPACKMAN, *Ex p.* FOLEY (1890), 24 Q. B. D. 728; 59 L. J. Q. B. 306; 62 L. T. 849, C. A.

Annotations:—**Consd.** *Re* Hughes, *Ex p.* Hughes, [1893] 1 Q. B. 595, C. A. **Refd.** *Re* Sharp, *Ex p.* Gundry *v.* Johnston (1900), 83 L. T. 416. **Mentd.** *Re* Pollitt, *Ex p.* Minor, [1893] 1 Q. B. 175; *Re* Simonson, *Ex p.* Ball (1893), 1 Mans. 30; *Re* Whitlock, *Ex p.* Official Receiver (1893), 63 L. J. Q. B. 245; *Re* David & Adlard, *Ex p.* Whinney, [1914] 2 K. B. 694; Radcliffe *v.* Abbey Rd. & St. John's Wood Permanent Bldg. Soc. (1918), 87 L. J. Ch. 557.

422. —— —— **Depending on what other effects trader had.**]—Where there was an assignment in trust to pay the creditors who should execute the deed, with a covenant by debtor, that if the creditors should not out of that fund be paid in full within two years, to pay the deficiency within a month afterwards, LORD ELDON, C., for the purpose of considering the question at issue, took it for granted that the deed was not an act of bkpcy. which must depend upon what other effects the trader had at that time.—*Ex p.* RICHARDSON (1807), 14 Ves. 184; 33 E. R. 491.

423. —— **Of part—Fraud—Mere conjecture of fraud insufficient.**]—A conveyance by a trader of part of his property for the benefit of his creditors is not an act of bkpcy., unless executed in circumstances of fraud; & mere conjecture of fraud, arising from extrinsic circumstances, will not be sufficient to affect the title under such conveyance.—CATTELL *v.* CORRALL (1840), 4 Y. & C. Ex. 228; 9 L. J. Ex. Eq. 37; 160 E. R. 989.

Annotation:—**Mentd.** *Re* Marshall & Salt's Contract, [1900] 2 Ch. 202.

424. —— —— **Recital that unable to pay debts.**]—A debtor conveyed real estate forming the principal part of his property, for the benefit of his creditors who should execute the deed. The deed recited that he was unable to pay his debts, & provided that the costs due to his solr. should be a first charge on the property:—*Held:* as the necessary effect of the deed was to delay creditors, it was an act of bkpcy.—*Re* WENSLEY, *Ex p.* WENSLEY (1862), 1 De G. J. & Sm. 273; 1 New Rep. 183; 32 L. J. Bcy. 23; 7 L. T. 548; 9 Jur. N. S. 315; 11 W. R. 241; 46 E. R. 110, L. C.

Annotations:—**Apld.** *Re* Nurse, *Ex p.* Foxley (1868), 17 L. T. 623. **Refd.** Young *v.* Fletcher (1865), 3 H. & C. 732. **Mentd.** *Re* Barron, *Ex p.* Potter (1864), 3 De G. J. & Sm. 240; Hobson *v.* Thelluson (1867), L. R. 2 Q. B. 642; Ponsford *v.* Walton (1868), L. R. 3 C. P. 167.

421 i. *"Of his property"—Whole or substantially whole.*]—An assignment by debtor of all his property to trustees for the benefit of his creditors according to the forms laid down by 5 Vict. No. 9, ss. 33 & 34, is exempted from the operation of 5 Vict., No. 17, s. 5, rendering it an act of insolvency, by 7 Vict. No. 19, s. 8.—*Re* COXEN (1844), 1 Legge, 223.—**AUS.**

421 ii. —— ——.]—Partners assigned to trustees all their joint & separate estate, "the household furniture of each of the debtors not exceeding £200 each only excepted":—*Held:* the deed was an assignment of all debtors' property.—*Re* THOMAS & COWIE (1883), 9 V. L. R. 2.—**AUS.**

421 iii. —— ——.]—Debtor executed a deed of assignment of all his property (except leaseholds), & by the deed declared that he held his leaseholds in trust for the trustee & to pay the moneys arising therefrom to the trustee to be held by him upon the trusts of the deed:—*Held:* the deed was an assignment of all debtor's property.—*Re* DOBSON, *Ex p.* BEATH, SCHIESS & Co. (1905), V. L. R. 51; 26 A. L. T. 103.—**AUS.**

423 i. —— *Of part.*]—A., finding himself unable to meet his engagements with his creditors, signed a deed, assigning portion of his property to trustees for the benefit of his creditors:—*Held:* the signing of the deed by A. was not an act of bkpcy.—*Re* WYNNE (1870), 5 I. L. T. 24.—**IR.**

425. "Of his creditors generally"—Deed excluding certain creditors.]—Debtor assigned by deed all his effects to trustees upon trust for all his creditors, parties to the assignment, who should assent thereto within three months from its date. The execution of the assignment by debtor & the trustees was attested by a solr., as required by 1849 Act, s. 68, & notice of it was given in the *London Gazette* & otherwise, as required by that sect. :—*Held :* the assignment was within the above sect., & was valid.—HARRIS *v.* PETTIT (1862), 31 L. J. Ch. 552 ; 6 L. T. 572 ; 9 Jur. N. S. 68 ; 10 W. R. 599.

426. ——— Assignment by partner—No provision for joint creditors.]—A. & N., being in partnership, executed assignments of all their joint estate to mtgees., & afterwards A. assigned all his separate estate & effects whatsoever, specifying them in detail, & " all other the estate & effects of " A., to a trustee upon trust to divide the proceeds arising from the sale thereof amongst such of his separate creditors as should within one month become parties to & execute the deed. The deed was not registered under Bills of Sale Act, 1854 (c. 36). Upon the day following the date of the last-mentioned deed a petition for adjudication of bkpcy. was filed against A. & N., under which they were subsequently declared bkpts., the acts of bkpcy. relied upon having been committed two or three days before the date of the last deed :—*Held :* the last-mentioned deed was an act of bkpcy., & a preference of separate creditors over the general body of creditors.—*Re* ALLIBON, NOYES & Co., *Ex p.* MCLEAN (1871), 24 L. T. 144.

427. ——— ———.]—In Dec., 1899, S., a publican, owed about £3000 to trade creditors ; his trade premises were mtged. to W. & Co., his lessors, & he was insolvent. It was agreed that S. should surrender his lease, that W. & Co. should release the mtge. & should take over the stock-in-trade, being the whole of S.'s assets, for £2800. This sum was the total amount of a list of his debts furnished by S. & stated to be a complete list, & a cheque for £2800 was handed by W. & Co. to S., who, according to the arrangement, immediately indorsed & delivered it to resps., who proceeded to pay all the debts set out in the list furnished by S. This list did not in fact contain all the creditors. The arrangement was entered into honestly & without any fraudulent motive :—*Held :* (1) the transfer by S. was an act of bkpcy. as necessarily tending to defeat the creditors omitted from the list, & as substituting for the administration of the estate in bkpcy. a different mode of administration ; (2) 1883 Act, s. 49, did not protect the transaction. —*Re* SHARP, *Ex p.* GUNDRY & JOHNSTON (1900), 83 L. T. 416.

Annotation :—**Mentd.** *Re* David & Adlard, *Ex p.* Whinney, [1914] 2 K. B. 694.

428. ——— ——— Only trade creditors benefited.] — *Held :* an assignment by debtor for the benefit of his trade creditors only was not an act of bkpcy. under 1883 Act, s. 4 (1) (*a*) (*see, now,* 1914 Act, s. 1 (1) (*a*)).—*Re* PHILLIPS, *Ex p.* BARTON, [1900] 2 Q. B. 329 ; 49 W. R. 16.

429. ——— ——— Excluding non-executing creditors.]———A deed of assignment executed by a trader to a trustee for the benefit of all his creditors, & advertised in manner & form prescribed by 1849 Act, s. 68, is not the less valid under that sect. by reason of its containing a clause excluding all creditors who should not come in under the deed within three months from all benefit thereunder, & is not an act of bkpcy. after the expiration of the three months specified in s. 68.

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425 i. *" Of his creditors generally ."*] —A deed of assignment by a debtor of all his property to trustees in trust to pay all costs charges & disbursments, & then to pay & discharge in full such claims as would have been preferential claims & entitled to be paid in full if the estate of the assignor had been sequestrated, & then to apply the residue towards payment of the debts owing by the assignor to the parties thereto of the third part ratably (except those entitled preferentially as above), but subject, as to those holding security to the provisions in that behalf therein contained, is an assignment for the benefit of creditors generally & an act of insolvency within Insolvency Stat. 1871, s. 37 (1).—*Re* VAGG (1886-7), 13 V. L. R. 172.—**AUS.**

425 ii. ———.]—The assignment of the whole of a debtor's property for the benefit of his creditor's generally constitutes an act of bkpcy. within Indian Insolvency Act, s. 9.—BRIJMOHUN DOBAY *v.* BUNGSIDHUR, 2 C. W. N. 335.—**IND.**

425 iii. *S. P.* KARSANDAS RAMDAS *v.* MAGANLAL KANKUCHAND (1902), I. L. R. 26 Bom. 476.—**IND.**

425 iv. ——— *Deed excluding certain creditors — Only scheduled creditors benefited.*] — To constitute an assignment of property to a trustee for creditors an act of insolvency, it must be an assignment for the benefit of creditors generally, & not of scheduled creditors only.—*Re* DERHAM (1875), 1 V. L. R. 2. —**AUS.**

425 v. ——— ——— ———.]—An assignment of property provided that the trustee should pay the debts owing to scheduled creditors of whose claims they should have notice, with power to admit any persons creditors upon such evidence as they might think reasonable, & take the directors of meetings of creditors thereon :—*Held :* the deed was not for the benefit of all the creditors generally & could not be relied upon as an act of insolvency under Insolvency Stat. 1871 (No. 379), s. 37 (1).—*Re* THOMAS & COWIE (1883), 9 V. L. R. 2.—**AUS.**

425 vi. ——— ———.]—An assignment of substantially all debtor's property, the assignee covenanting to pay the creditors named in a schedule, which does not include all of the creditors, is an act of bkpcy., under Debtors & Creditors Act, 1876.—*Re* BROWN, *Ex p.* MIDDLETON (1883), 2 N. Z. L. R. 189.—**N.Z.**

425 vii. ——— ——— *Creditors omitted from schedule by mistake.*]—The intention of an assignment for the benefit of creditors generally was to include all creditors, but some were omitted from the schedule by mistake :—*Held :* the deed did not *per se* constitute an act of insolvency.—*Re* HASLAM (1877), 3 V. L. R. 10.—**AUS.**

425 viii. ——— ——— *Only such creditors as trustee should approve of benefited.*]— The execution of an assignment for the benefit of such creditors as the trustees may approve of is not an act of insolvency under Insolvency Stat., 1871 (No. 379), s. 37 (1).—*Re* WIEDEMAN (1879), 5 V. L. R. 32.—**AUS.**

425 ix. ——— ——— ———.] — Debtor executed a deed of assignment of his property to a trustee in trust for the benefit of all his creditors who should by reasonable efforts satisfy the trustee that they were entitled to be included as creditors : — *Held :* the deed was an assignment for the benefit of creditors generally, & within Insolvency Act, 1897 (No. 1513), s. 106.—*Re* DOBSON, *Ex p.* BEATH, SCHIESS & Co. (1905), 2 C. L. R. 277.—**AUS.**

425 x. ——— ——— *Trustee with power to pay creditors at discretion.*]—A deed of assignment for the benefit of creditors, which empowers the trustee to pay certain preferential claims in full, others not at all, at his discretion is not an act of insolvency.—*Re* THONEMAN (1886), 12 V. L. R. 691.—**AUS.**

425 xi. ——— *General assignment of all effects.*] — A debtor's trust deed of assignment, executed for the benefit of all his creditors, complied with the forms of 20 & 21 Vict. c. 60, s. 93 :—*Held :* not an act of bkpcy. under s. 92, being protected by s. 93, when more than three months elapsed between its execution & the bkpcy.—*Re* PHELAN (1862), 7 Ir. Jur. 281 (B.).—**IR.**

425 xii. ——— ——— *Equivalent to declaration of insolvency.*] — HARROLD *v.* WALLIS (1862), 9 Gr. 443.—**CAN.**

425 xiii. ——— ——— *Delivered as escrow.*] —A deed of assignment to a trustee for creditors, signed by debtor & attested, was handed to the solr. for the trustee & for a number of the creditors, with a letter stating that it was handed over as an escrow until executed by the trustee & by all the creditors. It was executed by the trustee & by all the creditors except two :—*Held :* the deed operated as an assignment, notwithstanding the condition attached in the letter.—*Re* GOODE, *Ex p.* MANTTAN (1893), 13 N. Z. L. R. 47. —**N.Z.**

425 xiv. ——— ——— ———.]—Debtor, by deed, assigned his estate for the benefit of his creditors who should afterwards sign it, & delivered it to the trustees on the alleged condition that it was to be of no effect until all his creditors signed it. Some of the creditors signed it, but it did not appear that they were aware of any such condition :—*Held :* in respect of these creditors the deed had an immediate effect, & was not an escrow, & was an act of bkpcy.—*Re* INFIELD (1894), 12 N. Z. L. R. 582.—**N.Z.**

Sect. 2.—What is an act of bankruptcy: Sub-sects. 1 & 2, A.]

—*Re* A DISPUTED ADJUDICATION (1861), 3 L. T. 634.

A conveyance for the benefit of a class may be an act of bankruptcy as a fraudulent conveyance under 1914 *Act, s.* 1 (1) (*b*), *or as a fraudulent preference under s.* 1 (1) (*c*) *of that Act.*

430. Proof of act of bankruptcy—Admissibility of—Unregistered deed of assignment.]—An unregistered deed of assignment of all debtor's property to trustees for the benefit of creditors is receivable in evidence for the purpose of establishing an act of bkpcy., notwithstanding 1861 Act, s. 194.—*Re* MEW & THORNE (1861), 5 L. T. 435.

431. —— —— —— Deed unstamped.]—An assignment of the principal part of the assignor's property for the benefit of creditors may be given in evidence as an act of bkpcy., although not registered under 1861 Act & unstamped.—*Re* WENSLEY, *Ex p.* WENSLEY (1862), 1 De G. J. & Sm. 273; 1 New Rep. 183; 32 L. J. Bcy. 23; 7 L. T. 548; 9 Jur. N. S. 315; 11 W. R. 241; 46 E. R. 110, L. C.

Annotations :—**Dbtd.** *Re* Barron, *Ex p.* Potter (1864), 3 De G. J. & Sm. 240. **Apld.** Ponsford *v.* Walton (1868), L. R. 3 C. P. 167. **Refd.** Hobson *v.* Thelluson (1867), L. R. 2 Q. B. 642. **Mentd.** Young *v.* Fletcher (1865), 3 H. & C. 732; *Re* Nurse, *Ex p.* Foxley (1868), 17 L. T. 623.

432. —— —— —— ——.]—An assignment of the whole of a debtor's property for the benefit of creditors may be given in evidence as an act of bkpcy., though unstamped, & not registered under 1861 Act.—*Re* GOULDWELL, *Ex p.* SQUIRE (1868), 4 Ch. App. 47; 38 L. J. Bcy. 13; 19 L. T. 272; 17 W. R. 40, L. JJ.

Annotation :—**Mentd.** *Re* Gunsbourg, *Ex p.* Trustee, [1918–19] B. & C. R. 108.

433. —— —— —— ——.]—A deed of assignment may be given in evidence as proof of an act of bkpcy., though neither stamped nor registered, on the ground that it is given in evidence for a collateral purpose, & not to give effect to it as a valid instrument.—PONSFORD *v.* WALTON (1868), L. R. 3 C. P. 167; 37 L. J. C. P. 113; 17 L. T. 511; 16 W. R. 363.

Annotations :—**Folld.** *Re* Gouldwell, *Ex p.* Squire (1868), 4 Ch. App. 47, L. JJ. **Mentd.** Selby *v.* Graves (1868), 19 L. T. 186; *Re* Hughes, *Ex p.* Hughes (1893), 62 L. J. Q. B. 358; *Re* Gunsbourg, *Ex p.* Trustee, [1918–19] B. & C. R. 108.

434. —— —— —— ——.]—Where the act of bkpcy. relied upon in support of a petition is the assignment by a debtor of his property to a trustee for the benefit of his creditors, the deed of assignment is admissible in evidence in support of such petition, even though unstamped & unregistered.—*Re* HOLLINGSHEAD, *Ex p.* HEAPY (1889), 58 L. J. Q. B. 297; 60 L. T. 273; 37 W. R. 415; 6 Morr. 66, D. C.

435. —— —— Unstamped deed.]—A deed purporting to assign all debtor's property for the benefit of his creditors, if unstamped, is inadmissible as evidence of an act of bkpcy.—*Re* BARRON, *Ex p.* POTTER (1864), 3 De G. J. & Sm. 240; 34 L. J. Bcy. 46; 11 L. T. 435; 11 Jur. N. S. 49; 13 W. R. 189; 46 E. R. 628, L. C.

Annotation :—**Dbtd.** Ponsford *v.* Walton (1868), L. R. 3 C. P. 167.

436. —— —— ——.]—An unstamped agreement is receivable in evidence to prove an act of bkpcy.—*Re* GUNSBOURG, *Ex p.* TRUSTEE (1919), 88 L. J. K. B. 562; [1918–19] B. & C. R. 108.

437. —— Office copy of deed primâ facie evidence—Of execution of registered deed on date appearing in copy.]—Upon the hearing of a bkpcy. petition, the only evidence adduced to prove the act of bkpcy. alleged—that debtor had executed an assignment of all his property for the benefit of his creditors—was an office copy of a deed, registered under 1887 Act, purporting to be executed by debtor :—*Held :* the office copy was, by reason of s. 11, sufficient *primâ facie* evidence of the execution of the registered deed by debtor, & of its execution on the date appearing in the office copy.—*Re* SLATER, *Ex p.* SLATER (1897), 76 L. T. 704; 4 Mans. 118, C. A.

SUB-SECT. 2.—FRAUDULENT CONVEYANCES, GIFTS, DELIVERIES, OR TRANSFERS.

NOTE.—*Assignments fraudulent under* 13 *Eliz. c.* 5, *are acts of bkpcy. under* 1914 *Act, s.* 1 (1) (*b*). *As to what assignments are fraudulent under* 13 *Eliz. c.* 5, *& at common law, see* FRAUDULENT & VOIDABLE CONVEYANCES.

A. In General.

438. "In England or elsewhere"—Conveyance governed by English law.]—The words in 1869 Act, s. 6, "that debtor has in England or elsewhere made a fraudulent conveyance, etc., of his property or any part thereof" mean fraudulent by the law of England, & cannot properly apply to a conveyance which is executed in, & is to operate according to the law of, a foreign country.—*Re* CRISPIN, *Ex p.* CRISPIN (1873), 8 Ch. App. 374; 42 L. J. Bcy. 65; 28 L. T. 483; 37 J. P. 391; 21 W. R. 491, L. C. & L. J.

Annotations :—**Apprvd.** Cooke *v.* Vogeler Co., [1901] A. C. 102, H. L. **Mentd.** *Re* Myer, *Ex p.* Pascal (1876), 1 Ch. D. 509, C. A.; *Re* Gutierrez, *Ex p.* Gutierrez (1879), 11 Ch. D. 298, C. A.; *Re* Trench, *Ex p.* Brandon (1884), 25 Ch. D. 500, C. A.; *Re* A. B. (1900), 82 L. T. 169, C. A.

See, further, Nos. 399-401, *ante.*

439. "Fraudulent" — Significance in bankruptcy.]—The word "fraudulent" has received long since, with reference to bkpcy. questions, a particular signification, different from that in which it is ordinarily used. (KNIGHT BRUCE, V.-C.).—*Re* MARSHALL, *Ex p.* ZWILCHENBART (1844), 3 Mont. D. & De G. 671; *affd.* (1846), De G. 273, L. C.

Annotations :—**Mentd.** Graham *v.* Chapman (1852), 12 C. B. 85; Leake *v.* Young (1856), 5 E. & B. 955; *Re* Sinclair, *Ex p.* Chaplin (1884), 26 Ch. D. 319, C. A.

440. What conveyances, gifts, deliveries or transfers—Conveyance calculated to postpone creditor.]—A conveyance, calculated to postpone one creditor to the rest :—*Held :* an act of bkpcy.—GAYNER'S CASE (1755), 1 Burr. 477; 2 Keny. 230; 97 E. R. 412.

Annotation :—**Mentd.** Alderson *v.* Temple (1768), 4 Burr. 2235.

441. —— Conveyance of whole effects to particular creditor.]—A conveyance by a trader of his whole substance to a particular creditor :—*Held :* an act of bkpcy.—WORSELEY *v.* DEMATTOS (1758), 1 Burr. 467; 2 Keny. 218; 97 E. R. 407.

Annotations :—**Expld.** Law *v.* Skinner (1775), 2 Wm. Bl. 996. **Consd.** Hartley *v.* Smith (1819), Buck, 368; Strachan *v.* Barton (1856), 11 Exch. 647. **Expld.** Lee *v.* Hart (1856), 11 Exch. 880, Ex. Ch. **Consd.** Lomax *v.* Buxton (1871), L. R. 6 C. P. 107. **Refd.** Harman *v.* Fishar (1774), 1 Cowp. 117; Butcher *v.* Easto (1779), 1 Doug. K. B.

PART II. SECT. 2, SUB-SECT. 2.—A.

440 i. *What conveyances, gifts, deliveries or transfers—Agreement amounting to equitable charge.*]—A debtor, indebted to a firm of auctioneers, on being pressed for payment, placed his business in their hands for sale, at the same time giving them an order to pay out of the proceeds the sum of £178 14*s.*, the balance due to a creditor on an agreement to mtge. the business, to retain the amount of their own debt, & to pay the balance to debtor. He also verbally instructed the auctioneers to pay an amount due to another creditor. On the sale of the business by the auctioneers the proceeds were applied in paying the amounts under debtor's order, & after deducting commission on the sale they paid the balance to debtor :—*Held :* the direction to pay the amount due under the agreement to mtge. was not an act of bkpcy.—*Re* WALTON, OFFICIAL ASSIGNEE IN BANKRUPTCY *v.* MCKAY BROTHERS (1909), 28 N. Z. L. R. 948.—**N.Z.**

295 Baxter *v.* Pritchard (1834), 1 Ad. & El. 456; Siebert *v.* Spooner (1836), 1 M. & W. 714; Lindon *v.* Sharp (1843), 6 Man. & G. 895; Young *v.* Waud (1852), 8 Exch. 221; Smith *v.* Timms (1863), 1 H. & C. 849, Ex. Ch.; *Re* Hughes, *Ex p.* Hughes (1893), 68 L. T. 629, C. A.

442. —— —— Exception of part of trade effects.]—An insolvent debtor must not assign all or nearly all his effects to one creditor, so as to put it out of debtor's power to carry on his trade, but an assignment is not necessarily fraudulent when it does not include the whole of the trade effects.—THE HEART OF OAK (1869), 39 L. J. Adm. 15; 21 L. T. 727; 3 Mar. L. C. 317.

Annotation :—**Mentd.** The Mullingar (1872), 26 L. T. 326.

443. —— Conveyance or grant to defraud creditors.]—All acts to defraud creditors or the public laws of the land are void; & if the nature of the act be a conveyance or grant, it is not only void, but an act of bkpcy.—ALDERSON *v.* TEMPLE (1768), 4 Burr. 2235; 1 Wm. Bl. 660; 98 E. R. 165.

Annotations :—**Folld.** Harman *v.* Fishar (1774), 1 Cowp. 117. **Apprvd.** Marks *v.* Feldman (1870), L. R. 5 Q. B. 275, Ex. Ch. **Refd.** Cook *v.* Rogers (1831), 7 Bing. 438; Belcher *v.* Prittie (1834), 10 Bing. 408. **Mentd.** Janson *v.* Willson (1779), 1 Doug. K. B. 257; Whitfield *v.* Savage (1800), 2 Bos. & P. 277; Hartshorn *v.* Slodden (1801), 2 Bos. & P. 1582; Nichols *v.* Clent (1817), 3 Price, 547; Jones *v.* Yates (1829), 9 B. & C. 532; Fox *v.* Chester (1829), 3 Bli. N. S. 123, H. L.; *Re* Craven & Marshall, *Ex p.* Craven (1870), L. R. 10 Eq. 648.

444. —— Assignment by way of mortgage.]—An assignment of all one's stock-in-trade, together with two leasehold houses, to a creditor, by way of mtge., is an act of bkpcy., & renders void as well the mtge. of the houses as of the goods.—LAW *v.* SKINNER (1775), 2 Wm. Bl. 996; 96 E. R. 585.

Annotations :—**Refd.** Newton *v.* Chantler (1805) 3 Smith K. B. 137; Baxter *v.* Pritchard (1834), 1 Ad. & El. 456; Lindon *v.* Sharp (1843), 7 Scott, N. R. 730. **Mentd.** Lomax *v.* Buxton (1871), 40 L. J. C. P. 150.

445. —— Assignment made in contemplation of bankruptcy.]—An assignment of a lease, part of bkpt.'s estate, made in contemplation of a bkpcy., to some of the creditors, is an act of bkpcy.—DEVON *v.* WATTS (1779), 1 Doug. K. B. 86; 99 E. R. 59.

Annotations :—**Refd.** Baxter *v.* Pritchard (1834), 1 Ad. & El. 456; Graham *v.* Chapman (1852), 12 C. B. 85.

446. —— Surrender of copyhold.]—A fraudulent surrender of a copyhold estate is not an act of bkpcy. under 1 Jac. 1, c. 15, s. 2 (1).—*Re* RIDEHALGUE, *Ex p.* COCKSHOTT (1792), 3 Bro. C. C. 502; 29 E. R. 668.

447. —— Bill of sale in trust to pay creditor—Surplus to debtor.]—The executing a bill of sale of all a trader's stock & effects to pay certain debts, the overplus, if any, to be accounted for to himself, is an act of bkpcy.—BUTCHER *v.* EASTO (1779), 1 Doug. K. B. 295; 99 E. R. 191.

Annotations :—**Folld.** Newton *v.* Chantler (1806), 7 East, 138. **Refd.** Baxter *v.* Pritchard (1834), 1 Ad. & El. 456; Lindon *v.* Sharp (1843), 7 Scott, N. R. 730; Harrison *v.* Cohen (1875), 32 L. T. 717. **Mentd.** Bailie *v.* Grant (1832), 9 Bing. 121, H. L.

448. —— —— ——.]—A bill of sale to a particular creditor of all the effects of a trader, in trust to satisfy his debt & pay over the surplus, if any, to the trader, is an act of bkpcy., & of no effect as a conveyance, notwithstanding it was given by the trader when under arrest at the suit of the particular creditor for a just debt, & followed by an immediate change of possession. There was another writ out against the trader at the time, & he knew that he was in insolvent circumstances, but it did not appear that these facts were known to the particular creditor.—NEWTON *v.* CHANTLER (1806), 7 East, 138; 3 Smith K. B. 137; 103 E. R. 53.

Annotations :—**Folld.** Siebert *v.* Spooner (1836), 1 M. & W. 714. **Refd.** Gibson *v.* Boutts (1836), 3 Scott, 229; *Re* Hunt, *Ex p.* Simpson (1844), De G. 9; Woodhouse *v.* Murray (1867), 36 L. J. Q. B. 289. **Mentd.** Cannan *v.* Smith (1853), 1 C. L. R. 179; Smith *v.* Cannan (1853), 17 Jur. 911, Ex. Ch.

449. —— Assignment to indemnify surety.]—A trader assigned by deed to S. a copyhold tenement & all his goods, chattels & personal estate, to indemnify deft. as surety for him. The trader continued in credit three years after the assignment :—*Held :* this was an act of bkpcy.—HASSELLS *v.* SIMPSON (1784), 1 Doug. K. B. 89, n.; 99 E. R. 60; *S. C.* in Chancery (1781), 1 Bro. C. C. 99; Dick. 583.

Annotations :—**Refd.** Hartshorn *v.* Slodden (1801), 2 Bos. & P. 582; Baxter *v.* Pritchard (1834), 1 Ad. & El. 456; Siebert *v.* Spooner (1836), 1 M. & W. 714; Lindon *v.* Sharp (1843), 7 Scott, N. R. 730; Harrison *v.* Cohen (1875), 32 L. T. 717.

450. —— Fraudulent grant from partner to partner.]—Where one partner makes a fraudulent grant by deed to another partner, it is an act of bkpcy. in the former, but not in the latter.—WHITWELL *v.* THOMPSON (1793), 1 Esp. 68.

Annotations :—**Mentd.** Lindon *v.* Sharp (1843), 6 Man. & G. 895; Graham *v.* Chapman (1852), 12 C. B. 85.

451. —— Antenuptial settlement.]—An antenuptial settlement may be an act of bkpcy.—*Ex p.* MAYOR (1816), Mont. 292.

See, now, 1914 Act, s. 42 (2).

452. —— Deed of grant providing for grantor remaining in possession.] — *Semble :* a deed of grant of personal chattels, containing a stipulation for the grantor's continuing conditionally in possession, is not for that reason fraudulent & an act of bkpcy.—HARTLEY *v.* SMITH (1819), Buck, 368.

Annotations :—**Mentd.** Pott *v.* Turner (1830), L. & Welsb. 293; Cattell *v.* Corrall (1840), 4 Y. & C. Ex. 228; Pyrke *v.* Waddingham (1852), 10 Hare, 1.

453. —— Voluntary conveyance granted to give preference to particular creditors.]—A fraudulent conveyance, made voluntarily by a trader, in order to give a preference to particular persons to the prejudice of his general creditors, is an act of bkpcy., although bkpt. subsequently continued to carry on his trade for three years, at the end of which time a commission issued.—PULLING *v.* TUCKER (1821), 4 B. & Ald. 382; 106 E. R. 977.

Annotations :—**Expld.** Gibbins *v.* Phillipps (1827), 7 B. & C. 529. **Apld.** Botcherby *v.* Lancaster (1834), 1 Ad. & El. 77. **Distd.** Cattel *v.* Corral (1840), 9 L. J. Ex. Eq. 37. **Apld.** Stanger *v.* Wilkins (1855), 19 Beav. 626. **Refd.** Young *v.* Fletcher (1865), 6 New Rep. 162. **Mentd.** Brittain *v.* Brown & Millar (1871), 24 L. T. 504.

454. —— —— Bill of sale given to protect sister.]—A. carried on very extensive coal & iron works at several different places in the county of Stafford. His dishonoured acceptances exceeded £4000. A list of debts due from A. amounted to £12,000 exclusive of bills running, & £26,000 owing to his bankers at Stourbridge. A. went to London without leaving funds to satisfy the creditors who called during his absence. A. had entered into a bond to G. for £42,500. A. went to M., an attorney at Birmingham, & directed him to prepare a warrant of attorney to confess judgment for £6,000 to his brothers T. & J. & to prepare a bill of sale of his furniture for securing £700 to his sister to whom he was indebted in £550 :—*Held :* the act moved from bkpt. not by any pressure upon him, & there were circumstances of fraud sufficient to constitute the bill of sale

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447 i. —— *Bill of sale—Not to be registered.*]—Bkpt. gave a bill of sale to a co., on the mutual understanding that it should not be registered :—*Held :* an intention to defeat & delay creditors must be presumed.—*Re* LEMON, *Ex p.* OFFICIAL ASSIGNEE, COLONIAL FINANCE, MORTGAGE INVESTMENT & GUARANTEE CORPN., LTD., RESPONDENTS (1894), 15 N. S. W. B. 90.—AUS.

Sect. 2.—What is an act of bankruptcy: Sub-sect. 2, A.]

an act of bkpcy.—GIBBINS *v.* PHILLIPPS (1827), 7 B. & C. 529; 2 Man. & Ry K. B. 238; 6 L. J. O. S. K. B. 98; 108 E. R. 820; *subsequent proceedings* (1828), 8 B. & C. 437.

Annotations:—**Mentd.** *Re* Hunt, *Ex p.* Simpson (1844), 14 L. J. Bcy. 1; Bills *v.* Smith (1865), 5 New Rep. 364.

455. —— Clandestine removal of goods—To avoid execution.]—The clandestine removal of goods to preserve them from an execution is not an act of bkpcy.—COLE *v.* DAVIES (1699), 1 Ld. Raym. 724; 91 E. R. 1383.

Annotations:—**Consd.** Isitt *v.* Beeston (1869), 38 L. J. Ex. 89. **Mentd.** Brassey *v.* Dawson (1733), Cunn. 65; Ryall *v.* Rowles (1750), 1 Ves. Sen. 348; Cooper *v.* Chitty (1756), 1 Burr. 20; Balme *v.* Hutton (1833), 9 Bing. 471, Ex. Ch.; Garland *v.* Carlisle (1837), 11 Bli. N. S. 421, H. L.; Gladstone *v.* Padwick (1871), L. R. 6 Exch. 203.

456. —— Delivery for safe custody.]—The delivery of goods to a person for mere safe custody, & to prevent their being seized by a creditor, is not an act of bkpcy., although the person to whom they are delivered is a creditor.

A "delivery" must give some right of property in the goods to the person to whom they are delivered.—COTTON *v.* JAMES (1829), Dan. & Ll. 262; 1 Mood. & M. 273; 7 L. J. O. S. K. B. 125.

Annotations:—**Folld.** Isitt *v.* Beeston (1869), L. R. 4 Exch. 159. **Refd.** *Re* Hunt, *Ex p.* Simpson (1844), 14 L. J. Bcy. 1. **Mentd.** Mercer *v.* Whall (1845), 5 Q. B. 447.

457. —— Delivery to person to whom no debt due.]—A fraudulent delivery of goods by a trader will be of itself an act of bkpcy. A delivery of goods to one, to whom no debt was due, would be such a fraudulent delivery.—SCOTT *v.* THOMAS (1834), 6 C. & P. 611.

458. —— Drawing cheques on eve of bankruptcy—To particular creditors.]—S. having made up his mind to suspend payment, drew three cheques on his bankers in favour of three creditors for immediate payment & ordered them to pay no more. There was no pressure exercised by the three creditors:—*Held:* S. in issuing the cheques had committed an act of bkpcy. capable of supporting a fiat.—*Re* HUNT, *Ex p.* SIMPSON (1844), De G. 9; 14 L. J. Bcy. 1; 4 L. T. O. S. 143; 8 Jur. 1150, Ct. of R.

459. —— —— To defeat creditor suing.]—Debtor, on the eve of bkpcy., drew out his balance at his bankers & sent it to K., who was employed by him as accountant. His object in sending the money to K. was to prevent its being attached by a creditor, who had issued a writ against him. K. refused to accept it unless debtor consented to his paying himself out of it. After some discussion, debtor agreed to this, & K. appropriated part of the sum entrusted to him, in satisfaction of his own debt. The evidence did not establish that there had been any previous pressure for payment:—*Held:* the act of debtor in drawing out the balance from the bankers for the purpose of defeating the creditor who was suing him was in itself an act of bkpcy.—*Re* LIEBERT, *Ex p.* HALLIDAY (1873), 8 Ch. App. 283; 28 L. T. 324; 21 W. R. 348, L. JJ.

460. —— Conveyance to protect property from demands of other creditors.]—A., a trader, being in difficulties, & having five executions against him, all his goods were conveyed to deft. by bill of sale from the sheriff, with an understanding that they should remain on A.'s premises to enable him to repurchase them. The jury having found that the object of the transaction was, not merely to relieve A. from a forced sale of his goods, but also to protect them from the demands of other creditors:—*Held:* the transaction was an act of bkpcy.—GRAHAM *v.* FURBER (1854), 14 C. B. 410; 23 L. J. C. P. 51; 22 L. T. O. S. 242; 18 Jur. 226; 2 W. R. 163; 2 C. L. R. 452; 139 E. R. 169.

Annotations:—**Consd.** Brewin *v.* Short (1855), 5 E. & B. 227. **Apld.** Krell *v.* Great Central Gas Consumers Co. (1870), L. R. 5 Exch. 289. **Apprvd.** *Re* Seaman, *Ex p.* Furness Finance Co., [1896] 1 Q. B. 412. **Mentd.** *Re* Jenvey (1854), 24 L. T. O. S. 192; *Re* O'Shea's Settlmt., Courage *v.* O'Shea, [1895] 1 Ch. 325, C. A.

461. —— Assignment by continuing partner—In trust to pay joint creditors—Then debt due to deceased partner's estate — Resulting trust to debtor.]—A. & B. carried on partnership; A. died, & a considerable sum was due from the partnership to his estate. B. continued the trade, with the assent of the exors., but at the end of six months they insisted on payment, or that the business should be wound up, whereupon B. assigned to them his share in all the partnership assets, upon trust to pay the joint creditors, & then the debt due to A's. estate, & the residue to B. Upon B.'s subsequent bkpcy.:—*Held:* the assignment was not an act of bkpcy.—PAYNE *v.* HORNBY (1858), 25 Beav. 280; 53 E. R. 643.

462. —— Agreement to give bill of sale.]—An agreement to give a bill of sale is not & cannot be an act of bkpcy.—MERCER *v.* PETERSON (1868), L. R. 3 Exch. 104; 37 L. J. Ex. 54; 18 L. T. 30; 16 W. R. 486, Ex. Ch.

Annotations:—**Consd.** Jones *v.* Harber (1870), L. R. 6 Q. B. 77. **Refd.** *Re* King, *Ex p.* King (1876), 2 Ch. D. 256, C. A. **Mentd.** Bew *v.* Bill (1868), 16 W. R. 760; *Re* Nurse, *Ex p.* Foxley (1868), 3 Ch. App. 515, L. JJ.; Allen *v.* Bonnett (1870), 5 Ch. App. 577, L. C. & L. J.; Lomax *v.* Buxton (1871), L. R. 6 C. P. 107; *Re* Ash, *Ex p.* Fisher (1872), 7 Ch. App. 636, L. JJ.; Philps *v.* Hornstedt (1875), 1 Ex. D. 62, Ex. Ch.; Heath *v.* Cochrane (1877), 37 L. T. 280; *Re* Barker, *Ex p.* Kilner (1879), 13 Ch. D. 245, C. A.; *Re* Hemingway, *Ex p.* Hauxwell (1883), 23 Ch. D. 626, C. A.

463. —— Delivery to warehouseman.]—Eight days before his bkpcy., bkpt. caused his household furniture & stock-in-trade to be removed from his premises to the warehouse of deft., who advanced money on the security of the goods without any knowledge of the state of the trader's affairs:—*Held:* neither the removal of the goods nor the delivery of them to deft. was, in the absence of anything showing an intention to transfer the property to him, a "fraudulent delivery or transfer," so as to constitute an act of bkpcy. within 1849 Act.—ISITT *v.* BEESTON (1869), L. R. 4 Exch. 159; 38 L. J. Ex. 89; 20 L. T. 371; 17 W. R. 620.

464. —— Conveyance under pressure — No fraud or intention to prefer.]—R., a trader, under pressure assigned all his property to pltf., a creditor, without fraud & without intention to prefer. R. was at the time insolvent, & was a few days afterwards adjudged a bkpt. on his own petition:—*Held:* as the assignment could not be avoided as an act of bkpcy., it was not fraudulent & voidable by the assignees without fraud in fact.—JONES *v.* HARBER (1870), L. R. 6 Q. B. 77; 40 L. J. Q. B. 59; 23 L. T. 606; 19 W. R. 248.

465. —— Bill of sale of all effects—Except stock-in-trade & book debts.]—D., a trader, executed a bill of sale of all his furniture & other effects mentioned in the schedule, which did not include by description D.'s stock-in-trade or his book debts. D. subsequently filed a liquidation petition. The bill of sale was duly registered, & possession was taken of the property by the mtgee. three days before the petition was filed:—*Held:* the bill of sale was good as against the trustee, as it was not proved that the whole of debtor's property was included in the bill of sale.—*Re* DUNGATE, *Ex p.* CHESTER (1874), 1 Ch. D. 293, n.

466. —— Authority to sell security.]—Deft. received from M., a member of a trading firm, a bill of lading for brandy, for the purpose of landing & warehousing it, which he did, entering the brandy (at M.'s request) in his own name & paying charges amounting to £47. Afterwards & whilst he still had the bill of lading in his possession, an acceptance, which had been given by the firm to deft. falling due, & the firm not being able to meet it, deft. consented to take an acceptance at seven days for a balance of account, including the £47, upon receiving M.'s authority to sell the brandy if the bill were not met. The acceptance not being met, deft. sold the brandy. The transaction was *bonâ fide*, but the brandy formed in fact the whole property of the firm:—*Held:* although the transaction under which deft. obtained power to sell the brandy might be a "conveyance, gift, delivery, or transfer" within 1869 Act. s. 6 (2), it was not "fraudulent" within the Act.—PHILPS *v.* HORNSTEDT (1875), 1 Ex. D. 62, Ex. Ch.

Annotations:—**Consd.** *Re* Baum, *Ex p.* Cooper (1878), 10 Ch. D. 313, C. A. **Mentd.** Pattison *v.* Luckley (1875), 44 L. J. Ex. 180.

467. —— Assignment under stock exchange rules.]—The assignment of the assets of a defaulting member of the Stock Exchange under its rules amounts to a *cessio bonorum*, & constitutes an act of bkpcy.—TOMKINS *v.* SAFFERY (1877), 3 App. Cas. 213; 47 L. J. Bcy. 11; 37 L. T. 758; 26 W. R. 62, H. L.

Annotations:—**Refd.** Richardson *v.* Stormont, Todd, [1900] 1 Q. B. 701, C. A.; Lomas *v.* Graves, [1904] 2 K. B. 557, C. A. **Mentd.** Pearson *v.* Scott (1878), 9 Ch. D. 198; *Re* Plumbly, *Ex p.* Grant (1880), 13 Ch. D. 667, C. A.; *Re* Sharp, *Ex p.* Gundry *v.* Johnston (1900), 83 L. T. 416; Ratcliff & Dealtry *v.* Mendelssohn, [1902] 2 K. B. 653, C. A.; *Re* Halstead, *Ex p.* Richardson, [1916] 2 K. B. 902.

468. —— ——.]—The assignment by a defaulting member of the Stock Exchange of all his assets to the official assignee of the Stock Exchange for the benefit of his creditor, is an act of bkpcy.—PONSFORD, BAKER & CO. *v.* UNION OF LONDON & SMITH'S BANK, [1906] 2 Ch. 444; 75 L. J. Ch. 724; 95 L. T. 333; 22 T. L. R. 812; 13 Mans. 321, C. A.

Annotations:—**Mentd.** McCarthy *v.* Capital & Counties Bank, [1911] 2 K. B. 1038, C. A.; *Re* A Debtor (No. 211 of 1912), [1912] 2 K. B. 533, C. A.

469. —— Conveyance with fraudulent intention.]—In order to constitute an act of bkpcy. under 1883 Act, s. 4 (1) (*b*) (*see, now*, 1914 Act, s. 1 (1) (b)), there must be a conveyance, gift, delivery, or transfer of debtor's property, or part thereof, with a fraudulent intention.—*Re* SPACKMAN, *Ex p.* FOLEY (1890), 24 Q. B. D. 728; 59 L. J. Q. B. 306; 62 L. T. 849; 38 W. R. 497; 7 Morr. 100, C. A.

Annotations:—**Apld.** *Re* Hughes, *Ex p.* Hughes, [1893] 1 Q. B. 595, C. A.; *Re* Pollitt, *Ex p.* Minor, [1893] 1 Q. B. 175; *Re* Whitlock, *Ex p.* Official Receiver (1893), 1 Mans. 33. **Consd.** *Re* Sharp, *Ex p.* Gundry *v.* Johnston (1900), 83 L. T. 416. **Apld.** *Re* David & Adlard, *Ex p.* Whinney, [1914] 2 K. B. 694. **Folld.** Radcliffe *v.* Abbey Road & St. John's Wood Permanent Bldg. Soc. (1918), 87 L. T. Ch. 557. **Mentd.** *Re* Simonson, *Ex p.* Ball (1891), 1 Mans. 30, C. A.

470. —— Agreement to assign included in deed of sale—Assignment not made.]—Debtor sold his business, & the purchaser agreed by deed, on debtor assigning the rest of his assets, to pay such of debtor's creditors as would accept a composition. The remaining assets were not assigned, & debtor became bkpt:—*Held:* the deed was not given to defraud or delay creditors, & was not void.—*Re* GILLO, *Ex p.* DOLLAR (1891), 8 Morr. 157.

471. —— Conveyance for benefit of defrauded cestuis que trust—Granted to shield debtor from consequences of breach of trust.]—Bkpt. two days before his bkpcy. executed a deed by which he conveyed an estate to a person upon trust to raise thereout by sale or mtge. £4,200 & therewith to make good certain breaches of trust:—*Held:* the deed was not a fraudulent preference within 1883 Act, s. 48, because the object of bkpt. was not to prefer some creditors to others but to shield himself from the consequences of the breaches of trust.—SHARP *v.* JACKSON, [1899] A. C. 419; 68 L. J. Q. B. 866; 80 L. T. 841; 15 T. L. R. 418; 6 Mans. 264, H. L.; *affg.* S. C. *sub nom.* NEW, PRANCE & GARRARD'S TRUSTEE *v.* HUNTING, [1897] 2 Q. B. 19, C. A.

Annotations:—**Apld.** Hermoux *v.* Harbord (1898), 14 T. L. R. 243. **Apprvd.** *Re* Blackburn, Buckley's Case, [1899] 2 Ch. 725. **Apld.** *Re* Vantin, *Ex p.* Saffery, [1900] 2 Q. B. 325. **Distd.** *Re* Blackpool Motor Car Co., Hamilton *v.* Blackpool Motor Car Co., [1901] 1 Ch. 77. **Apld.** *Re* Pidcock, Penny *v.* Pidcock (1907), 51 Sol. Jo. 514. **Refd.** *Re* Lake, *Ex p.* Dyer, [1901] 1 K. B. 710, C. A.; Wigan *v.* English & Scottish Law Life Assce. Assocn., [1909] 1 Ch. 291. **Mentd.** Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231, C. A.; *Re* Cozens, Green *v.* Brisley, [1913] 2 Ch. 478.

472. Of what property—Property excepted must be substantial.]—A colourable exception of part of the effects assigned will not prevent the operation of bkpcy. laws.—WILSON *v.* DAY (1759), 2 Burr. 827; 97 E. R. 583.

Annotations:—**Distd.** Law *v.* Skinner (1775), 2 Wm. Bl. 996. **Consd.** Siebert *v.* Spooner (1836), 1 M. & W. 714. **Refd.** Morgan *v.* Horseman (1810), 3 Taunt. 241; Smith *v.* Timms (1863), 1 H. & C. 849, Ex. Ch.; Woodhouse *v.* Murray (1867), 36 L. J. Q. B. 289. **Mentd.** Young *v.* Fletcher (1865), 11 Jur. N. S. 449.

473. —— ——.]—An assignment of all, except a trifle, of a man's stock-in-trade in favour of particular creditors, just before an act of bkpcy. committed, is fraudulent & void as against his assignees in bkpcy.—COMPTON *v.* BEDFORD (1762), 1 Wm. Bl. 362; 96 E. R. 202.

Annotations:—**Refd.** Hooper *v.* Smith (1763), 1 Wm. Bl. 441; Law *v.* Skinner (1775), 2 Wm. Bl. 996; Baxter *v.* Pritchard (1834), 1 Ad. & El. 456; *Re* Barrell, *Ex p.* Bailey (1853), 3 De G. M. & G. 534, L. JJ.; Goodricke *v.* Taylor (1863), 2 Hem. & M. 380.

474. —— —— Furniture & book debts of small value excepted.]—An assignment of the machinery

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472 i. *Of what property.*]—An assignment on the face of the instrument of all bkpt.'s estate to one creditor is an act of bkpcy. *per se. Qu.:* whether anything short of this is such an act.—KERR *v.* COLEMAN (1850), 6 U. C. R. 218.—**CAN.**

472 ii. —— *Property excepted must be substantial.*]—A deed of sale executed by bkpt. to a creditor conveyed all bkpt.'s stock-in-trade, but evidence *aliunde* showed that the residue of his property was of some value:—*Held:* the deed constituted an act of bkpcy.—*Re* O'BRIEN (1862), 7 Ir. Jur. 148.—**IR.**

472 iii. —— —— *Exception of book debts.*]—Where an assignment of a trader's property must result in the stoppage of his business, & prevent him from paying other creditors, such assignment is an act of bkpcy. Excepting from the assignment of a trader's chattels all the book debts due to him, but still leaving him in possession of the chattels assigned, is not such an exception as to prevent the assignment from being an act of bkpcy.; all the property purporting to be assigned by such a bill of sale passes to the assignees.—*Re* LILBURNE (1865), 12 L. T. 209.—**IR.**

472 iv. —— *Stock-in-trade—On creation of partnership.*]—H., on entering into partnership with B., assigned to B. all his stock-in-trade in consideration of B. accepting a bill drawn by H. upon B. in favour of his (H.'s) bankers, & handed them in part payment of his (H.'s) overdraft with them. H. had at the time other debts & also other assets. The partnership (H., B. & Co.) having been formed, B. assumed control of H.'s stock-in-trade assigned to him, effected sales, & applied the proceeds towards meeting the acceptance given to the bank. Subsequently H.'s old stock-in-trade was assigned to the firm, & an acceptance of the firm, falling due on the same date & for the same amount as that given by B. to the bank, was substituted for this latter with the bank:—*Held:* the assignment of stock-in-trade to B. not being of the whole of H.'s property, or of the whole with only a colourable & trifling reservation, did not amount to an act of bkpcy.—*Re* HARPER, BLACK & CO., Mac. 944.—**N.Z.**

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& effects of a trader necessary for carrying on his trade, & comprising all his property except his household furniture & book debts, which were of small value, he being at the time in insolvent circumstances :—*Held :* to be fraudulent & void against the assignees on his becoming bkpt.—*Re* MURGATROYD, *Ex p.* BLAND (1855), 6 De G. M. & G. 757 ; 43 E. R. 1427, L. JJ.

Annotations :—**Consd.** *Re* Murgatroyd (1855), 26 L. T. O. S. 166. **Appld.** *Re* Nurse, *Ex p.* Foxley (1868), 17 L. T. 623. **Distd.** *Re* Price, *Ex p.* Bolland (1872), 41 L. J. Bcy. 60.

475. —— Chattel—Bill of exchange.]—A bill of exchange is a chattel within 6 Geo. 4, c. 16, s. 3, the fraudulent delivery or transfer of which will constitute an act of bkpcy.—CUMMING *v.* BAILY (1830), 6 Bing. 363 ; L. & Welsb. 206 ; 4 Moo. & P. 36 ; 8 L. J. O. S. C. P. 103 ; 130 E. R. 1320.

Annotations :—**Refd.** Carr *v.* Burdiss (1835), 1 Cr. M. & R. 782 ; *Re* Hunt, *Ex p.* Simpson (1844), 14 L. J. Bcy. 1 ; Edwards *v.* Cooper (1847), 11 Q. B. 33.

476. —— Effects at particular place—No effects elsewhere.]—A conveyance by a trader of his effects at a certain place is not an act of bkpcy., unless it be shown that he had no other effects.—CHASE *v.* GOBLE (1841), 2 Man. & G. 930 ; 3 Scott, N. R. 345 ; 10 L. J. C. P. 216 ; 5 Jur. 608 ; 133 E. R. 1021.

Annotations :—**Apld.** *Re* Kerslake, *Ex p.* Allum (1853), 1 Bankr. & Ins. R. 47. **Mentd.** Edwards *v.* English (1857), 7 E. & B. 564 ; Shingler *v.* Holt (1861), 7 H. & N. 65 ; Richards *v.* Jenkins (1886), 17 Q. B. D. 544.

477. —— —— Effects in England—Other property abroad.]—*Qu. :* whether an assignment by an English trader, having property abroad, of all his property in England would not be an act of bkpcy.—*Re* MYERS, *Ex p.* DEFRIES (1876), 35 L. T. 392, L. JJ.

478. —— Property held by debtor as security for suretyship.]—In Mar. a trader assigned all his goods, etc., to B., to secure a composition to his creditors, & B. became liable for the payment. In Nov., the trader was made bkpt., & B. entered into an arrangement by which he gave up the goods to the assignee :—*Held :* B.'s assignment was an act of bkpcy.—HARDWICK *v.* WRIGHT (1865), 35 Beav. 133 ; 55 E. R. 845.

479. —— Whole partnership property—To secure separate debts.]—Where one partner, knowing the firm to be insolvent, acting under a power of attorney purported to mtge. nearly the whole assets of the partnership to secure the separate debts of his partner & himself :—*Held :* an act of bkpcy.—*Re* DOUGLAS, *Ex p.* SNOWBALL (1872), 7 Ch. App. 534 ; 41 L. J. Bcy. 49 ; 26 L. T. 894 ; 20 W. R. 786, L. JJ.

Annotations :—**Mentd.** Vane *v.* Vane (1873), 28 L. T. 320, C. A. ; Elliott *v.* Turquand (1881), 7 App. Cas. 79, P. C. ; *Re* Boocock, *Ex p.* Walker (1916), 85 L. J. K. B. 914, D. C.

B. Conveyances or Assignments in Satisfaction of or as Security for antecedent Debts.

(a) In General.

480. General rule—Transfer or payment in contemplation of bankruptcy.]—A transfer of goods or payment of money in contemplation of bkpcy. is by 6 Geo. 4 (c. 16) an act of bkpcy. because such transactions are direct frauds upon the creditors of bkpt.—FOX *v.* CHESTER (BISHOP) (1829), 3 Bli. N. S. 123 ; 1 Dow & Cl. 416 ; 6 Bing. 1 ; 4 E. R. 1287, H. L.

Annotations :—**Mentd.** Gully *v.* Exeter (1828), 2 Moo. & P. 105 ; Alston *v.* Atlay (1837), 7 Ad. & El. 289, Ex. Ch. ; Walsh *v.* Lincoln (1875), L. R. 10 C. P. 518 ; Spiers *v.* Hunt, [1908] 1 K. B. 720.

481. —— ——.]—Under 6 Geo. 4, c. 16, a transfer of goods in satisfaction of a *bonâ fide* debt, made voluntarily, & in contemplation of bkpcy., is an act of bkpcy., & not protected by s. 81, though made more than two months before a commission issues.—BEVAN *v.* NUNN (1832), 9 Bing. 107 ; 2 Moo. & S. 132 ; 1 L. J. C. P. 175 ; 131 E. R. 555.

Annotations :—**Mentd.** *Re* Hunt, *Ex p.* Simpson (1844), 14 L. J. Bcy. 1 ; Shears *v.* Goddard (1895), 65 L. J. Q. B. 151.

482. —— ——.]—The delivery of goods by a trader to one, to whom a debt was due, would be fraudulent, if the transfer of the goods was made voluntarily & in contemplation of bkpcy.—SCOTT *v.* THOMAS (1834), 6 C. & P. 611.

483. —— —— "Contemplation of bankruptcy."]—A., carried on very extensive coal & iron works at several different places in the county of Stafford. His dishonoured acceptances exceeded £4,000. A list of debts due from A. amounted to £12,000 exclusive of bill running, & £26,000 owing to his bankers at Stourbridge. A. went to London without leaving funds to satisfy the creditors who called during his absence. A. had entered into a bond to G. for £42,500. A. went to M., an attorney at Birmingham, & directed him to prepare a warrant of attorney to confess judgment for £6,000 to his brothers T. & J. & to prepare a bill of sale of his furniture for securing £700 to his sister to whom he was indebted in £550 :—*Held :* the act moved from bkpt., not by any pressure upon him, & there were circumstances of fraud sufficient to constitute the bill of sale an act of bkpcy.

By contemplation of bkpcy. is not meant the expectation of a commission issuing immediately, but that the party knew himself to be in such a state that he must be supposed to have anticipated that bkpcy. would in all human probability follow. —GIBBINS *v.* PHILLIPPS (1827), 7 B. & C. 529 ; 2 Man. & Ry. K. B. 238 ; 6 L. J. O. S. K. B. 98 ; 108 E. R. 820 ; *subsequent proceedings* (1828), 8 B. & C. 437.

Annotations :—**Refd.** *Re* Hunt, *Ex p.* Simpson (1844), 14 L. J. Bcy. 1. **Mentd.** Bills *v.* Smith (1865), 5 New Rep. 364.

484. —— Assignment executed in hope of further advances.]—A bill of sale by a trader of all his effects to a creditor, as security for an antecedent debt, is an act of bkpcy., although it may have been executed in the hope of obtaining further advances from the creditor, & with the intention of continuing to trade, & although such advances may have subsequently been made.—LINDON *v.* SHARP (1843), 6 Man. & G. 895 ; 7 Scott, N. R. 730 ; 13 L. J. C. P. 67 ; 134 E. R. 1154.

Annotations :—**Consd.** Graham *v.* Chapman (1852), 12 C. B. 85 ; *Re* Baum, *Ex p.* Cooper (1878), 10 Ch. D. 313, C. A. **Refd.** *Re* Barrell, *Ex p.* Bailey (1853), 3 De G. M. & G. 534, L. JJ. ; *Re* Murgatroyd, *Ex p.* Bland (1855), 6 De G. M. & G. 757, L. JJ. ; *Re* Nurse, *Ex p.* Foxley (1868), 17 L. T. 623. **Mentd.** Graham *v.* Furber (1854), 2 C. L. R. 452 ; Mercer *v.* Peterson (1868), 18 L. T. 30 Ex. Ch. ; *Re* Winstanley, *Ex p.* Sheen (1876), 1 Ch. D. 560, C. A.

485. —— Property conveyed largely in excess of amount secured.]—Debtor conveyed all his property, worth about £3000, except shares worth £60, to a creditor to secure a debt of £900 :—*Held :* (1) the conveyance might be an act of bkpcy. as a fraudulent grant ; (2) the conveyance being of property worth three times the amount of the debt which it was given to secure, did not prevent the deed being an act of bkpcy., for, though the grantee would be a trustee as to the amount beyond his own debt, the property could not be taken in execution, & as the common law remedies of the other creditors against their debtor's property would thus be barred, they might

consequently be defeated or delayed.—SMITH *v.* CANNAN (1853), 2 E. & B. 35; 22 L. J. Q. B. 290; 17 Jur. 911; 1 W. R. 338; 118 E. R. 682; *sub nom.* CANNAN *v.* SMITH, 1 C. L. R. 179; 21 L. T. O. S. 231, Ex. Ch.

Annotations :—**Apld.** Stanger *v.* Wilkins (1855), 19 Beav. 626. **Distd.** Harris *v.* Wanklen (1856), 5 W. R. 51. **Consd.** Pennell *v.* Dawson (1856), 18 C. B. 355. **Folld.** Oriental Banking Co. *v.* Coleman (1861), 3 Giff. 11; Lacon *v.* Liffen (1862), 4 Giff. 75. **Apld.** Young *v.* Fletcher (1865), 3 H. & C. 732. **Consd.** Bew *v.* Bill (1868), 16 W. R. 760. **Folld.** *Re* Nurse, *Ex p.* Foxley (1868), 3 Ch. App. 515, L. JJ. **Apld.** The Heart of Oak (1869), 39 L. J. Adm. 15. **Consd.** *Re* Wood (1872), 7 Ch. App. 302, L. JJ. **Folld.** Crawcour *v.* Salter (1881), 18 Ch. D. 30, C. A. **Apld.** *Re* David & Adlard, *Ex p.* Whinney, [1914] 2 K. B. 694. **Refd.** *Re* Collins, *Ex p.* Harvey (1854), 1 Bankr. & Ins. R. 194; Bittlestone *v.* Cook (1856), 6 E. & B. 296; Hale *v.* Allnutt (1856), 18 C. B. 505; *Re* A Disputed Adjudication, *Ex p.* Cottrell (1860), 1 L. T. 465; Smith *v.* Timms (1863), 1 H. & C. 849, Ex. Ch.; Woodhouse *v.* Murray (1867), 8 B. & S. 464; *Re* Harris, *Ex p.* The Trustee (1907), 14 Mans. 127, D. C. **Mentd.** Whitmore *v.* Claridge, Weaver & Moore (1862), 31 L. J. Q. B. 141; Mercer *v.* Peterson (1868), 18 L. T. 30; Jones *v.* Harber (1870), 19 W. R. 248; Shears *v.* Goddard, [1896] 1 Q. B. 406, C. A.

486. —— Intention to defraud immaterial.]—A conveyance by a trader of all his effects & stock-in-trade to one of his creditors in payment of an antecedent debt, is of itself an act of bkpcy., & it is immaterial whether any fraud be intended by the trader or not.—SIEBERT *v.* SPOONER (1836), 1 M. & W. 714; 2 Gale, 135; Tyr. & Gr. 1075; 5 L. J. Ex. 249; 150 E. R. 621.

Annotations :—**Apprvd.** James *v.* Ebbit (1872), 21 W. R. 194. **Refd.** Graham *v.* Chapman (1852), 12 C. B. 85; Woodhouse *v.* Murray (1867), 8 B. & S. 464; *Re* Nurse, *Ex p.* Foxley (1868), 3 Ch. App. 515, L. JJ.

487. —— Motive immaterial.]—Where debtor assigns his whole property as a security for a past debt only, it is an act of bkpcy., whatever the motives of the parties may have been.—*Re* ELLIS, *Ex p.* ELLIS (1876), 2 Ch. D. 797, C. A.

Annotations :—**Consd.** *Re* Sinclair, *Ex p.* Chaplin (1884), 26 Ch. D. 319, C. A. **Mentd.** *Re* Williamson, *Ex p.* Threlfall (1876), 25 W. R. 127; *Re* Vane, *Ex p.* Greener (1877), 46 L. J. Bcy. 76, C. A.; *Re* Foulds, *Ex p.* Learoyd (1878), 10 Ch. D. 3, C. A.; *Re* Sidebotham, *Ex p.* Sidebotham (1880), 14 Ch. D. 458, C. A.; *Re* Parker, *Ex p.* Dann (1881), 17 Ch. D. 26, C. A.; *Re* Berry, *Ex p.* Wilkinson (1883), 31 W. R. 649, C. A.; Administrator-General of Jamaica *v.* Lascelles, De Mercado, *Re* Rees' Bankruptcy, [1894] A. C. 135, P. C.

488. —— Effect of 1869 Act.]—The law that a conveyance of a man's whole property to secure a past debt, whether he be a trader or a non-trader, is an act of bkpcy. was not altered by the above Act.—*Re* WOOD (1872), 7 Ch. App. 302; 41 L. J. Bcy. 21; 26 L. T. 113; 20 W. R. 403, L. JJ.

Annotations :—**Distd.** Philps *v.* Hornstedt (1872), L. R. 8, Exch. 26. **Refd.** Harrison *v.* Cohen (1875), 32 L. T. 717; Crawcour *v.* Salter (1881), 18 Ch. D. 30, C. A.; *Re* Hughes, *Ex p.* Hughes, [1893] 1 Q. B. 595, C. A.; *Re* Brindley, *Ex p.* Taylor, [1906] 1 K. B. 377, C. A.; *Re* David & Adland, *Ex p.* Whinney, [1914] 2 K. B. 694. **Mentd.** *Re* Stewart, *Ex p.* Pottinger (1878), 8 Ch. D. 621, C. A.

489. —— Mortgage deed.]—Bkpt. mortgaged all his property to B., without her collusion, to secure money previously lent by her :—*Held :* the mtge. deed must be set aside as a fraudulent preference & an act of bkpcy.—*Re* YATES, *Ex p.* BROWN (1879), 11 Ch. D. 148; 48 L. J. Bcy. 78; 40 L. T. 402; 27 W. R. 651, C. A.

Annotations :—**Consd.** *Re* Harrison, *Ex p.* Harrison (1880), 49 L. J. Bcy. 30; *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169, C. A.; Sharp *v.* McHenry, Sharp *v.* Brown (1886), 55 L. T. 747. **Refd.** *Re* Lowenthal, *Ex p.* Beesty (1884), 13 Q. B. D. 238.

490. Of what property—Only part of whole assets.]—A. & B., being in embarrassed circumstances, conveyed to C. all the machinery in their mills, & all the machinery to be substituted in lieu thereof, to secure £3029 9*s.* 7*d.* with interest, defeasible, however, upon the payment of that sum, with interest, by instalments of £50 in each succeeding month. A. & B. had other property :—*Held :* this was not *per se* an act of bkpcy., but, it should have been left to the jury to say, whether the conveyance was a fraudulent preference.—BALME *v.* HUTTON (1828), 2 Y. & J. 101; 148 E. R. 849

Annotations :—**Consd.** Hale *v.* Allnutt (1856), 25 L. J. C. P. 267. **Refd.** Stanger *v.* Wilkins (1855), 19 Beav. 626; *Re* Nurse, *Ex p.* Foxley (1868), 17 L. T. 623. **Mentd.** O'Connell *v.* R. (1844), 11 Cl. & Fin. 155, H. L.

491. —— Whole property.]—A creditor, who takes the whole of debtor's property in consideration of a past debt with knowledge of the existence of other creditors, is not protected. Such transaction is an act of bkpcy., *primâ facie* a fraudulent preference.—*Re* JUKES, *Ex p.* OFFICIAL RECEIVER, [1902] 2 K. B. 58; 71 L. J. K. B. 710; 86 L. T. 456; 50 W. R. 560; 46 Sol. Jo. 452; 9 Mans. 249.

492. —— Exception of book debts.]—Bkpt. being indebted to his bankers in the sum of £600 gave them a deed by which, in substance, he mtged. to them all the property (personal) which he possessed at the time, except his book debts. The proviso was that if bkpt. should repay the £600 & interest on Mar. 25, 1858, or at such earlier time as the bankers should require on two days' notice, then it should be void. On Aug. 4, 1854, the bankers gave such notice, & on the 11th they took possession. The petition was filed on the 21st. Bkpt. had remained in possession until possession was taken by the bankers, & the assignment was of his printing presses & stock-in-trade :—*Held :* the assignment was an act of bkpcy., & the deed

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PART II. SECT. 2, SUB-SECT. 2.—B (a).

489 i. *General rule—Mortgage deed.*]—Debtor, on the eve of bkpcy., but in pursuance of a previous agreement with a party, who had *bonâ fide* advanced money, executed a deed of mtge. to the lender, who, when the deed was executed, knew nothing to vary it from a simple fulfilment of the agreement : —*Held :* the execution of the deed was not an act of bkpcy.—*Re* M'KEAN (1862), 8 Ir. Jur. 16.—**IR.**

491 i. *Of what property—Whole property.*]—As a general rule a transfer of all debtor's property although by way of mtge., as a security for an antecedent debt, especially when debtor is in insolvent circumstances, *ipso facto*, constitutes an act of bkpcy. within Irish 1872 Act, s. 21 (2).—*Re* LYNCH (1876), 10 I. L. T. 107.—**IR.**

491 ii. —— *Whole property including property held under lease with condition against alienation.*]—Where debtor, in embarassed circumstances, transfers his whole property by mtge. to secure an antecedent debt, he thereby commits an act of bkpcy., notwithstanding that a substantial portion of the property assigned consisted of premises held under a lease subject to a condition against alienation, without the lessor's consent.—*Re* PORTER (1875), 9 I. L. T. 149.—**IR.**

491 iii. —— *Substantial part of property—Including premises where trade carried on.*]—A debtor, under pressure, & partly in consideration of an antecedent debt, assigned to the creditor the substantial portion of his property, including the house in which he carried on his trading :—*Held :* an act of bkpcy. under Irish 1857 Act, s. 92.—JAMES *v.* EBBIT (1872), I. R. 6 C. L. 553; 7 I. L. T. 7.—**IR.**

a. —— *Instructions to auctioneers to sell & to retain amount of debt—Considerable assets remaining.*]—A debtor, being indebted to a firm of auctioneers, on being pressed for payment, placed his business in their hands for sale, at the same time giving them an order to pay out of the proceeds the sum of £178 14*s.*, the balance due to a creditor on an agreement to mortgage the business, to retain the amount of their own debt, & to pay the balance to debtor. He also instructed the auctioneers to pay an amount due to another creditor. At that time the only other property held by debtor consisted of £15 worth of book debts, but his wife owned certain furniture, which was dealt with by debtor as his own, & the proceeds obtained from the sale thereof were included in his list of assets :—*Held :* as, after the retention by the auctioneers of the amount of their debt, assets were left considerably in excess of the amount retained, the transfer was not fraudulent within Bkpcy. Act, 1908, s. 26 (*b*).—*Re* WALTON, OFFICIAL ASSIGNEE IN BANKRUPTCY *v.* MCKAY BROTHERS (1909), 28 N. Z. L. R. 948. —**N.Z.**

Sect. 2.—What is an act of bankruptcy: Sub-sect. 2, B. (a).]

was void as against the assignees.—*Re* JENVEY (1854), 24 L. T. O. S. 192.

493. —— —— & certain goods in bond.]—A., a trader, gave under pressure a bill of sale of his stock-in-trade & personal effects to B. & C., to secure debts due to them amounting to £178. The bill of sale included the whole of his stock & effects, except book debts, estimated by him at about £170, & some tea in bond which he valued at £45, but which could not be obtained without a payment of about £15. His other liabilities at the time amounted to about £434. The bill of sale, which was put in force the next day, realised £160, after paying some £30 for the expenses of it. The expected book debts amounted, on realisation, to about £70 only & the tea in bond was sold for £25 :—*Held :* the bill of sale was not an act of bkpcy.—SMITH *v.* TIMMS (1863), 1 H. & C. 849 ; 1 New Rep. 448 ; 32 L. J. Ex. 215 ; 7 L. T. 859 ; 9 Jur. N. S. 1285 ; 11 W. R. 381 ; 158 E. R. 1127, Ex. Ch.

Annotations :—**Apld.** The Heart of Oak (1869), 39 L. J. Adm. 15. **Consd.** James *v.* Ebbit (1872), 21 W. R. 194. **Refd.** Young *v.* Fletcher (1865), 6 New Rep. 162 ; *Re* Nurse, *Ex p.* Foxley (1868), 17 L. T. 623.

494. —— —— & furniture.] — A trader conveyed all his property, except his furniture & book debts, to a creditor for securing a previously existing debt :—*Held :* notwithstanding the reservation, the deed was fraudulent & void, inasmuch as it placed the bulk of his property out of the reach of his other creditors.—*Re* NURSE, *Ex p.* FOXLEY (1868), 3 Ch. App. 515 ; 18 L. T. 862 ; 16 W. R. 831, L. JJ.

Annotations :—**Expld. & Distd.** Martin *v.* Willyams (1869), 20 L. T. 350. **Distd.** *Re* Carlisle, *Ex p.* Northern Investment & Discount Co. (1872), 27 L. T. 520 ; *Re* Winstanley, *Ex p.* Winder (1875), 1 Ch. D. 290. **Consd.** *Re* Marlow, *Ex p.* Field (1879), 13 Ch. D. 106, n. **Refd.** The Heart of Oak (1869), 39 L. J. Adm. 15.

495. —— —— Of substantial value.] — An assignment of all a person's property, except book debts, to secure an antecedent debt is not an act of bkpcy., if the book debts have a substantial value.—*Re* MARLOW, *Ex p.* FIELD (1879), 13 Ch. D. 106, n. ; 28 W. R. 267, C. A.

496. —— —— Value must be considered.] —In estimating whether a bill of sale comprises the whole of a trader's property, the value of his book debts must be taken into consideration.—*Re* TUNSTALL, *Ex p.* BURTON (1879), 13 Ch. D. 102 ; 41 L. T. 571 ; 28 W. R. 268, C. A.

Annotation :—**Refd.** *Re* Hemingway, *Ex p.* Hauxwell (1883), 23 Ch. D. 626, C. A.

497. —— Furniture, effects, goods & chattels in & upon place of business.]—A trader in insolvent circumstances by a bill of sale assigned to one creditor all his household furniture & effects, & the goods & chattels in & upon his place of business, & was afterwards adjudged bkpt. :—*Held :* the assignment was an act of bkpcy., & fraudulent & void against the assignees.—ORIENTAL BANKING CO. *v.* COLEMAN (1861), 3 Giff. 11 ; 30 L. J. Ch. 635 ; 4 L. T. 9 ; 9 W. R. 432 ; 66 E. R. 302.

Annotation :—**Apld.** *Re* Nurse, *Ex p.* Foxley (1868), 17 L. T. 623.

498. —— All property in & about premises when assignment put in execution.]—An assignment by a trader, in consideration of a debt then due, of his stock-in-trade, fixtures, & effects, household furniture, etc., & all other his goods, chattels, & effects there, or which should or might be in & about the premises at the time the assignment is put in execution, is an act of bkpcy., & sufficient to support an adjudication founded upon it.—*Re* A DISPUTED ADJUDICATION, *Ex p.* ROYCE (1866), 14 L. T. 418.

499. —— Exception of pension incapable of passing to trustee in bankruptcy.] — Debtor executed a deed of assignment of all his property, except a pension from East India Co., to a creditor to secure a past debt :—*Held :* as this pension could not pass to his trustee in bkpcy., it formed no substantial exception from the assignment, & the assignment was an act of bkpcy.—*Re* KEELY, *Ex p.* HAWKER (1872), 7 Ch. App. 214 ; 41 L. J. Bcy. 34 ; 26 L. T. 54 ; 20 W. R. 322, L. JJ.

Annotations :—**Apprvd.** Philps *v.* Hornstedt (1872), L. R. 8 Exch. 26. **Folld.** *Re* Wood (1872), 7 Ch. App. 302, L. JJ. **Refd.** Crawcour *v.* Salter (1881), 18 Ch. D. 30, C. A. **Mentd.** Lucas *v.* Harris (1886), 18 Q. B. D. 127, C. A.

500. —— Exception of valueless partnership assets.] — Where debtor has an interest in a partnership which turns out to be insolvent, a bill of sale which comprises the whole of his separate estate, but does not include his partnership assets, & which was given to secure an antecedent debt, is an act of bkpcy.—*Re* BURGHARDT, *Ex p.* TREVOR (1875), 1 Ch. D. 297 ; 45 L. J. Bcy. 27 ; 33 L. T. 756 ; 24 W. R. 301.

501. —— Whole property including hired property.]—Pltf. lent furniture on hire to defts., hotel-keepers, at a fixed sum to be paid by instalments, with a provision that until all the instalments were paid the property should remain in pltf., & if any instalment should not be paid when due, pltf. was to be at liberty to retake possession of his goods & the instalments to be forfeited, but upon all the instalments being paid the furniture to become the property of defts. Upon one instalment being unpaid pltf. put a man in possession of the furniture, & defts. executed an assignment of the lease of the hotel (which had been previously mtged. to persons whom pltf. had paid off) & of all their personal chattels & effects, including the hired furniture, to pltf., & afterwards became bkpt :—*Held :* the assignment of the whole property of defts., which was duly registered, was an act of bkpcy., & the assignment was void so far as it was an assignment of the chattels as being an act of bkpcy., & the trustee in bkpcy. was entitled to all the personal effects of bkpt., but not to the hired furniture.—CRAWCOUR *v.* SALTER (1881), 18 Ch. D. 30 ; 51 L. J. Ch. 495 ; 45 L. T. 62 ; 30 W. R. 21, C. A.

Annotations :—**Refd.** *Re* Fowler, *Ex p.* Brooks (1883), 23 Ch. D. 261, C. A. **Mentd.** *Re* Parker, *Ex p.* Turquand (1885), 14 Q. B. D. 636, C. A. ; Chappell *v.* Harrison (1910), 75 J. P. 20.

502. —— Substantially whole property—Though

502 i. —— *Substantially whole property.*]—A married woman, owner of a public-house, executed a mtge. of the house & licence on Aug. 19, 1896, to a person who was her security to a bank for an advance of £60, & to whom she owed £10. On Sept. 28 the mtgee., with her consent, sold the premises, & on Sept. 25 she sold by auction all her goods & chattels, & on Oct. 1 a petition was filed by a creditor :—*Held :* the mtge., being substantially of the whole of bkpt.'s estate, was an act of bkpcy.—*Re* GORDON, *Ex p.* BELL (1897), 31 I. L. T. 87.—**IR.**

502 ii. —— —— *Effect of pressure by creditor.*]—Where a creditor takes an assignment of substantially the whole of debtor's property to secure an antecedent debt, although pressure by the creditor prevents such transaction being a fraudulent preference, no amount of pressure can prevent it being an act of bkpcy.—COMMERCIAL UNION ASSURANCE CO., LTD. *v.* MACGIBBON & CO. (1905), 25 N. Z. L. R. 43.—**N.Z.**

502 iii. —— —— *Only available asset.*] — A firm of railway contractors, having as its only available asset moneys owing by the railways comrs. consisting of a deposit receipt in face value of £1,500 & £400 in cash, being pressed by one creditor, S., assigned to him, upon settlement with the comrs., the deposit receipt subject to the payment thereout of a sum of £75 owing to the firm's solrs., in discharge of the debt owing by it :—*Held :* the transaction was not an act of insolvency.—*Re* CAIRNS BROTHERS (1896) 21 V. L. R. 708.—**AUS.**

not stopping trading.]—The necessary consequence of an assignment of what is substantially all a trader's property is to delay his creditors, & the existence of a resulting trust, & of a substantial surplus, does not prevent its having that effect, & a conveyance necessarily delaying a trader's creditors is an act of bkpcy., though it has not the effect of stopping his trade.—SMITH *v.* CANNAN (1853), 2 E. & B. 35 ; 22 L. J. Q. B. 290 ; 17 Jur. 911 ; 1 W. R. 338 ; 118 E. R. 682 ; *sub nom.* CANNAN *v.* SMITH, 21 L. T. O. S. 231 ; 1 C. L. R. 179, Ex. Ch.

Annotations :—**Consd.** Hale *v.* Allnutt (1856), 18 C. B. 505. **Distd.** Harris *v.* Wanklen (1856), 5 W. R. 51. **Consd.** Oriental Banking Co. *v.* Coleman (1861), 3 Giff. 11 ; Smith *v.* Timms (1863), 1 H. & C. 849, Ex. Ch. **Apld.** Woodhouse *v.* Murray (1867), L. R. 2 Q. B. 634 ; The Heart of Oak (1869), 39 L. J. Adm. 15. **Consd.** Crawcour *v.* Salter (1881), 18 Ch. D. 30, C. A. ; *Re* Harris, *Ex p.* The Trustee (1907), 14 Mans. 127, D. C. **Refd.** *Re* Collins, *Ex p.* Harvey (1854), 1 Bankr. & Ins. R. 194 ; Bittlestone *v.* Cooke (1856), 6 E. & B. 296 ; Pennell *v.* Dawson (1856), 18 C. B. 355 ; Lacon *v.* Liffen (1862), 4 Giff. 75 ; Young *v.* Fletcher (1865), 3 H. & C. 732 ; Bew *v.* Bill (1868), 16 W. R. 760 ; *Re* Nurse, *Ex p.* Foxley (1868), 3 Ch. App. 515, L. JJ. ; *Re* Wood (1872), 7 Ch. App. 302, L. JJ. ; Shears *v.* Goddard, [1896] 1 Q. B. 406, C. A. ; *Re* David & Adlard, *Ex p.* Whinney, [1914] 2 K. B. 694. **Mentd.** Stanger *v.* Wilkins (1855), 19 Beav. 626 ; Whitmore *v.* Claridge, Weaver & Moore (1862), 31 L. J. Q. B. 141 ; Mercer *v.* Paterson (1868), 18 L. T. 30, Ex. Ch. ; Jones *v.* Harber (1870), 19 W. R. 248.

503. —— Property assignment of which stops trading—What must be established—Onus of proof.]—A trader conveying away property to such an extent as will prevent him from continuing his business, & render him insolvent, commits an act of bkpcy. But those who rely upon such act of bkpcy. on a trial, must show that it was calculated to have the alleged effect, by evidence of the general state of the party's affairs at the time of such conveyance. It is not sufficient to prove that the trader, under pecuniary pressure, disposed of some article essential to the carrying on of his business, as that a miller, by bill of sale, transferred his waggon & horses to a creditor who had arrested him.—WEDGE *v.* NEWLYN (1833), 4 B. & Ad. 831 ; 110 E. R. 668.

Annotations :—**Apld.** *Re* Kerslake, *Ex p.* Allum (1853), 1 Bankr. & Ins. R. 47. **Refd.** Young *v.* Waud (1852), 22 L. J. Ex. 27 ; *Re* Jenvey (1854), 24 L. T. O. S. 192 ; Young *v.* Fletcher (1865), 3 H. & C. 732. **Mentd.** *Re* Fowke, *Ex p.* Sparrow (1852), 2 De G. M. & G. 907, L. JJ.

504. —— —— Knowledge that creditors must be delayed.]—Where a debtor in consideration of a pre-existing debt executes a bill of sale which is so extensive as to prevent him from carrying on his trade & is calculated to his knowledge to defeat & delay his creditors, he thereby commits an act of bkpcy.—YOUNG *v.* FLETCHER (1865), 3 H. & C. 732 ; 6 New Rep. 162 ; 34 L. J. Ex. 154 ; 12 L. T. 392 ; 11 Jur. N. S. 449 ; 13 W. R. 722 ; 159 E. R. 720.

Annotations :—**Apld.** *Re* Nurse, *Ex p.* Foxley (1868), 17 L. T. 623 ; James *v.* Ebbit (1872), 21 W. R. 194 ; Jones *v.* Harber (1876), L. R. 6 Q. B. 77.

505. —— —— Mortgagee taking possession resulting in stoppage of trading.]—A trader mtged. the house (worth £1000) in which he resided & carried on his trade, to secure antecedent debts amounting to £1100, at a time when he was liable to other debts to a large amount, & when the remainder of his property was not worth £100. The mtgor. having afterwards become bkpt. :—*Held :* as the result of the mtgee.'s entering into possession would immediately render the carrying on of the business impossible, it was an "assignment of the mtgor.'s solvency," & an act of bkpcy.

A surety is no more justified in placing the whole of his property out of the reach of liability to pay the debt, than if he were the principal debtor (TURNER, L.J.).—GOODRICKE *v.* TAYLOR (1864), 2 De G. J. & Sm. 135 ; 2 Hem. & M. 380 ; 3 New Rep. 678 ; 10 L. T. 113 ; 10 Jur. N. S. 414 ; 12 W. R. 632 ; 46 E. R. 326, L. JJ.

Annotations :—**Apld.** Young *v.* Fletcher (1865), 3 H. & C. 732 ; *Re* Nurse, *Ex p.* Foxley (1868), 17 L. T. 623. **Refd.** Allen *v.* Bonnett (1870), 21 L. T. 578.

506. —— —— Granted under pressure.]—A trader assigned to particular creditors, by a deed at their instance, & on their threatening proceedings, all his debts, bills of exchange, promissory notes & other securities, & all books of account, as a security for their debt. At this time, although the fact was not known to the trader, writs on two judgments were in the hands of the sheriff. Two days after the deed, the sheriff seized the trader's stock-in-trade & furniture :—*Held :* the deed being a transfer of so much of his estate & effects as rendered it impossible for him to carry on his trade in the ordinary & usual course, although executed under pressure, was void as against the general body of the creditors ; & was an act of bkpcy.—*Re* BARRELL, *Ex p.* BAILEY (1853), 3 De G. M. & G. 534 ; 22 L. J. Bcy. 45 ; 21 L. T. O. S. 176 ; 17 Jur. 475 ; 1 W. R. 343 ; 43 E. R. 210.

Annotations :—**Consd.** *Re* Roper & Mitchell, *Ex p.* Roper (1855), 26 L. T. O. S. 186. **Apld.** Stanger *v.* Wilkins (1855), 19 Beav. 626 ; Young *v.* Fletcher (1865), 3 H. & C. 732 ; *Re* Nurse, *Ex p.* Foxley (1868), 17 L. T. 623. **Distd.** *Re* Price, *Ex p.* Bolland (1872), 41 L. J. Bcy. 60. **Refd.** *Re* Taylor, *Ex p.* Taylor (1854), 5 De G. M. & G. 392, L. JJ. **Mentd.** Goodricke *v.* Taylor (1863), 9 L. T. 604.

507. —— —— All furniture & other effects—Exception of stock-in-trade, money & book debts.]—*Held :* an assignment by an innkeeper of all the furniture & other effects at the inn (except his stock-in-trade, money, & book debts) to a creditor, in trust to sell & pay himself, returning the surplus to the innkeeper, inasmuch as it disabled the latter from carrying on his business, amounted to an act of bkpcy., if the party were insolvent at the time of the assignment.—PORTER *v.* WALKER (1840), 1 Man. & G. 686 ; 1 Scott, N. R. 568 ; 9 L. J. C. P. 334 ; 4 Jur. 768 ; 133 E. R. 507.

Annotations :—**Apld.** *Re* Barrell, *Ex p.* Bailey (1853), 3 De G. M. & G. 534, L. JJ. **Consd.** Hernamann *v.* Barber (1854), 14 C. B. 583 ; Bell *v.* Simpson (1857), 26 L. J. Ex. 363. **Refd.** Lindon *v.* Sharp (1843), 7 Scott N. R. 730 ; *Re* Nurse, *Ex p.* Foxley (1868), 17 L. T. 623. **Mentd.** *Re* A Disputed Adjudication, *Ex p.* Cottrell (1860), 1 L. T. 465.

508. —— —— Stoppage necessarily result of transfer—Substantial exceptions of property not connected with trading.]—If the assignment must have the effect of stopping the trade, the exception of a considerable amount of property, not necessarily connected with the trading, will not save an assignment from being an act of bkpcy.—*Re* ROPER & MITCHELL, *Ex p.* ROPER (1855), 26 L. T. O. S. 186.

509. —— —— Mortgage with power of sale of premises, trade & other fixtures & furniture—Total assets worth three times value of mortgaged property.]—A., a licensed victualler, was indebted to B. for goods sold & money advanced. Being pressed for payment, as an inducement for forbearance on the part of B., A. executed a deed whereby he mtged. to him the public-house in which the business was carried on, & assigned to him all his trade & other fixtures & household furniture, with a power of sale in case of default in payment of the debt & interest by certain instalments, extending over a period of several months. The value of the property mtged. was between £300 & £400. The value of A.'s assets at the time was about £1200, & his debts altogether amounted to £4000. A. continued his business until he became bkpt., having in the meantime received further supplies of goods & advances of money from B., & made various payments to other creditors :—*Held :* the execution of the deed was

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not an act of bkpcy., the assignment not being of the whole (or the whole with a colourable exception) of A.'s property, & the defeating or delaying of creditors, by producing absolute present insolvency & incapacity to carry on trade, not being its necessary result.—HALE *v.* ALLNUTT (1856), 18 C. B. 505; 25 L. J. C. P. 267; 2 Jur. N. S. 904; 4 W. R. 637; 139 E. R. 1467.

510. —— —— Assignment of equity of redemption—Materials for carrying on trade remaining.]—An assignment of an equity of redemption, left a trader in possession of the materials for carrying on his trade in the way he was at the time carrying it on:—*Held:* not an act of bkpcy.—JOHNSON *v.* FESEMEYER (1858), 3 De G. & J. 13; 44 E. R. 1174, L. C.

Annotations:—**Refd.** *Re* Nurse, *Ex p.* Foxley (1868), 3 Ch. App. 515, L. JJ. **Mentd.** Pearson *v.* Benson (1860), 28 Beav. 598; The Heart of Oak (1869), 39 L. J. Adm. 15; Smith *v.* Pilgrim (1876), 2 Ch. D. 127; National Bank of Australasia *v.* United Hand-in-Hand & Band of Hope Co. (1879), 4 App. Cas. 391, P. C.; Ward *v.* Sharp (1884), 53 L. J. Ch. 313.

511. —— —— Stock-in-trade & furniture—Exception of equity of redemption.]—*Semble:* an equity of redemption is not a property sufficiently available for a creditor to constitute a substantial exception from an assignment by a trader of his stock-in-trade & furniture.—YOUNG *v.* FLETCHER (1865), 3 H. & C. 732; 6 New Rep. 162; 34 L. J. Ex. 154; 12 L. T. 392; 11 Jur. N. S. 449; 13 W. R. 722; 159 E. R. 720.

Annotations:—**Mentd.** *Re* Nurse, *Ex p.* Foxley (1868), 17 L. T. 623; Jones *v.* Harber (1870), L. R. 6 Q. B. 77; James *v.* Ebbit (1872), 21 W. R. 194.

512. —— —— Assignment of good will, trade fixtures & implements—Exception of small life policies & heavily mortgaged leases.]—R., a retail trader, assigned to a trade creditor, in consideration of a past debt of £174 6*s.* 6*d.* & a money payment of £2 13*s.* 6*d.* the goodwill of his business, which was of very small value, together with the trade fixtures, three horses & cart & van, & also his household furniture. At the date of the assignment R. was the owner, in addition to the property comprised in the assignment, of two life policies which produced £46 6*s.* 3*d.*, & of three leases which were very heavily mtged., two of which the trustee disclaimed:—*Held:* as the property consisted chiefly in the implements of his trade, the assignment which rendered him incapable of carrying on his trade was in substance an assignment of all his property & void as against his trustee as an act of bkpcy.—*Re* RAYMENT, *Ex p.* TRUSTEE (1899), 80 L. T. 807; 6 Mans. 288.

513. Sufficiency of consideration—Security for bond to trustees of son's marriage settlement.]—On July 1, 1831, M. being indebted on bond to the trustees of his son's marriage settlement, assigned, at his son's request, a house & furniture to the trustees, as a security for the bond debt. At the time of the assignment M. was in some pecuniary difficulties arising from the failure of stock transactions & other speculations on which he had been engaged. On Jan. 2, 1832, he stopped payment, & on the 26th a fiat issued, on a debt incurred in 1830, under which he was found a bkpt.:—*Held:* in the circumstances the assignment was not an act of bkpcy.—BANNATYNE *v.* LEADER (1841), 10 Sim. 350; 10 L. J. Ch. 385; 5 Jur. 573; 59 E. R. 649.

Annotation:—**Refd.** Stanger *v.* Wilkins (1855), 19 Beav. 626.

514. —— Release of trader's property from charge.]—A trader, being pressed by two creditors, one of whom had a bill of sale on part of his property, & the other creditor an execution on the residue of his goods, applied to deft. to assist him, & in consideration of deft. agreeing to pay off the two creditors, assigned to deft, by a bill of sale, all his estate & effects. Deft. paid off the creditors:—*Held:* the assignment was not an act of bkpcy., as it was not an assignment in consideration of a past debt only, but an assignment in consideration of the assignee releasing the trader's property from a charge already laid upon it.—WHITMORE *v.* CLARIDGE (1863), 3 New Rep. 210; 33 L. J. Q. B. 87; 9 L. T. 451; 12 W. R. 214, Ex. Ch.

Annotation:—**Refd.** Bew *v.* Bill (1868), 16 W. R. 760.

515. —— Payment of debtor's acceptances.]—The acceptor of bills of exchange being unable to meet them as they became due, in consideration of the drawer taking them up, assigned to the drawer all his property to secure the amount of the bills & certain past debts:—*Held:* the payment of the bills was a substantial advance at the date of the assignment, & prevented the assignment from being an act of bkpcy.—*Re* TWEDDELL, *Ex p.* REED & STEEL (1872), L. R. 14 Eq. 586; 26 L. T. 558; 20 W. R. 622.

Annotation:—**Expld. & Apprvd.** Philps *v.* Hornstedt (1875), 1 Ex. D. 62, Ex. Ch.

516. —— Withdrawal of execution by creditor.]—An execution was levied by seizure on the goods of a trader, & he then being insolvent, in consideration of the judgment creditor withdrawing the execution, assigned to the creditor the whole of his property, & ceased to carry on his trade. The jury having found the transaction *bonâ fide*:—*Held:* as the creditors at large could have interfered & taken the proceeds of the execution under 24 & 25 Vict. c. 134, s. 73, there was not sufficient equivalent for the assignment to the execution creditor, which was void & an act of bkpcy.—WOODHOUSE *v.* MURRAY (1868), L. R. 4 Q. B. 27; 9 B. & S. 720; 38 L. J. Q. B. 28; 19 L. T. 570; 17 W. R. 206, Ex. Ch.

Annotations:—**Consd.** *Re* Nurse, *Ex p.* Foxley (1868), 3 Ch. App. 515, L. JJ. **Apld.** The Heart of Oak (1869), 39 L. J. Adm. 15. **Folld.** *Re* Mortimer, *Ex p.* Pearson (1873), 8 Ch. App. 670, n.; *Re* Baum, *Ex p.* Cooper (1878), 10 Ch. D. 313, C. A. **Consd.** *Re* David & Adlard, *Ex p.* Whinney, [1914] 2 K. B. 694.

517. —— New bill of sale granted in substitution for defective one—Sufficient consideration for defective bill.]—Debtor applied for a loan, & agreed to execute a bill of sale of all his personal estate & effects for securing the repayment thereof with interest. The money having been advanced, he executed an instrument, believed to be a good & valid bill of sale. It was afterwards ascertained that the supposed security was invalid, & he thereupon executed a formal bill of sale:—*Held:* inasmuch as debtor had executed the bill of sale merely as a substitute for another instrument given for good consideration, he had not thereby committed an act of bkpcy.—ANON., *Re* A DISPUTED ADJUDICATION (1860), 3 L. T. 632; 9 W. R. 199.

Annotation:—**Refd.** *Re* Nurse, *Ex p.* Foxley (1868), 17 L. T. 623.

518. —— Previous agreement to renew bill of sale.]—An advance of £55 was made to a trader, on the security of bills of sale of all the goods & effects of the trader, which were valued at £600. It was agreed that the bills should be from time to time renewed, so as to render registration unnecessary. The bills were renewed three times. The trader became bkpt.:—*Held:* the last bills of sale were invalid, as constituting an act of bkpcy.—*Re* SPARKE, *Ex p.* COHEN (1871), 7 Ch. App. 20; 41 L. J. Bcy. 17; 25 L. T. 473; 20 W. R. 69, L. JJ.

Annotations :—**Distd.** Ramsden *v.* Lupton (1873), L. R. 9 Q. B. 17. **Consd.** *Re* Bent, *Ex p.* Mackenzie (1873), 42 L. J. Bcy. 25. **Distd.** *Re* Cook, *Ex p.* Izard (1874), 9 Ch. App. 271. **Folld.** *Re* Stevens, *Ex p.* Stevens (1875), L. R. 20 Eq. 786. **Distd.** *Re* Jackson, *Ex p.* Hall (1877), 4 Ch. D. 682; *Re* Wood, *Ex p.* Musgrave (1878), 10 Ch. D. 94, C. A. **Consd.** *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169, C. A. **Mentd.** *Re* Couston, *Ex p.* Ward (1872), 27 L. T. 502, C. A.; Halliday *v.* Harris (1874), L. R. 9 C. P. 668.

519. ——— ———.]—A bill of sale of the whole of the mtgor.'s property, given by way of renewal of a former one not registered with a view to avoiding publicity, is, if no fresh advance be made by the mtgee., an act of bkpcy., & void as against the trustee in bkpcy. of the mtgor., notwithstanding its registration in due time.—*Re* STEVENS, *Ex p.* STEVENS (1875), L. R. 20 Eq. 786; 44 L. J. Bcy. 136; 33 L. T. 135; 23 W. R. 908.

Annotations :—**Distd.** *Re* Jackson, *Ex p.* Hall (1877), 4 Ch. D. 682. **Apprvd.** *Re* Cross, *Ex p.* Payne (1879), 11 Ch. D. 539, C. A.

520. —— **Fresh advance—Agreement to give new bill of sale.**]—A trader gave to one of his creditors a bill of sale of all his property to secure an existing debt & a fresh advance. It was verbally agreed that the bill of sale should not be registered, but that the grantor should give a new bill of sale in substitution for the first when required to do so by the grantee. More than two months before the grantor filed his petition, the grantee put a man in possession of the property, but the grantor's name remained on the premises as the ostensible occupier of them :—*Held :* there having been a sufficient fresh advance when the first bill of sale was given, the substituted bill of sale was good as against the trustee.—*Re* JACKSON, *Ex p.* HALL (1877), 4 Ch. D. 682; 46 L. J. Bcy. 39; 35 L. T. 947; 25 W. R. 382.

521. —— **Giving time by taking bills of exchange of debtor.**]—Deft. received from M., a member of a trading firm, a bill of lading for brandy, for the purpose of landing & warehousing it, which he did, entering the brandy, at M.'s request, in his own name & paying charges amounting to £47. Afterwards & whilst he still had the bill of lading in his possession, an acceptance, which had been given by the firm to deft. falling due, & the firm not being able to meet it, deft. consented to take an acceptance at seven days for a balance of account, including the £47, upon receiving M.'s authority to sell the brandy if the bill were not met. This acceptance not being met, deft. sold the brandy. The transaction was *bonâ fide*, but the brandy formed in fact the whole property of the firm :—*Held :* the transaction was not "fraudulent" within 1869 Act, because deft.'s consent to give seven days' time to pay the debts due, taking his acceptance at seven days, was an equivalent for the power of sale given to deft.—PHILPS *v.* HORNSTEDT (1875), 1 Ex. D. 62, Ex. Ch.

Annotations :—**Dbtd.** *Re* Baum, *Ex p.* Cooper (1878), 10 Ch. D. 313, C. A. If *Philps* v. *Hornstedt* is in conflict with *Woodhouse* v. *Murray*, the latter appears to me to be more in accordance with the law which is applicable (BAGGALLAY, L.J.). **Mentd.** Pattison *v.* Luckley (1875), 44 L. J. Ex. 180.

522. —— **Forbearance to levy execution.**]—A judgment debtor gave a written undertaking, in the event of the judgment creditor not levying execution for his judgment debt, to execute on demand a bill of sale of substantially the whole of his property. The creditor forbore to levy execution. Ultimately a bill of sale was executed to secure the judgment debt & subsequent advances, no fresh advance being made on the execution of the bill of sale, the deed purporting to be made in pursuance of the undertaking :—*Held :* the bill of sale was an act of bkpcy., & the forbearance to levy execution was not a sufficient equivalent for it.—*Re* BAUM, *Ex p.* COOPER (1878), 10 Ch. D. 313; 48 L. J. Bcy. 54; 39 L. T. 523; 27 W. R. 299, C. A.

Annotation :—**Apld.** *Re* Cross, *Ex p.* Payne (1879), 11 Ch. D. 539, C. A.

523. —— **Forbearance to seize goods under bill of sale.**]—The forbearance of the grantee under a bill of sale of the whole of the grantor's property, given for value, to seize the property comprised in it is not, as against the trustee in bkpcy. of the grantor, good consideration for the giving of a new bill of sale in lieu of the first, but the new bill of sale given in such circumstances without any fresh advance to the grantor is an act of bkpcy.—*Re* CROSS, *Ex p.* PAYNE (1879), 11 Ch. D. 539; 40 L. T. 563; 27 W. R. 808, C. A.

Annotations :—**Folld.** *Re* Emery, *Ex p.* Chief Official Receiver (1888), 37 W. R. 21, C. A. **Refd.** Lyons *v.* Tucker (1881), 6 Q. B. D. 660. **Mentd.** Sanguinetti *v.* Stuckey's Banking Co., [1895] 1 Ch. 176.

524. Promise to give security made at time of loan.]—Y., a trader, being indebted to L., in £200, agreed with deft. that, on deft. paying the £200 to L., Y. would assign by bill of sale all her effects to deft., to secure the £200. A deed of assignment was executed, some months after:—*Held :* the execution of the deed was not necessarily in itself an act of bkpcy., as the transaction was as if the deed had been executed at the time of the payment by deft. to L.—HUTTON *v.* CRUTTWELL (1852), 1 E. & B. 15; 22 L. J. Q. B. 78; 20 L. T. O. S. 245; 17 Jur. 392; 118 E. R. 342.

Annotations :—**Folld.** *Re* Kerslake, *Ex p.* Allen (1853), 1 Bankr. & Ins. R. 47; *Re* Collins, *Ex p.* Harvey (1854), 1 Bankr. & Ins. R. 194; Bittlestone *v.* Cooke (1856), 6 E. & B. 296; Harris *v.* Rickett (1859), 4 H. & N. 1; *Re* A Disputed Adjudication (1860), 3 L. T. 632; Whitmore *v.* Claridge, Weaver & Moore (1862), 31 L. J. Q. B. 141. **Distd.** Lacon *v.* Liffen (1862), 4 Giff. 75. **Apld.** Lomax *v.* Buxton (1871), L. R. 6 C. P. 107. **Refd.** Mercer *v.* Peterson, (1868), 18 L. T. 30, Ex. Ch.; *Re* Ash, *Ex p.* Fisher (1872), 7 Ch. D. 636, L. JJ.; Harrison *v.* Cohen (1875), 32 L. T. 717.

525. ———.]—Bkpt., before his bkpcy., on receiving an advance of money, gave the lender a promissory note, & a memorandum agreeing to assign some reversionary property & a policy of assurance, by way of further security. He subsequently executed a bill of sale of all his goods & effects, to secure the same sum & any future debts. Bkpt.'s assignees having brought an action to recover the goods, on the ground that the bill of sale was an act of bkpcy., & fraudulent:—*Held :* it was competent to deft. to prove that the bill of sale was given in pursuance of a parol undertaking made at the time of the loan, & on proof of that fact it was not an act of bkpcy.—HARRIS *v.* RICKETT (1859), 4 H. & N. 1; 28 L. J. Ex. 197; 32 L. T. O. S. 389; 157 E. R. 734.

Annotations :—**Refd.** *Re* Nurse, *Ex p.* Foxley (1868), 17 L. T. 623. **Mentd.** Anon., *Re* A Disputed Adjudication (1860), 9 W. R. 199; Chapman *v.* Callis (1861), 7 Jur. N. S. 995; Lindley *v.* Lacey (1864), 17 C. B. N. S. 578; *Re* Holland, Gregg *v.* Holland, [1902] 2 Ch. 360, C. A.

526. ———.]—ANON., *Re* A DISPUTED ADJUDICATION, No. 517, *ante*.

527. ———.]—Money was lent upon a verbal promise to give security, & a deed was executed two days before bkpcy. purporting to be an absolute assignment to the creditor of the equity of redemption in some property :—*Held :* the promise was sufficient to support the deed, & the deed must stand as security for the debt.—MORRIS, *v.* VENABLES (1866), 15 W. R. 2.

528. ———.]—On Dec. 9, 1865, in consideration of deft. having agreed to lend J. money to pay an acceptance falling due on the 12th of the same month, J. agreed to give deft. a mtge. of all his goods & chattels, as security for the sum so lent, & also for any further money deft. might lend him. On Jan. 6, 1866, deft. (having previously duly

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taken up the acceptance) made a further advance to J., who, on Jan. 27, executed a bill of sale in pursuance of the agreement, assigning all his personal estate to deft. as security for the debt then due to him. On Dec. 31, 1866, J. was adjudicated bkpt. :—*Held :* the giving of the bill of sale was not an act of bkpcy.—MERCER *v.* PETERSON (1868), L. R. 3 Exch. 104 ; 37 L. J. Ex. 54 ; 18 L. T. 30 ; 16 W. R. 486, Ex. Ch.

Annotations :—**Folld.** Bew *v.* Bill (1868), 16 W. R. 760. **Distd.** *Re* Nurse, *Ex p.* Foxley (1868), 3 Ch. App. 515, L. JJ. **Folld.** Lomax *v.* Buxton (1871), L. R. 6 C. P. 107. **Distd.** *Re* Ash, *Ex p.* Fisher (1872), 7 Ch. App. 636, L. JJ. **Folld.** *Re* King, *Ex p.* King (1876), 2 Ch. D. 256, C. A. ; Heath *v.* Cochrane (1877), 46 L. J. Q. B. 727. **Consd.** *Re* Barker, *Ex p.* Kilner (1879), 13 Ch. D. 245, C. A. **Refd.** Jones *v.* Harber (1870), L. R. 6 Q. B. 77 ; *Re* Hemingway, *Ex p.* Hauxwell (1883), 23 Ch. D. 626, C. A. **Mentd.** Allen *v.* Bonnett (1870), 5 Ch. App. 577, L. C. & L. JJ. ; Philps *v.* Hornstedt (1875), 1 Ex. D. 62, Ex. Ch.

529. —— Absolute promise.]—Where a sum of money is advanced upon the faith of a promise by debtor to give a bill of sale of his property, the sum so advanced is to be considered as advanced upon the security of the bill of sale ; but in such a case the promise must be an absolute one.—*Re* ASH, *Ex p.* FISHER (1872), 7 Ch. App. 636 ; 41 L. J. Bcy. 62 ; 26 L. T. 931 ; 20 W. R. 849, L. JJ.

Annotations :—**Distd.** *Re* King, *Ex p.* King (1876), 2 Ch. D. 256, C. A. **Consd.** *Re* Jackson & Bassford, [1906] 2 Ch. 467. **Refd.** *Re* Tunstall, *Ex p.* Burton (1879), 13 Ch. D. 102, C. A. ; Morris *v.* Morris, [1895] A. C. 625, P. C. ; *Re* Columbian Fireproofing Co., [1910] 1 Ch. 758. **Mentd.** *Re* Bent, *Ex p.* Mackenzie (1873), 42 L. J. Bcy. 25 ; R. *v.* Creese (1874), L. R. 2 C. C. R. 105 ; *Re* Cook, *Ex p.* Izard (1874), 9 Ch. App. 271, L. JJ. ; Philps *v.* Hornstedt (1875), 1 Ex. D. 62, Ex. Ch. ; Harrison *v.* Cohen (1875), 32 L. T. 717 ; Heath *v.* Cochrane (1877), 46 L. J. Q. B. 727 ; *Re* Gibson, *Ex p.* Bolland (1878), 8 Ch. D. 230 ; *Re* Dobson, *Ex p.* Bolland (1878), 38 L. T. 326 ; *Re* Barker, *Ex p.* Kilner (1879), 13 Ch. D. 245, C. A. ; *Re* Hemingway, *Ex p.* Hauxwell (1883), 23 Ch. D. 626, C. A.

530. —— Promise not exigible until creditor "lost confidence."]—Shortly before a trader filed his petition he executed a bill of sale of substantially the whole of his property, to secure the repayment of an advance which had been made to him two months previously. At the time when the advance was made, the borrower agreed to give a bill of sale to secure it ; but the agreement was that the bill of sale was not to be signed until the lender "lost confidence" in the borrower :—*Held :* this amounted to an agreement to postpone the giving of the bill of sale until the grantor should be on the verge of bkpcy.—*Re* TUNSTALL, *Ex p.* BURTON (1879), 13 Ch. D. 102 ; 41 L. T. 571 ; 28 W. R. 268, C. A.

Annotation :—**Mentd.** *Re* Hemingway, *Ex p.* Hauxwell (1883), 23 Ch. D. 626, C. A.

531. —— Promise fulfilled on occasion of further advance.]—A bill of sale founded upon a verbal promise to give security in respect of a guarantee for bkpt.'s benefit made three years previously, & executed voluntarily by bkpt. upon the occasion of a subsequent additional guarantee, is not an act of bkpcy., nor a fraudulent preference within 1849 Act, although bkpt. was at the time confessedly in insolvent circumstances. The principle upon which the ct. proceeds in determining such a question is, whether or not bkpt. has received an immediate benefit as a consideration for the bill of sale.—*Re* KINDRED, *Ex p.* KINDRED (1857), 29 L. T. O. S. 250.

532. —— Creditor having equitable charge—Promise to assign legal estate.]—Two traders obtained advances in various sums, &, on the last advance, they signed an agreement that they would, on demand, assign the lease of their premises & their business, stock-in-trade, & book debts to the creditors, with a proviso that if they should repay the sums advanced the agreement should be void, but if they should fail to do so a valuation should be made, & the balance, if any, should be paid to debtors. At the same time the lease was deposited with the same creditors as a security for the due performance of the agreement. Debtors became embarrassed, & the creditors demanded the execution of an assignment in pursuance of the agreement, which was accordingly executed, & the balance of the valuation of the property was paid to debtors. The assignment included substantially the whole of debtors' property, & the creditors took possession of it forthwith :—*Held :* the agreement became a binding security on demand being made, & constituted a good equitable security, & the assignment was only necessary to pass the legal estate, & was not an act of bkpcy.—*Re* COOK, *Ex p.* IZARD (1874), 9 Ch. App. 271 ; 43 L. J. Bcy. 31 ; 30 L. T. 7 ; 22 W. R. 342, L. JJ.

Annotations :—**Expld.** *Re* Barker, *Ex p.* Kilner (1879), 13 Ch. D. 245, C. A. **Mentd.** *Re* Hemingway, *Ex p.* Hauxwell (1883), 23 Ch. D. 626, C. A.

533. —— What must be shown—Onus of proof.]—When an assignment comprising the whole of the grantor's property is given on the eve of his bkpcy. to secure a pre-existing debt, & it is attempted to support it by an agreement alleged to have been made at the time when the money was advanced, it is for the ct. to judge from all the surrounding circumstances whether the agreement was a *bonâ fide* one, or whether the giving of the bill of sale was purposely postponed in order to protect the grantor's credit. The fact that the agreement was to give the bill of sale "if or when required" by the creditor does not of itself necessarily invalidate it. The ct. will require a very clear explanation of the delay in the execution of the bill of sale, & the *onus* is on the person who sets up the prior agreement to prove, not only its existence, but its *bona fides*.—*Re* BARKER, *Ex p.* KILNER (1879), 13 Ch. D. 245 ; 41 L. T. 520 ; 44 J. P. 264 ; 28 W. R. 269, C. A.

Annotations :—**Apprvd.** *Re* Hemingway, *Ex p.* Hauxwell (1883), 23 Ch. D. 626, C. A. **Expld.** *Re* Jackson & Bassford, [1906] 2 Ch. 467.

534. —— Evidence of bona fides.]—A trader, who owed his brother £800, applied to him for a further advance, which the brother declined to make without security. Ultimately it was agreed in writing that the brother should advance £150, & that on his doing so debtor should give him a bill of sale of his plant, furniture, & book debts, which comprised substantially his whole property. The brother advanced £50 in Aug., £50 in Sept., & £50 on Oct. 6. On the last-named day, being the expiration of the time allowed by another large creditor, who was known to the brother to be pressing for payment of his debt, debtor gave the brother the bill of sale, which was expressed to be to secure the amount due & any future advances. In the course of Oct. the brother advanced £100 more :—*Held :* the giving the bill of sale was not an act of bkpcy., as it was given in pursuance of an agreement by which a substantial further advance was obtained, & the circumstances negatived the conclusion that the giving it was purposely postponed till debtor's circumstances were desperate.—*Re* KING, *Ex p.* KING (1876), 2 Ch. D. 256 ; 45 L. J. Bcy. 109 ; 34 L. T. 466 ; 24 W. R. 559, C. A.

Annotations :—**Consd.** *Re* Barker, *Ex p.* Kilner (1879), 13 Ch. D. 245, C. A. **Apprvd. & Apld.** Administrator-General of Jamaica *v.* Lascelles, De Mercado, *Re* Rees' Bankruptcy, [1894] A. C. 135, P. C. **Refd.** *Re* Hemingway, *Ex p.* Hauxwell (1883), 23 Ch. D. 626, C. A. ; *Re* Jackson & Bassford, [1906] 2 Ch. 467. **Mentd.** *Re* Williamson, *Ex p.* Threlfall (1876), 46 L. J. Bcy. 8.

535. Admissibility of evidence.]—On Oct. 25, W., a trader, being pressed by L. for payment of a debt, promised to give security the next day. Instead of doing so, W. went away immediately, gave security to G., & did not see L. again till Nov. 20. when he had a conversation with L. about the security given to G. W. having been declared a bkpt., & his assignees relying on an act of bkpcy. alleged to have been committed in giving the security to G. :—*Held :* the declarations made by W. to L. on Nov. 20, were admissible evidence towards establishing the act of bkpcy.—RIDLEY *v.* GYDE (1832), 9 Bing. 349; 2 Moo. & S. 448 ; 2 L. J. C. P. 25 ; 131 E. R. 646.

Annotations :—**Consd.** Morgan *v.* Brundrett (1833), 2 Nev. & M. K. B. 280. **Distd.** Peacock *v.* Harris (1836), 5 Ad. & El. 449. **Consd.** Rouch *v.* G. W. Ry. Co. (1841), 1 Q. B. 51. **Refd.** Johnston *v.* Woolf (1835), 2 Scott, 372 ; *Re* Douglas, *Ex p.* Snowball (1872), 7 Ch. App. 534, L. JJ.

(b) Where contemporaneous Advance.

536. Whether act of bankruptcy.]—An assignment, by a trader, of his stock-in-trade, fixtures, & effects (which in fact constitute his whole property), partly in consideration of an existing debt & partly as security for a further advance, if *bonâ fide*, is not necessarily, & as a conclusion of law (apart from evidence of fraudulent preference), an act of bkpcy.—BELL *v.* SIMPSON (1857), 2 H. & N. 410 ; 26 L. J. Ex. 363 ; 29 L. T. O. S. 202 ; 5 W. R. 688 ; 157 E. R. 169.

537. ——.]—An assignment by a trader of substantially all his property to secure a present advance & an antecedent debt, is an act of bkpcy. —*Re* A DISPUTED ADJUDICATION, *Ex p.* COTTRELL (1860), 1 L. T. 465.

Annotation :—**Consd.** Pennell *v.* Reynolds (1861), 11 C. B. N. S. 709.

538. ——.]—A man may lawfully get security for a debt, whether actually payable or not, *e.g.* where bills still running have been given for the debt, & it is not any fraud upon other creditors nor any act of bkpcy., if it be partly also in consideration of a further advance.—WHITMORE *v.* DOWLING (1860), 2 F. & F. 134.

539. ——.]—If the assignment includes all the property, & is made in consideration of a past debt, & of a further advance made at the time, the advance, if substantial, has the same effect as a substantial exception out of the property.—(MELLISH, L.J.).—*Re* KING, *Ex p.* KING (1876), 2 Ch. D. 256; 45 L. J. Bcy. 109; 34 L. T. 466; 24 W. R. 559, C. A.

Annotations :—For full list, see No. 534, *ante*, but this point is not specifically referred to in those cases.

540. —— **Previous promise to give security.**]—An assignment by a trader of all his personal estate, present & future, during the continuance of the security to secure the repayment of an antecedent debt & present & future advances, & also in consideration of a promise upon the occasion of the first & subsequent advances, to give security, is not an act of bkpcy. sufficient to support an adjudication. — *Re* A DISPUTED ADJUDICATION (1861), 4 L. T. 809.

See, also, Nos. 524 *et seq.*, *ante*.

541. Sufficiency of consideration — Creditor entitled to seize after-acquired property.]—A trader, in consideration of a past debt of £240, & a present advance of £200, conveyed by deed substantially the whole of his property, giving the transferee a right to seize & take all future acquired property, even though it should be purchased with the money which was alleged to be the consideration for the transfer :—*Held :* inasmuch as the trader got no equivalent for any part of the stock transferred, & such transfer necessarily defeated & delayed his creditors, though without fraud in fact, it constituted an act of bkpcy. within 1849 Act.—GRAHAM *v.* CHAPMAN (1852), 12 C. B. 85 ; 21 L. J. C. P. 173 ; 18 L. T. O. S. 209 ; 138 E. R. 833.

Annotations :—**Distd.** Hutton *v.* Cruttwell (1852), 1 E. & B. 15 ; Young *v.* Waud (1852), 8 Exch. 221 ; Bittlestone *v.* Cooke (1856), 6 E. & B. 296. **Folld.** *Re* A Disputed Adjudication, *Ex p.* Cottrell (1860), 1 L. T. 465 ; *Re* A Disputed Adjudication, *Ex p.* Royce (1866), 14 L. T. 418. **Consd.** Bew *v.* Bill (1868), 16 W. R. 760 ; The Heart of Oak (1869), 39 L. J. Adm. 15. **Distd.** Kevan *v.* Mawson (1871), 24 L. T. 395 ; Lomax *v.* Buxton (1871), L. R. 6 C. P. 107 ; *Re* Price, *Ex p.* Bolland (1872), 41 L. J. Bcy. 60. **Dbtd.** *Re* Hemingway, *Ex p.* Hauxwell (1883), 23 Ch. D. 626, C. A. **Refd.** Bell *v.* Simpson (1857), 2 H. & N. 410 ; Harris *v.* Rickett (1859), 32 L. T. O. S. 389 ; Lacon *v.* Liffen (1862), 4 Giff. 75 ; Smith *v.* Timms (1863), 1 H. & C. 849. Ex. Ch. ; Allen *v.* Bonnett (1870), 5 Ch. App. 577, L. C. & L. JJ. **Mentd.** Smith *v.* Cannan (1853), 2 E. & B. 35 ; Lee *v.* Hart (1856), 11 Exch. 880, Ex. Ch. ; Pennell *v.* Reynolds (1861), 11 C. B. N. S. 709 ; Whitmore *v.* Claridge (1862), 8 Jur. N. S. 1059.

542. —— ——.]— An assignment (by bill of sale) of the whole of a trader's property to a creditor in consideration partly of existing debts, & partly of a sum advanced by the creditor at the date of the assignment, & containing a power to seize after-acquired property, is not an act of bkpcy., although the consideration for the assignment is falsely stated therein, there being no fraud in fact shown.—KEVAN *v.* MAWSON (1871), 24 L. T. 395 ; 35 J. P. 311 ; 19 W. R. 1145.

543. —— —— **Advance made by redeeming property already charged.**]—A bill of sale including all the existing property of a trader, & containing a power to seize all after-acquired property with a certain exception, was made by him in favour of a creditor, in consideration partly of an existing debt & partly of a sum advanced by such creditor. The advance consisted of a sum paid to another creditor in satisfaction of a debt secured by a previous bill of sale over the same property, for the purpose of redeeming the property which he had already seized under such bill :—*Held :* the later bill of sale was not an act of bkpcy.—LOMAX *v.* BUXTON (1871), L. R. 6 C. P. 107 ; 40 L. J. C. P. 150 ; 24 L. T. 137 ; 19 W. R. 441.

Annotations :—**Distd.** *Re* Ash, *Ex p.* Fisher (1872), 7 Ch. App. 636, L. JJ. **Folld.** Heath *v.* Cochrane (1877), 46 L. J. Q. B. 727. **Refd.** *Re* Hemingway, *Ex p.* Hauxwell (1883), 23 Ch. D. 626, C. A. **Mentd.** R. *v.* Creese (1874), L. R. 2 C. C. R. 105 ; Philps *v.* Hornstedt (1875), 1 Ex. D. 62, Ex. Ch. ; *Re* Hughes, *Ex p.* Hughes (1893), 62 L. J. Q. B. 358, D. C.

544. —— **Charge covering property acquired with funds advanced.**]—An assignment of the whole of the grantor's property to secure an existing debt & a present advance, although it includes that which he may purchase by means of the advance, is not necessarily void as an act of bkpcy.—*Re* HEMINGWAY, *Ex p.* HAUXWELL (1883), 23 Ch. D. 626 ; 52 L. J. Ch. 737 ; 48 L. T. 742 ; 31 W. R. 711, C. A.

Annotations :—**Distd.** *Re* Jackson & Bassford, [1906] 2 Ch. 467. **Mentd.** Jarvis *v.* Jarvis (1893), 63 L. J. Ch. 10.

545. —— **Advance merely to pay solicitor's costs of assignment.**]—An assignment by a trader of all his property, book debts, & stock-in-trade, in consideration of an old debt of £530, the only present advance being a sum of £20, to pay the trader's

PART II. SECT. 2, SUB-SECT. 2.—B (b).

536 i. *Whether act of bankruptcy.*]—An assignment under pressure, by debtor, of substantially the whole of his property, partly in consideration of a pre-existing debt & partly of a present advance, to a purchaser aware that the assignor intended to abscond with the money advanced, & not to pay any of his creditors, is an act of bkpcy.—JAMES *v.* EBBIT (1872), 21 W. R. 194; I. R. 6 C. L. 553 ; 7 I. L. T. 7.—**IR.**

536 ii. ——.]— Debtor assigned all his property, except a small portion worth £5. to one of his creditors, partly in consideration of the antecedent debt & partly in consideration of a small further advance of money :—*Held :* the transaction was necessarily & by force of law, without reference to any extrinsic circumstances showing fraud, an act of bkpcy.—JAMES *v.* MORIARTY (1874), I. R. 8 C. L. 454 ; 8 I. L. T. 177.—**IR.**

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attorney the costs of the assignment, amounts to a fraud in the eye of the law, & is an act of bkpcy., notwithstanding that it was in fact, as between the parties to it, a perfectly fair & *bonâ fide* transaction.—PENSON *v.* MOON (1866), 15 L. T. 444.

546. —— Fair equivalent.]—An assignment by a trader of his whole property for a fair equivalent is not an act of bkpcy., although a past debt is included in the sum secured by the assignment.—BEW *v.* BILL (1868), 16 W. R. 760.

547. —— Present equivalent.]—An insolvent debtor must not assign all or nearly all his effects to one creditor, so as to put it out of debtor's power to carry on his trade, but an assignment is not necessarily fraudulent when the debtor gets a present equivalent for his goods.—THE HEART OF OAK (1869), 39 L. J. Adm. 15; 21 L. T. 727; 3 Mar. L. C. 317.

Annotation :—**Mentd.** The Mullingar (1872), 26 L. T. 326.

548. —— Advance substantial.]—B. mtged. to deft. the whole of his property, real & personal, present & future, to secure £450 previously due, & £300 then advanced. B. became bkpt., & a bill was filed by his assignees to set aside the mtge. :—*Held :* as there was a substantial advance made at the time of the deed, it justified the execution of the deed, which was not fraudulent or void under 13 Eliz. c. 5 or an act of bkpcy.—ALLEN *v.* BONNETT (1870), 5 Ch. App. 577; 23 L. T. 437; 18 W. R. 874, L. C. & L. JJ.

Annotations :—**Folld.** *Re* Tweddell, *Ex p.* Reed & Steel (1872), L. R. 14 Eq. 586. **Refd.** *Re* Ash, *Ex p.* Fisher (1872), 7 Ch. App. 636, L. JJ. **Mentd.** *Re* Bamford, *Ex p.* Games (1879), 12 Ch. D. 314, C. A.

549. —— Advance merely to pay off another creditor.]—A trader, in consideration of a past debt & a further advance, executed a bill of sale over all the household furniture & effects which then or thereafter should be in or upon the hotel in which he carried on his business as an innkeeper : —*Held :* inasmuch as it appeared that the further advance was merely for the purpose of paying off another creditor, the bill of sale was a fraudulent preference & an act of bkpcy.—*Re* BOON, *Ex p.* BOON (1879), 41 L. T. 42.

Annotation :—**Expld.** *Re* Wilkinson, *Ex p.* Stubbins (1881), 17 Ch. D. 58, C. A.

550. —— —— Advance to enable debtor to pay wages.]—In Aug. S., a shipbuilder, whose account current with his bankers was overdrawn, offered to give them security upon a ship which he was building. The bankers declined to accept the security then, but said that circumstances might arise to make it desirable that they should have it, & he promised to give it them when they wished it. On Sept. 28 the offer was renewed, but the bankers urged him to sell the ship, & so prevent the necessity of their taking the security. On Oct. 7 S. had an interview with them at the bank, & they told him that they would accept the security, & that he was to lodge the builder's certificate of the ship with their manager. The next day he signed the certificate, & gave it to the bank manager. The certificate described the ship & her engines, & stated that she had been built for the bank manager. At this time she was not launched, but was in an unfinished state in the builder's yard. The engines were not on board, but were lying unfinished in the yard of the firm who were making them for the shipbuilder. On Oct. 9 the shipbuilder had another interview with the bankers, when they told him they could advance him no more money, & did not see how he could go on, to which he assented, but they agreed to advance him £770 to pay his workmen's weekly wages, on the security of an assignment of a debt owing to him from another person, & told him that they could go no further, & that he had better consult his solr. as to his position. On Oct. 10 the manager endeavoured to get himself registered as the owner of the ship, but, as she was not launched, that could not be done, but he placed a man in possession of her, & fixed a notice upon her that she was his property. On Oct. 10 S. paid his workmen & then discharged them, & closed his place of business. On Oct. 12 he filed a liquidation petition :—*Held :* both the securities given to the bankers were valid as against the trustee in the liquidation, there not being in the transactions anything amounting to either a fraudulent preference or an act of bkpcy.—*Re* SOFTLEY, *Ex p.* HODGKIN (1875), L. R. 20 Eq. 746; *sub nom. Re* SOFTLEY, *Ex p.* WINTER, 44 L. J. Bcy. 107; 33 L.T. 62; 24 W. R. 68.

Annotations :—**Apld.** *Re* Ellis, *Ex p.* Thoday (1876), 34 L. T. 261. **Refd.** *Re* Wincham Shipbuilding, Boiler & Salt Co., Poole, Jackson & Whyte's Cases (1878), 26 W. R. 588; Bulteel & Colmore *v.* Parker & Bulteel Trustee in Bankruptcy (1916), 32 T. L. R. 661.

551. —— Debtor enabled to carry on business—How far amount of advance to be considered.]—Where debtor on the eve of bkpcy. assigns all his property to a creditor to secure a past debt as well as a fresh advance, the smallness of the fresh advance although not necessarily making the assignment an act of bkpcy., is strong evidence that the advance was made, not to enable debtor to continue his trade, but to secure the past debt.

A trader applied to a creditor who had previously advanced him £600, for a further advance of £100, which was accordingly made on debtor giving a conditional promise that if he did not repay the £100 within ten days, he would make an assignment of all his property to the creditor to secure both the past & fresh advance. Default was made in payment, & the assignment was executed. Shortly afterwards debtor became bkpt., & the property was sold for about £700 :—*Held :* having regard to the conditional nature of the promise & the smallness of the fresh advance, the assignment was an act of bkpcy. & void against the creditors. —*Re* ASH, *Ex p.* FISHER (1872), 7 Ch. App. 636; 41 L. J. Bcy. 62; 26 L. T. 931; 20 W. R. 849, L. JJ.

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546 i. *Sufficiency of consideration—Fair equivalent.*]—*Held :* it was not, under Debtors & Creditors Act, 1876, a fraudulent preference for a debtor to give a security over substantially the whole of his property in the *bonâ fide* expectation of obtaining assistance from his creditor to enable him to carry on his business, but the giving of such security was an act of bkpcy. unless there were given a present fair equivalent or an agreement, afterwards performed, to make *bonâ fide* & not merely colourable advances to enable debtor to carry on business.—WHITTAKER *v.* DENNISTON, 1 N. Z. L. R. 311.—**N.Z.**

e. *What amounts to present advance—Payment by mortgagee as surety for past debt.*]—A debtor, in insolvent circumstances, voluntarily assigned, by mtge., his whole property to a relative to secure (1) an antecedent debt, in respect of money advanced by the mtgee. to a creditor of the mtgor.; (2) a sum of money, then paid by the mtgee. to another creditor, for the purpose of releasing property, to be included in the mtge., from a lien upon it by such creditor; (3) a sum which the mtgee. paid to another creditor, for payment of which sum the mtgee. was a surety for the mtgor., & on foot of which the creditor had previously sued the mtgor., but had been induced by the mtgee. to suspend proceedings until a date subsequent to that of the execution of the deed. Only one day was allowed for redemption, & the mtgee. assumed possession immediately :—*Held :* the execution of the deed constituted an act of bkpcy. by the mtgor., under Irish 1872 Act, s. 21 (2), the payment made by the mtgee. as surety for the past debt not being equivalent to a present advance.—*Re* UPPINGTON, *Ex p.* LAMKIN (1876), 10 I. L. T. 66.—**IR.**

Annotations :—**Distd.** Harrison *v.* Cohen (1875), 32 L. T. 717. **Consd.** Philps *v.* Hornstedt (1875), 1 Ex. D. 62, Ex. Ch. **Distd.** *Re* King, *Ex p.* King (1876), 2 Ch. D. 256, C. A.; Heath *v.* Cochrane (1877), 46 L. J. Q. B. 727. **Apld.** *Re* Barker, *Ex p.* Kilner (1879), 13 Ch. D. 245, C. A. **Mentd.** *Re* Bent, *Ex p.* Mackenzie (1873), 42 L. J. Bcy. 25; R. *v.* Creese (1874), L. R. 2 C. C. R. 105; *Re* Cook, *Ex p.* Izard (1874), 9 Ch. App. 271, L. JJ.; *Re* Gibson, *Ex p.* Bolland (1878), 8 Ch. D. 230; *Re* Tunstall, *Ex p.* Burton (1879), 13 Ch. D. 102, C. A.; *Re* Hemingway, *Ex p.* Hauxwell (1883), 23 Ch. D. 626, C. A.; Morris *v.* Morris, [1895] A. C. 625, P. C.; *Re* Jackson & Bassford, [1906] 2 Ch. 467; *Re* Columbian Fireproofing Co., [1910] 1 Ch. 758.

552. —— —— ——.]—Where debtor assigns his whole property as a security for a past debt & for a further advance, it is not a question whether the further advance is great or small, but whether there was a *bonâ fide* intention of carrying on the business.—*Re* ELLIS, *Ex p.* ELLIS (1876), 2 Ch. D. 797, C. A.

Annotations :—**Folld.** *Re* Williamson, *Ex p.* Threlfall (1876), 25 W. R. 127; *Re* Vane, *Ex p.* Greener (1877), 46 L. J. Bcy. 76, C. A. **Distd.** *Re* Parker, *Ex p.* Dann (1881), 17 Ch. D. 26; *Re* Sinclair, *Ex p.* Chaplin (1884), 26 Ch. D. 319. **Apprvd.** Administrator-General of Jamaica *v.* Lascelles, De Mercado, *Re* Rees' Bankruptcy, [1894] A. C. 135, P. C. **Refd.** *Re* Berry, *Ex p.* Wilkinson (1883), 31 W. R. 649, C. A. **Mentd.** *Re* Foulds, *Ex p.* Learoyd (1878), 10 Ch. D. 3, C. A.; *Re* Sidebotham, *Ex p.* Sidebotham (1880), 14 Ch. D. 458, C. A.

553. —— —— ——.]—The question whether a further advance to a trader will sustain an assignment to secure it & a previous debt is not simply a question of amount, but a question whether the advance was made to enable the trader to continue business, or merely to enable the creditor to obtain a security.

A firm of traders, one of the partners in which was an infant, in consideration of one of their creditors paying out an execution for about £100, executed an assignment to him of their whole joint & separate property to secure the repayment of the £100, & an existing debt of about £200, on demand. The business was carried on for about three weeks by the firm when the bill of sale holder took possession, & the firm then went into liquidation :—*Held :* the payment of the execution creditor was not a present advance such as to sustain the assignment.—*Re* VANE, *Ex p.* GREENER (1877), 46 L. J. Bcy. 76; 36 L. T. 781, C. A.

554. —— —— ——.]—A shoemaker in a very small way of business executed to a creditor a bill of sale upon all his property except his book debts, afterwards valued at £70, to secure a past debt of £227 5*s.*, & a fresh advance of £15 :—*Held :* the £15 was, in the circumstances, a substantial further advance sufficient to enable him to continue his trade.—*Re* EDWARDS, *Ex p.* EVANS (1878), 39 L. T. 364.

555. —— —— ——.]—When a bill of sale of the whole of a trader's property is executed as security for an existing debt & a fresh advance, the true test whether the execution of the deed is an act of bkpcy., is, was the fresh advance made by the lender with the intention of enabling the borrower to continue his business, & had he reasonable grounds for believing that the advance would enable the borrower to do so. If these questions can be answered in the affirmative, the execution of the deed is not an act of bkpcy. The ct. ought not to look at the uncommunicated intention of the borrower, nor at the actual result of the loan. The greatness or smallness of the fresh advance is not alone to be taken as the true test.—*Re* CHAPMAN, *Ex p.* JOHNSON (1884), 26 Ch. D. 338; 53 L. J. Ch. 762; 50 L. T. 214; 32 W. R. 693, C. A.

Annotations :—**Apprvd.** Administrator-General of Jamaica *v.* Lascelles, De Mercado, *Re* Rees' Bankruptcy, [1894] A. C. 135, P. C. **Mentd.** Richardson *v.* Harris (1889), 22 Q. B. D. 268, C. A.; *Re* Smith, *Ex p.* Tarbuck (1894), 72 L. T. 59; Baker *v.* Ambrose, [1896] 2 Q. B. 372; Darlow *v.* Bland, [1897] 1 Q. B. 125, C. A.; *Re* Rouard, *Ex p.* Trustee (1915), 85 L. J. K. B. 393.

556. —— —— **Additional advance in form of goods supplied.**]—Debtor having failed to meet a cheque which he had given in part payment of goods purchased by him, the vendor stopped the goods *in transitu*, & declined to make any further advances without security. Debtor then paid the amount of the cheque & gave the creditor a bill of sale of the bulk of his property to secure the debt then due & further advances in goods or in money. The goods which had been stopped were then delivered :—*Held :* the goods constituted a present consideration amounting to a substantial advance enabling the business to be carried on, & the assignment was not an act of bkpcy.—*Re* WILLIAMSON, *Ex p.* THRELFALL (1876), 46 L. J. Bcy. 8; 35 L. T. 675; 25 W. R. 127.

557. —— —— **For nine months.**]—A farmer, knowing that he was hopelessly insolvent, but, for the purpose of going on as long as he could, obtained an advance from a money lender, to whom he was already indebted, upon the security of a bill of sale of all his effects, stock, crops, etc., both present & future. Nine months afterwards he failed to pay an instalment due, & the grantee of the bill of sale took possession of & sold the effects. Upon action brought by the trustee in bkpcy. of the grantor's estate, claiming the proceeds of the sale :—*Held :* the granting of the bill of sale did not amount to an act of bkpcy. so as to defeat the title of deft. under it.—HEATH *v.* COCHRANE (1877), 46 L. J. Q. B. 727; 37 L. T. 280.

—— **Previous promise to give security.**]—*See* Nos. 524 *et seq.*, 540, *ante.*

(*c*) *Where contemporaneous Agreement for future Advance.*

558. What property—Question for jury—Whether insolvency would be produced—Not whether business would be stopped.]—A manufacturer assigned, by way of mtge., all his machinery as a security for bills of exchange, discounted by the mtgor., & also for such other bills as should from time to time be discounted in like manner; & the amount of the security was not to exceed £2,000. At the time of the execution of the deed the machinery was worth £1,500, & the trader's effects much exceeded £3,000, & he deposed that the deed was executed with a view to obtain cash for the bills, & without any intent to defeat or delay his creditors :—*Held :* (1) there was no evidence to constitute the

PART II. SECT. 2, SUB-SECT. 2.—B.(c).

558 i. *What property—Several transactions deemed as one.*]—When debtor by several deeds assigns his property to a creditor to secure a past debt as well as to procure future advances, & a third party executes a mtge. to the same creditor for the same purpose, & then takes an assignment from the trader by way of counter security, all the transactions will be deemed as one deed, & being in part security for a bygone debt, even though future advances be made, such assignments are acts of bkpcy. (the assignor being at the time insolvent).—*Re* CARROLL, 6 Ir. Jur. 244.—**IR.**

558 ii. —— *Letter of lien over stock-in-trade, etc.*]—An insolvent in debt to a bank had given a promissory note for the full amount of the debt due. He also gave, by way of collateral security for the promissory note & for any future advances, a letter of lien over his stock-in-trade, etc., & undertook at the time to execute, whenever called upon to do so, an assignment of his business. This undertaking was never carried out. Two years & three months from the date of the loan the insolvent had addressed a letter to the bank enclosing a cheque for R.600, & requesting that it should be placed to the credit of the loan account :—*Held :* the assignment contemplated by the letter of hypothecation amounted to an act of insolvency within Insolvent Debtors Act, s. 9.—*Re* SUMMERS, I. L. R. 23 Calc. 592.—**IND.**

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execution of the assignment an act of bkpcy.; (2) if there had been any such evidence, the proper question for the jury was not, whether the deed, if acted upon, would have stopped the business, but whether it would have produced insolvency.—YOUNG *v.* WAUD (1852), 8 Exch. 221; 22 L. J. Ex. 27; 20 L. T. O. S. 101; 155 E. R. 1328.

Annotations :—**Distd.** Lee *v.* Hart (1856), 11 Exch. 880, Ex. Ch.; *Re* A Disputed Adjudication, *Ex p.* Cottrell (1860), 1 L. T. 465. **Refd.** Bell *v.* Simpson (1857), 2 H. & N. 410; *Re* Nurse, *Ex p.* Foxley (1868), 17 L. T. 623. **Mentd.** *Re* Kerslake, *Ex p.* Allum (1853), 1 Bankr. & Ins. R. 47.

559. —— Exception of book debts—& lease of shop.]—A trader assigned all her stock-in-trade, fixtures, chattels & effects, in or about her place of business, to secure an antecedent debt. The bill of sale included goods subsequently acquired for the purposes of the business, & was expressed to be in consideration of further future advances, but contained no agreement for making such advances. The lease of the shop & the book debts were not included in the bill of sale. Upon the trader's bkpcy. shortly afterwards the excepted property realised about the same amount as that included in the bill of sale :—*Held :* the lease & book debts formed a substantial exception, & the bill of sale was not void as an act of bkpcy.—*Re* PRICE, *Ex p.* BOLLAND (1872), 41 L. J. Bcy. 60; 20 W. R. 862

560. —— Excepted property equal to debt secured—Deed not executed in contemplation of bankruptcy.]—A., a soap & alkali manufacturer, being indebted to a banking co., assigned to them, to secure past & future advances, his leasehold property, with all the stock-in-trade, utensils, & effects thereon, & also a policy of insurance, as a security for money advanced or to be advanced. The deed contained a power of sale, & a proviso that the trader should remain in possession until default. The assignment did not include another part of A.'s property equal in amount to the debt covered by the security. In an action by A.'s assignees, to recover part of the property assigned, the jury found that the deed was not executed in contemplation of bkpcy. :—*Held :* it was a valid deed, & did not amount to an act of bkpcy.—CARR *v.* BURDISS (1834), 1 Cr. M. & R. 443; 5 Tyr. 136; 4 L. J. Ex. 60; 149 E. R. 1153, L. C.

Annotations :—**Consd.** Stanger *v.* Wilkins (1855), 19 Beav. 626. **Refd.** Young *v.* Waud (1852), 8 Exch. 221; Smith *v.* Cannon (1853), 17 Jur. 911, Ex. Ch.; Johnson *v.* Fesemeyer (1858), 3 De G. & J. 13. **Mentd.** *Re* Hunt, *Ex p.* Simpson (1844), 14 L. J. Bcy. 1.

561. —— About two-thirds of entire property—Remainder insufficient to pay unsecured debts.]—A lace manufacturer being pressed by a creditor, assigned to him by bill of sale four lace machines to secure the then balance of £465, & any future balance that might arise. The value of the machines was about two-thirds of his entire property, & the remaining assets were insufficient to meet his unsecured debts :—*Held :* the transfer of the machines was not an act of bkpcy., & it was good as against creditors.—HARRIS *v.* WANKLEN (1856), 5 W. R. 51.

562. Sufficiency of consideration—Stipulation that no advances made until existing debt reduced.]—Traders having overdrawn their account at the bank, & being hopelessly insolvent, gave to the bankers a bill of sale comprising their whole property to secure the existing debt & future advances, with a stipulation that no further advances were to be made until the debt was reduced to nearly half its original amount :—*Held :* the bill of sale was an act of bkpcy.—LACON *v.* LIFFEN (1863), 32 L. J. Ch. 315; 7 L. T. 774; 9 Jur. N. S. 477; 11 W. R. 474, L. C.

Annotation :—**Refd.** *Re* Nurse, *Ex p.* Foxley (1868), 17 L. T. 623.

563. —— Further goods to be supplied—Goods not delivered.]—A trader, by a bill of sale dated Apr. 24, 1860, reciting that he was indebted to M. in the sum of £98 for goods already delivered, & that he was desirous of obtaining a further supply to the extent of £82, which M. had declined to furnish without security, assigned to M. all his household furniture, stock-in-trade, & effects for securing the £180 & any further advances which M. might make to him, with a proviso for redemption on payment, & a power to M. to seize & sell if the money should not be paid on demand. No further advance beyond the £98 either in money or goods was made by M. At the time of the execution of the deed, the trader was indebted to several other creditors in sums sufficient to constitute good petitioning creditors' debts :—*Held :* the execution of the deed was an act of bkpcy.—TOPPING *v.* KEYSELL (1864), 16 C. B. N. S. 258; 4 New Rep. 197; 33 L. J. C. P. 225; 10 L. T. 526; 10 Jur. N. S. 774; 12 W. R. 756; 143 E. R. 1127.

Annotations :—**Distd.** Symons *v.* George (1865), 11 Jur. N. S. 713, Ex. Ch. **Consd.** Exley *v.* Inglis (1868), L. R. 3 Exch. 247. **Refd.** *Re* A Trust Deed, *Ex p.* James (1866), 15 L. T. 193; *Re* Vizard's Trusts (1866), 1 Ch. App. 588, L. JJ.

564. —— Promise to make advances—Covenant in mortgage not necessary.]—An assignment of substantially the whole of a mtgor.'s property to secure a previously existing debt & further advances is not an act of bkpcy., if there is a contemporaneous parol agreement on the part of the mtgee. to make further advances to a sufficient amount, & such advances are afterwards in fact made, even though the deed contains no covenant or obligation on the part of the mtgee. to make any further advances.—*Re* WINSTANLEY, *Ex p.* SHEEN (1876), 1 Ch. D. 560; 45 L. J. Bcy. 89; 34 L. T. 48; 24 W. R. 685, C. A.

Annotation :—**Consd.** *Re* Parker, *Ex p.* Dann (1881), 17 Ch. D. 26, C. A.

565. —— Necessity for agreement to make advances—Deed stamped to cover such advances.]—In order that the execution of a bill of sale of substantially the whole of the grantor's property as security for a pre-existing debt & further advances may not be an act of bkpcy., it is necessary that there should be an agreement binding the grantee to make further advances. It is not sufficient that further advances should have been in the contemplation of the parties, the deed being stamped so as to cover them, & further advances having been actually made after the execution of the deed.—*Re* PARKER, *Ex p.* DANN (1881), 17 Ch. D. 26; 51 L. J. Ch. 290; 44 L. T. 760; 29 W. R. 771, C. A.

Annotations :—**Distd.** *Re* Berry, *Ex p.* Wilkinson (1883), 22 Ch. D. 788, C. A. **Folld.** *Re* Lewis, *Ex p.* The Official Receiver (1912), 1 L. J. C. C. 86, C. A.

564 i. *Sufficiency of consideration—Promise to make advances—Covenant in mortgage not necessary.*]—A firm executed an assignment, by mtge., of their factory & mill premises & all fixed & movable machinery, then or thereafter to be used on those premises, in order to secure an antecedent debt of nearly £2,000 & further advances, on an account current between the trading firm & the mtgees. The mtgees. did not covenant by the mtge. deed to make any further advances. The accounts showed that more than the sum due at the date of the mtge. had been paid by the firm to the mtgees. on foot of balances subsequent to that date, that there were still sums, amounting in the whole to more than £4,000, due on the security of the mtge., & that these sums were due for advances subsequent to the date of the deed :—*Held :* the mtge. was not an act of bkpcy.—*Re* DAWSON TATE & Co. (1868), 16 W. R. 424.—IR.

566. —— —— Whether to enable debtor to carry on business.]—In order that a deed, assigning the whole of a debtor's property as security for an existing debt, may not be fraudulent & an act of bkpcy., on the ground that the assignee agreed to make further advances to the assignor, it is not necessary that the agreement should be technically binding; a *bonâ fide* promise is sufficient. The question in all such cases is whether the arrangement was made *bonâ fide* with the view of enabling debtor to continue his business, or whether it was a mere scheme to obtain payment of the existing debt.—*Re* BERRY, *Ex p.* WILKINSON (1883), 22 Ch. D. 788; 52 L. J. Ch. 657; 48 L. T. 495; 31 W. R. 649, C. A.

567. —— Release of debt by creditor—Secret agreement to pay other debts.]—A trader in embarrassed circumstances assigned substantially the whole of his property to a single creditor, in consideration, as expressed in the deed, of the release by that creditor of a debt then owing to him by debtor. In fact, the real consideration was the release by the assignee of that debt, & a secret verbal agreement between him & the assignor that he should undertake the payment of the assignor's debts, either the whole of his debts, or, at any rate, his trade debts. The assignee paid out some executions for the assignor, &, shortly after the execution of the deed, he paid an arrear of rent which the assignor owed to his landlord. The business was, after the execution of the deed, carried on by the assignor in his own name, just as it was before, there being nothing to show that he was not the real, as well as the apparent, owner of it, though he was in fact acting under the directions of the assignee:—*Held:* the deed was void as against the trustee as an act of bkpcy., its necessary effect being to defeat & delay the assignor's creditors in enforcing their ordinary remedies for the recovery of their debts, & there being no means by which they could compel the fulfilment by the assignee of his agreement to pay their debts.—*Re* SINCLAIR, *Ex p.* CHAPLIN (1884), 26 Ch. D. 319; 53 L. J. Ch. 732; 51 L. T. 345, C. A.

Annotations:—**Consd.** *Re* Cranston, *Ex p.* Cranston (1892), 9 Morr. 160, D. C. **Distd.** Shears *v.* Goddard (1895), 65 L. J. Q. B. 151.

568. —— Main object further advances.]—A mtgor., who conveys all his property with the main object of securing further advances, does not thereby commit an act of bkpcy., even though the mtge. also secures a past debt due from the mtgor. to the mtgee.—THE THAMES (1890), 63 L. T. 353; 6 Asp. M. L. C. 536.

C. Conveyances or Assignments as Security for contemporaneous Advance or in respect of Guarantees, etc.

569. Assignment of all effects—In consideration of assignees paying creditors—Payment by way of promissory notes.]—An assignment of all the property of traders, in consideration of the assignees giving promissory notes to the traders' creditors:—*Held:* not a sale, but an act of bkpcy.—*Re* MARSHALL, *Ex p.* ZWILCHENBART (1844), 3 Mont. D. & De G. 671; 13 L. J. Bcy. 19; 8 Jur. 1081; *affd.* (1846), De G. 273, L. C.

Annotations:—**Consd.** Graham *v.* Chapman, (1852), 12 C. B. 85; **Folld.** Leake *v.* Young (1856), 5 E. & B. 955. **Refd.** *Re* Sinclair, *Ex p.* Chaplin (1884), 26 Ch. D. 319, C. A.

570. ——In consideration of existing suretyship —& present advance—Debtor remaining in possession of property assigned.]—C. assigned all his estate & effects to H., in consideration of H. having previously become surety for him for £100, & also for a present advance of £55. The deed contained a proviso, permitting C. to retain possession of the property until default by him in paying the £100 when due, & the £55 when required. No default was made up to the time of the bkpcy. of C., & the property was in the possession of C. at the time of the bkpcy. & was sold by the assignees by consent of H., he submitting his right to same to the judgment of the ct.:—*Held:* the assignment was an act of bkpcy. & the proceeds of sale passed to the assignees of H.—*Re* COLLINS, *Ex p.* HARVEY (1854), 1 Bankr. & Ins. R. 194.

571. —— In consideration of guarantee of composition—One creditor not assenting.]—Traders assigned all their property, in consideration of the assignee guaranteeing the payment of 10*s.* in the pound on the assignor's debts. One creditor did not accede to the composition:—*Held:* an act of bkpcy.—*Re* MARSHALL, *Ex p.* ZWILCHENBART (1844), 3 Mont. D. & De G. 671; 13 L. J. Bcy. 19; 8 Jur. 1081; *affd.* (1846), De G. 273, L. C.

Annotations:—**Consd.** Leake *v.* Young (1856), 5 E. & B. 955. **Refd.** Graham *v.* Chapman (1852), 12 C. B. 85; *Re* Sinclair, *Ex p.* Chaplin (1884), 26 Ch. D. 319, C. A.

572. —— —— Assignment made after default.]—By the terms of a composition deed debtor's creditors were to receive a composition, secured by bills of exchange drawn by debtor on a third party as surety. The bills having been dishonoured, debtor assigned all his effects to the surety, in pursuance of a *bonâ fide* promise to give security:—*Held:* the assignment was an act of bkpcy., not being for such an equivalent as to make it not necessarily delay his creditors.—LEAKE *v.* YOUNG (1856), 5 E. & B. 955; 25 L. J. Q. B. 266; 27 L. T. O. S. 151; 2 Jur. N. S. 516; 4 W. R. 282; 119 E. R. 736.

Annotation:—**Expld.** Bittleston *v.* Cooke (1856), 25 L. J. Q. B. 281.

573. —— Present & future—Advance small as compared to security—Transaction bonâ fide.]—A trader, by bill of sale, conveyed all his stock, & all the stock that should during the continuance of the security become his, as a security for money to be advanced. Part of the money was used to pay existing debts:—*Held:* (1) the transaction must be viewed as if the bill of sale had been drawn as it was intended to be, entirely as a security for fresh advances; (2) the effect of pledging the whole of the trader's property for such advances was not necessarily to delay his creditors, as the advances, even if bearing a small proportion to the value of the property pledged, might be of more advantage to the trader & his creditors than the property itself; (3) the bill of sale being in fact *bonâ fide*, was not, in point of law, fraudulent, nor an act of bkpcy.—BITTLESTONE *v.* COOKE (1856), 6 E. & B. 296; 25 L. J. Q. B. 281; 2 Jur. N. S. 758; 4 W. R. 493; 119 E. R. 875.

Annotations:—**Consd.** *Re* A Disputed Adjudication, *Ex p.* Cottrell (1860), 1 L. T. 465. **Folld.** Whitmore *v.* Claridge, Weaver & Moore (1862), 31 L. J. Q. B. 141. **Distd.** Woodhouse *v.* Murray (1868), L. R. 4 Q. B. 27, Ex. Ch. **Folld.** Martin *v.* Willyams (1869), 20 L. T. 350; Harrison *v.* Cohen (1875), 32 L. T. 717. **Refd.** Pennell *v.* Reynolds (1861), 11 C. B. N. S. 709; Lacon *v.* Liffen (1862), 4 Giff. 75; *Re* Colemere (1865), 1 Ch. App. 128, L. C.; *Re* Nurse, *Ex p.* Foxley (1868), 3 Ch. App. 515, L. JJ.; *Re* Ash, *Ex p.* Fisher (1872), 7 Ch. App. 636, L. JJ. **Mentd.** Bew *v.* Bill (1868), 16 W. R. 760.

574. —— Advance of part of their value.]—An assignment by a trader of all his property & effects for a present advance of part of their value is not necessarily an act of bkpcy. It is for the jury to say whether in the circumstances the effect of the assignment is to defeat & delay creditors.—PENNELL *v.* REYNOLDS (1861), 11 C. B. N. S. 709; 5 L. T. 286; 142 E. R. 974.

Sect. 2.—What is an act of bankruptcy: Sub-sect. 2, C. & D. (a).]

Annotations :—**Folld.** Smith *v.* Timms & Stanton (1863), 1 H. & C. 849, Ex. Ch. **Apprvd.** *Re* Colemere (1865), 1 Ch. App. 128, L. C. **Distd.** *Re* A Disputed Adjudication, *Ex p.* Royce (1866), 14 L. T. 418. **Consd.** *Re* Ash, *Ex p.* Fisher (1872), 7 Ch. App. 636, L. JJ. **Apld.** *Re* Cranston, *Ex p.* Cranston (1892), 9 Morr. 160, D. C. **Refd.** Shrubsole *v.* Sussams (1864), 16 C. B. N. S. 452; *Re* Winstanley, *Ex p.* Winder (1875), 1 Ch. D. 290.

575. —— Proceeds applied in paying existing debts—Lender's knowledge of debtor's intention.] —An assignment by a trader of all his property, as security for an advance of money which he afterwards applies in payment of existing debts, is not necessarily fraudulent within Bkpcy. Acts. In order to make such an assignment fraudulent the lender must be aware that the borrower's object was to defeat or delay his creditors. Such an assignment cannot be an act of bkpcy. unless it is also void as being fraudulent.—*Re* COLEMERE (1865), 1 Ch. App. 128; 35 L. J. Bcy. 8; 13 L. T. 621; 12 Jur. N. S. 38; 14 W. R. 318, L. C.

Annotations :—**Consd.** *Re* A Disputed Adjudication, *Ex p.* Joyce (1866), 14 L. T. 418; *Re* Nurse, *Ex p.* Foxley (1868), 3 Ch. App. 515, L. JJ. **Refd.** *Re* Sinclair, *Ex p.* Chaplin (1884), 26 Ch. D. 319, C. A.

576. —— Exorbitant terms given.]—An assignment of a person's whole property for a *bonâ fide* present advance is not an act of bkpcy., though exorbitant interest is charged & stringent conditions imposed.—HARRISON *v.* COHEN (1875), 32 L. T. 717.

577. —— To raise funds to pay pressing creditors—Assignee being surety for such debts—Assignment used to get rid of suretyship.] —Where C., being in difficulties, in consideration of a sum of £900, gave a bill of sale over all his property to his brother W. to enable him to pay off two pressing creditors, for the payment of whose debts W. was surety, & W. immediately afterwards borrowed from the two creditors the exact sum so paid to them, whereby W. was thus relieved from his liability as surety :—*Held :* the bill of sale, being for value for the purpose of paying debts, could not be impeached as an act of bkpcy., the ct. not inferring fraud from mere suspicion.—*Re* MORRIS, *Ex p.* JAY (1882), 45 L. T. 797.

578. —— —— Relief enabling debtor to continue business.]—A trader being indebted in £200 agreed with deft. that on deft. paying the debt he would assign by bill of sale all his effects to deft. to secure the £200. A deed of assignment was executed, some months after. The goods were subsequently sold, & the £200 paid to deft. :—*Held :* the deed was not an act of bkpcy., as the payment of the debt operated as an advance to the trader, & enabled him to carry on his business. —HUTTON *v.* CRUTTWELL (1852), 1 E. & B. 15; 22 L. J. Q. B. 78; 20 L. T. O. S. 245; 17 Jur. 392; 118 E. R. 342.

Annotations :—**Distd.** *Re* Collins, *Ex p.* Harvey (1854), 1 Bankr. & Ins. R. 194. **Folld.** Bittlestone *v.* Cooke (1856), 6 E. & B. 296. **Expld.** Lacon *v.* Liffen (1862), 4 Giff. 75. **Apld.** Whitmore *v.* Claridge, Weaver & Moore (1862), 31 L. J. Q. B. 141; Lomax *v.* Buxton (1871), L. R. 6 C. P. 107. **Distd.** *Re* Ash, *Ex p.* Fisher (1872), 7 Ch. App. 636, L. JJ. **Expld.** Harrison *v.* Cohen (1875), 32 L. T. 717. **Refd.** *Re* A Disputed Adjudication (1860), 3 L. T. 632. **Mentd.** *Re* Kerslake, *Ex p.* Allum (1853), 1 Bankr. & Ins. R. 47; *Re* Kindred, *Ex p.* Kindred (1857), 29 L. T. O. S. 250; Harris *v.* Rickett (1859), 4 H. & N. 1; Mercer *v.* Peterson (1868), 18 L. T. 30.

579. —— To enable debtor to carry on business — Plant of contractor on employer's land — Advances by employer.] — A. having contracted with a canal co. to build locks & bridges on the canal as their engineer, purchased timber & other materials for the purpose, which were laid on the co.'s premises on the bank of the canal; & on the co.'s advancing money to him, they took a bill of sale of the goods, & a symbolical delivery of them by a halfpenny. Afterwards the co. took out execution upon a judgment confessed by A., & the sheriff seized the goods, & A. became a bkpt. :—*Held :* (1) A. had not such a possession of the goods as would enable his assignees to take them within 21 Jac. 1, c. 19, s. 11, for the best delivery was given that the nature of the goods would admit of, they being before on the co.'s premises; (2) the bill of sale was no act of bkpcy. in A.—MANTON *v.* MOORE (1796), 7 Term Rep. 67; 101 E. R. 858.

Annotations :—**Apld.** Crowfoot *v.* London Dock Co. (1834), 2 Cr. & M. 637. **Mentd.** Gordon *v.* East India Co. (1797), 7 Term Rep. 228; Hawthorn *v.* Newcastle-upon-Tyne & North Shields Ry. Co. (1840), 2 Ry. & Can. Cas. 288; Lindon, Saunders & Fox *v.* Sharpe (1843), 13 L. J. C. P. 67.

580. —— —— In belief debtor would be able to do so.]—An assignment of the whole of debtor's property, in consideration of a contemporaneous advance & promise of further assistance "in order to enable debtor to carry on his business, & in the reasonable belief that he would thereby be enabled to do so," is not an act of bkpcy.—ADMINISTRATOR-GENERAL OF JAMAICA *v.* LASCELLES, DE MERCADO & CO., *Re* REES' BANKRUPTCY, [1894] A. C. 135; 63 L. J. P. C. 70; 70 L. T. 179; 42 W. R. 416; 10 T. L. R. 238; 1 Mans. 163; 6 R. 445, P. C.

581. Assignment of separate property of one partner —To secure composition agreed with joint creditors.] —Joint traders entered into a deed of composition with their joint creditors, whereby it was agreed that they should remain in possession of the joint stock-in-trade, & that the creditors should receive a composition payable by instalments. The separate property of one of the partners, consisting of a policy of insurance on his life, was assigned to trustees as a security for the payment of the instalments :—*Held :* the assignment of the policy did not constitute an act of bkpcy.—ABBOTT *v.* BURBAGE (1836), 2 Bing. N. C. 444; 1 Hodg. 448; 2 Scott, 656; 5 L. J. C. P. 117; 132 E. R. 174.

Annotations :—**Consd.** *Re* Hunt, *Ex p.* Simpson (1844), 14 L. J. Bcy. 1. **Refd.** Aldred *v.* Constable (1843), 4 Q. B. 674.

582. Assignment of sufficient property—To secure guarantee of composition—Agreement not known to creditors.] — The creditors of a liquidating debtor agreed to accept a composition of 7*s.* 6*d.* in the pound, payable by three instalments to be secured by the acceptances of debtor, & the third instalment to be secured by the acceptance of R., the surety. R. had consented to become surety upon the express understanding that goods of sufficient value to cover any money he might be called upon to pay as such surety should be deposited with him by debtor. This arrangement was not disclosed to the creditors :—*Held :* the transaction between debtor & R. was not an act of bkpcy.—*Re* ROBINSON, *Ex p.* ROBINSON (1875), 33 L. T. 609; *affd.* (1876), 34 L. T. 198, C. A.

583. Mortgage of land & buildings—Fixtures present & future — Agreement not to remove fixtures — Not whole property of mortgagor.] — A mtge. by two, described in the deed as copper roller manufacturers, recited a conveyance to them of land, & mills or factories, in a manufacturing town, as tenants in common in fee, & that they were carrying on business at the mills or factories as copper roller manufacturers, & in such capacity had lately affixed to or placed upon the land, mills or factories, a steam-engine & boilers, together with a large quantity of mill

gear & millwright work, & granted the land, mills or factories, & hereditaments comprised in the recited conveyance, to the use of pltfs. in fee, subject to a proviso for redemption:—*Held:* as between pltfs. & the mtgors.' assignee in bkpcy., the mtge., although it comprised all fixtures then or thereafter to be placed on the land, & contained a covenant not to remove any of the particulars granted by the mtge. without the permission of the mtgees., was not an act of bkpcy., it appearing that the mtgors. had other property, that the mtge. money was actually advanced, & that the transaction was clear of fraud.—MATHER *v.* FRASER (1856), 2 K. & J. 536; 25 L. J. Ch. 361; 27 L. T. O. S. 41; 2 Jur. N. S. 900; 4 W. R. 387; 69 E. R. 895.

Annotations:—**Mentd.** Waterfall *v.* Penistone (1856), 6 E. & B. 876; *Re* Brook, *Ex p.* Scott (1857), 29 L. T. O. S. 314; Metropolitan Counties, &c. Soc. *v.* Brown (1859), 26 Beav. 454; Walmsley *v.* Milne (1859), 7 C. B. N. S. 115; Haley *v.* Hammersley (1861), 3 De G. F. & J. 587; Cullwick *v.* Swindell (1866), L. R. 3 Eq. 249; Boyd *v.* Shorrock (1867), L. R. 5 Eq. 72; Patent Peat Co. (1867), 17 L. T. 69; Climie *v.* Wood (1868), L. R. 3 Exch. 257; Longbottom *v.* Berry (1869), L. R. 5 Q. B. 123; *Re* Richards, *Ex p.* Astbury, *Ex p.* Lloyd's Banking Co. (1869), 4 Ch. App. 630, L.J.: Holland *v.* Hodgson (1872), L.R. 7 C. P. 328; Hawtry *v.* Butlin (1873), L. R. 8 Q. B. 290; Meux *v.* Jacobs (1875), L. R. 7 H. L. 481, H.L.; Cross *v.* Barnes (1877), 46 L. J. Q. B. 479; *Re* Armytage, *Ex p.* Moore & Robinson's Banking Co. (1880), 14 Ch. D. 379; Southport & West Lancashire Banking Co. *v.* Thompson (1887), 57 L. J. Ch. 114, C. A.; *Re* Yates, Batcheldor *v.* Yates (1888), 38 Ch. D. 112, C. A.; Gough *v.* Wood, [1894] 1 Q. B. 713, C. A.; Huddersfield Banking Co. *v.* Lister (1895), 72 L. T. 703, C. A.; Hobson *v.* Gorringe, [1897] 1 Ch. 182, C. A.; Reynolds *v.* Ashby, [1904] A. C. 466, H. L.; *Re* Chesterfields' S. E. [1911] 1 Ch. 237; *Re* Rogerstone Brick & Stone Co., Southall *v.* Wescomb, [1919] 1 Ch. 110, C. A.

584. Mortgage of all effects—To secure monthly payments—Whole debt to become due on bankruptcy proceedings being taken against debtor.]—A. executed a mtge. of all his effects, etc., in consideration of an advance from a society, of which he was a member, to secure his monthly payments, with a proviso that in default, or if any legal proceedings should be taken against the mtgor. "tending towards bkpcy.," the whole payments were to be due, & the trustees of the deed were then to have a power of sale:—*Semble:* the deed was an act of bkpcy.—*Re* HOLLIER, *Ex p.* LEWIS (1861), 31 L. J. Bcy. 11, L. JJ.

D. Transfers by way of Sale.

(a) In General.

585. To near relative.]—Sale by bkpt. to a near relation is a badge of fraud.—ANON. (1701), 12 Mod. Rep. 439; 88 E. R. 1435.

586. Pretended sale.]—A pretended sale, though of part of a trader's goods only, to a particular creditor is not in itself an act of bkpcy., no more is any fraudulent transaction, which is not a deed.—RUST *v.* COOPER (1777), 2 Cowp. 629; 98 E. R. 1277.

Annotation:—**Refd.** Billiter *v.* Young (1856), 6 E. & B. 1, Ex. Ch.

587. Sale at fair price—Bonâ fide purchaser.]—A fair & *bonâ fide* sale of the whole of a trader's property is not, of itself, an act of bkpcy.

The party who impeaches the sale of the whole of a bkpt.'s property, must show some facts from which fraud may be inferred.—ROSE *v.* HAYCOCK (1827), 1 Ad. & El. 461; 3 Nev. & M. K. B. 644; 5 L. J. O. S. K. B. 210; 110 E. R. 1283.

Annotations:—**Folld.** Baxter *v.* Pritchard (1834), 1 Ad. & El. 456. **Distd.** Lindon *v.* Sharp (1843), 7 Scott, N. R. 730; *Re* Marshall, *Ex p.* Zwilchenbart (1844), 3 Mont. D. & De G. 671; *Re* Marshall, *Re* Marshall & Rodgers (1846), De G. 273, L. C.; Leake *v.* Young (1856), 5 E. & B. 955; *Re* Myers, *Ex p.* Defries (1876), 35 L. T. 392, C. A. **Refd.** Harwood *v.* Bartlett (1839), 6 Bing. N. C. 61; *Re* Fowke, *Ex p.* Sparrow (1852), 2 De G. M. & G. 907; Bittlestone *v.* Cooke (1856), 6 E. & B. 296.

588. —— ——.]—An assignment by a trader of his whole stock, with intent to abscond from his creditors & carry off the purchase-money, is not an act of bkpcy., when the purchaser pays a fair price for the goods, & is ignorant of the trader's design.—BAXTER *v.* PRITCHARD (1834), 1 Ad. & El. 456; 3 Nev. & M. K. B. 638; 3 L. J. K. B. 185; 110 E. R. 1282.

Annotations:—**Distd.** Siebert *v.* Spooner (1836), 1 M. & W. 714; Lindon *v.* Sharpe (1843), 6 Man. & G. 895; *Re* Marshall, *Ex p.* Zwilchenbart (1844), 3 Mont. D. & De G. 671; *Re* Marshall, *Re* Marshall & Rodgers (1846), De G. 273, L. C. **Consd.** Graham *v.* Chapman (1852), 12 C. B. 85. **Distd.** Leake *v.* Young (1856), 5 E. & B. 955. **Expld.** Lee *v.* Hart (1856), 11 Exch. 880, Ex. Ch. **Refd.** Harwood *v.* Bartlett (1839), 6 Bing. N. C. 61; *Re* Fowke, *Ex p.* Sparrow (1852), 2 De G. M. & G. 907; Bittlestone *v.* Cooke (1856), 6 E. & B. 296; Fraser *v.* Levy (1860), 6 H. & N. 16; *Re* Sills, Shears *v.* Goddard (1896), 3 Mans. 24, C. A.

589. —— ——.]—Goods were sold by deft. as agent of C., in contemplation of C.'s bkpcy., for the purpose of raising money for deft. & C. The buyer did not know the sale to be fraudulent:—*Held:* such sale was not an act of bkpcy. by C.—HARWOOD *v.* BARTLETT (1839), 6 Bing. N. C. 61; 8 Scott, 171; 9 L. J. C. P. 105; 4 Jur. 73; 133 E. R. 24.

Annotation:—**Refd.** Lindon *v.* Sharp (1843), 7 Scott, N. R. 730.

590. —— **Transactions in ordinary course of business.**]—On June 6, 1871, G., a dealer in oil, borrowed £400 of N., his brother-in-law, the money to be repaid in a month. The money not having been repaid when due, N. pressed for it, & ultimately placed the matter in the hands of his solrs., who gave G. till the end of July to pay. On Aug. 1 G. asked N. for further time, & N. said he must have a speedy settlement or he should take proceedings. G. said he would do what he could during the week. On Aug. 5 he went to N., & said he had no money, but that he had some oil, & that if N. could induce a firm of B. & Co., in which he had formerly been a partner, to buy it, he should be paid out of the proceeds. N. went to B. & explained the circumstances to him, & ultimately B. consented to treat with G. G. then went to B., &, in the result, a contract was entered into by B. on behalf of his firm to buy fourteen casks of oil from G. At this time G. had,

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PART II. SECT. 2, SUB-SECT. 2—D. (a).

f. *Sale of cattle by tenant under "Plan of Campaign."*]—M., having been served with a writ for one year's rent, a sale by public auction of the tenant's cattle was announced, pursuant to a published scheme known as the "Plan of Campaign," with which words the posters for the sale were conspicuously headed. Shortly before the service of the writ upon him M. had paid to the local trustees of the "Plan of Campaign" £25 10*s.*, which represented a half-yearly gale of his rent, less by 40 per cent., the abatement he claimed:—*Held:* the payment of the £25 10*s.* to the trustees of the "Plan of Campaign" & the sale of the cattle constituted acts of bkpcy.—*Re* MORONEY (1887), 21 L. R. Ir. 27.—**IR.**

587 i. *Sale at fair price—Bonâ fide purchaser.*]—Pltf. went to B., about twenty miles from where he lived, & saw G. for the first time. The same night he commenced taking stock with G. of the latter's stock-in-trade & next day, without making any inquiry as to G.'s position, purchased the stock & paid over to G. in cash the purchase-money. G., who was insolvent, absconded the same night. Pltf. in fact purchased the business at 35 per cent. discount, & there were other circumstances of suspicion:—*Held:* the sale of the whole stock-in-trade was an act of bkpcy.—BROOKS *v.* TAYLOR (1876), 26 C. P. 443.—**CAN.**

g. *Sale by auction—Innocence of purchasers immaterial.*]—M., a clothing manufacturer, caused dress materials, which had been purchased on credit & were still unpaid for, to be sold by auction. The sale was a scheme on the part of M. to perpetrate a gross fraud on his creditors:—*Held:* notwithstanding the innocence of the purchasers at the auction, all that had to be considered was the conduct & motives of debtor, & the sale constituted an act of bkpcy. by M. within Bkpcy. Act, 1898 (No. 25), s. 4 (1) (b).—*Re* MYERSON & MYERSON, *Ex p.* COOK & SONS, LTD. (1907), 7 S. R. N. S. W. 666.—**AUS.**

Sect. 2.—What is an act of bankruptcy: Sub-sect. 2, D. (a) & (b); sub-sects. 3 & 4.]

in fact, no oil, but on Aug. 9 he ordered fourteen casks from W. on credit, & this oil was by G.'s direction sent to B. & Co. G. never paid for it, & had no means of doing so when he ordered it. On Aug. 15, G. called at the warehouse of B. & Co. to settle the purchase, & by his order B. & Co. paid to N. the amount of his loan & interest, & paid the balance of the price of the oil to G. On Apr. 6, 1872, G. was adjudicated a bkpt., the act of bkpcy. being the filing of a petition for liquidation on Mar. 7. The trustee having applied to set aside the payment of the £400 to N. as a fraudulent preference & an act of bkpcy.:—*Held:* (1) the purchase of the oil was a *bonâ fide* transaction in the ordinary course of trade, & N. was a payee in good faith, & for valuable consideration; (2) there was no act of bkpcy. & no fraudulent preference.—*Re* GOLDEN, *Ex p.* NORTON (1873), L. R. 16 Eq. 397; 21 W. R. 422.

Annotation:—**Mentd.** *Re* Simpson, *Ex p.* Morgan (1876), 2 Ch. D. 72, C. A.

See, now, 1914 Act, s. 1 (1) (*c*).

591. Sale for cash—Purchaser knowing price will be applied in making voluntary payment.]—An actual sale of goods for money, the vendor intending to use the purchase-money in making a voluntary payment & the purchaser knowing of that intention, is not a fraudulent transfer within s. 6 (2) of 1869 Act.—*Re* WILKINSON, *Ex p.* STUBBINS (1881), 17 Ch. D. 58; 50 L. J. Ch. 547; 44 L. T. 877; 29 W. R. 653, C. A.

Annotations:—**Apld.** *Re* Kemp, *Ex p.* Luck (1883), 49 L. T. 809. **Folld.** *Re* Goldsmid, *Ex p.* Taylor (1886), 18 Q. B. D. 295, C. A.; *Re* Hutchinson (1887), 3 T. L. R. 324, C. A. **Apld.** Pratt *v.* Inman (1889), 6 T. L. R. 91. **Folld.** New, Prance & Garrard's Trustee *v.* Hunting, [1897] 1 Q. B. 607. **Consd.** *Re* Blackpool Motor Car Co., Hamilton *v.* Blackpool Motor Car Co., [1901] 1 Ch. 77; *Re* Lake, *Ex p.* Dyer, [1901] 1 K. B. 710, C. A.

592. Sale below market value — Whether fraudulent question for jury.]—A sale by a trader of his goods at prices considerably below their market value, is not of itself a fraudulent transfer within 1849 Act, s. 67. To render the transaction fraudulent within that Act, the seller must have intended by such sale to defeat or delay his creditors, & the purchaser must have had reason to know that such was the object of the seller.

A trader from time to time, during several months sold his goods to deft. at prices from £40 to £50 per cent. less than he paid for them, & afterwards became bkpt.:—*Held:* it was properly left to the jury to say whether the dealings between deft. & bkpt. were real sales by bkpt. to deft., each endeavouring to make the best bargain he could for himself, & if so such sales were not an act of bkpcy. as fraudulent transfers.—LEE *v.* HART (1856), 11 Exch. 880; 25 L. J. Ex. 135; 26 L. T. O. S. 283; 2 Jur. N. S. 308; 4 W. R. 289, Ex. Ch.

Annotations:—**Distd.** Fraser *v.* Levy (1860), 6 H. & N. 16. **Refd.** *Re* Herman, *Ex p.* Pharaoh, [1915] H. B. R. 41, C. A.

593. —— To raise money in fraud of creditors.]—A sale of goods at such a price, & in such circumstances, that the buyer ought to know the trader is selling to raise money in fraud of his creditors, is an act of bkpcy.—COOK *v.* CALDECOTT (1830), 4 C. & P. 315; Mood. & M. 522.

Annotations:—**Folld.** Baxter *v.* Pritchard (1834), 1 Ad. & El. 456; Harwood *v.* Bartlett (1839), 6 Bing. N. C. 61. **Distd.** Lee *v.* Hart (1856), 11 Exch. 880, Ex. Ch. **Refd.** Lee *v.* Hart (1854), 10 Exch. 555.

594. —— —— Not for purpose of carrying on business—Express or presumptive notice to purchaser.]—If a trader raises money by selling his goods at an under-value, not for the purpose of carrying on his business, but in contemplation of stopping payment, & for the purpose of cheating his creditors, to one who has notice either by express information, or from the nature of the transaction, that he is selling his goods not in order to carry on his business but with a fraudulent intention, the sale is an act of bkpcy. & void.—FRASER *v.* LEVY (1860), 6 H. & N. 16; 158 E. R. 7.

(b) To Company.

595. For shares—Debtor in sole control of company.]—An insolvent trader, for the purpose of defeating his creditors, sold his business to a co. he had formed for the purpose, in consideration of fully paid up shares & of the co. undertaking to pay his debts. He was chairman, sole director, & secretary of the co., & the other members held only one share each:—*Held:* the sale was an act of bkpcy.—*Re* HIRTH, *Ex p.* TRUSTEE, [1899] 1 Q. B. 612; 68 L. J. Q. B. 287; 80 L. T. 63; 47 W. R. 243; 15 T. L. R. 153; 43 Sol. Jo. 209; 6 Mans. 10, C. A.

Annotations:—**Distd.** Bullock *v.* Ardern (1901), 17 T. L. R. 285, C. A. **Extd.** Gonville's Trustee *v.* Patent Caramel Co., Same *v.* Gonville, Jarvis, [1912] 1 K. B. 599.

596. —— In private company formed by debtor's former manager—Debtor appointed managing director.]—Debtor, who was hopelessly insolvent, carried on business till Aug., 1914, when he gave his manager, P., notice to cease. P., with G., formed a private co. on Aug. 31, of which the signatories & first directors were debtor, P. & G., debtor being managing director at £300 a year. The co. had its offices at debtor's premises. In Sept. debtor sold the whole machinery on his premises, worth £1,000, for £400 in fully paid shares of the co.:—*Held:* a fraudulent conveyance within 1883 Act, s. 4 (1) (*b*).—*Re* HERMAN, *Ex p.* PHARAOH & Co., [1915] H. B. R. 41, C. A.

597. For cash & second debentures—Promoter taking first debentures — Book debts excepted from transfer.]—Debtor assigned to a co. all his trade assets, retaining book debts of the nominal value of £1,760, which realised £700. The consideration was £100 in cash & £3,700 in second debentures. At the date of the assignment debtor owed £4,000, excluding about £3,000 to the promoter of the co., who took first debentures:—*Held:* the assignment was an act of bkpcy.—WHEATLEY'S TRUSTEE *v.* WHEATLEY, LTD. (1901), 85 L. T. 491.

Annotation:—**Refd.** *Re* David & Adlard, *Ex p.* Whinney, [1914] 2 K. B. 694.

598. For debentures & ordinary shares—Debtor chairman of company—Other directors under his control.]—An insolvent trader sold his business & book debts, & also another business which he had contracted to purchase, & large quantities of stock purchased on credit, to a co. which he promoted for the purpose. The purchase-money was paid in debentures, which were issued to his nominees, & the balance (except a small amount of cash) in ordinary shares, which were allotted to the promoter. He was the chairman of the co., & the other directors were his instruments in carrying through the transaction:—*Held:* an act of bkpcy.—*Re* SLOBODINSKY, *Ex p.* MOORE, [1903] 2 K. B. 517; 72 L. J. K. B. 883; 89 L. T. 190; 52 W. R. 156; 19 T. L. R. 616; 47 Sol. Jo. 710; 10 Mans. 341.

Annotations:—**Extd.** Gonville's Trustee *v.* Patent Caramel Co.; Same *v.* Gonville, Jarvis, [1912] 1 K. B. 599. **Apld.** *Re* Hart, *Ex p.* Green, [1912] 3 K. B. 6, C. A. **Mentd.** *Re* Goldburg, *Ex p.* Silverstone, [1912] 1 K. B. 384.

599. —— Company undertaking to pay debts —Transaction bonâ fide for benefit of creditors.]

—A trader being in difficulties transferred his assets to a co. in the *bonâ fide* hope of thereby benefiting his creditors. His assets were estimated at £2,000 & his debts at £1,000. The consideration for the transfer was an undertaking by the co. to pay his debts & the allotment of ninety-four shares & debentures of the nominal value of £1,000. The debentures could not be enforced until interest was two months overdue, *i.e.* eight months from their issue or until execution was put in against the co. :—*Held :* the transfer did not necessarily tend to defeat or delay creditors, was not a fraudulent conveyance within 1883 Act, s. 4 (1) (*b*), & should not be set aside as void against the trustee in bkpcy.—*Re* HARRIS, *Ex p.* TRUSTEE (1906), 54 W. R. 460 ; 50 Sol. Jo. 241 ; 14 Mans. 127, D. C.

Annotation :—**Consd.** *Re* David & Adlard, *Ex p.* Whinney, [1914] 2 K. B. 694.

600. —— Arrangement approved by majority of creditors.]—Two debtors trading in partnership, whose liabilities amounted to £20,000 & who were unable to meet their engagements as they fell due, assigned their business as a going concern with the approval of the majority of their creditors to a private co. for £5,000 in fully paid up shares & £20,000 in debentures. By the articles of assocn. of the co. the two debtors were made permanent directors of the co. at fixed salaries & did not vacate office if they became bkpt. The debentures were a floating charge in common form for five years, but became immediately enforceable if the usual events happened. The majority of the creditors accepted debentures as security for their debts. Within three months debtors became bkpt., & the trustee in bkpcy. claimed that the assignment to the co. was void as against him under stat. 13 Eliz. c. 5, & also as an act of bkpcy. under 1883 Act, s. 4 (1) (*b*) :—*Held :* (1) the assignment was not void under the above stat. of Elizabeth ; (2) the assignment was an act of bkpcy. because it naturally tended to defeat & delay any creditors who wished to enforce their ordinary rights against debtors' estate.—*Re* DAVID & ADLARD, *Ex p.* WHINNEY, [1914] 2 K. B. 694 ; *sub nom. Re* DAVID & JOHNSON, *Ex p.* WHINNEY, 83 L. J. K. B. 1173 ; 110 L. T. 942 ; 30 T. L. R. 366 ; 58 Sol. Jo. 340 ; 21 Mans. 148.

601. Cash & negotiable bills excepted from transfer—Debtor managing director—Company not taking over liabilities.]—Bkpt., who had been in partnership & traded as G. & Co., after the dissolution continued to trade alone in the same name & incurred large liabilities to trade creditors. On Sept. 19, 1917, a private co. was registered as G. & Co., the signatories to the memo. of association being bkpt. & another. By an agreement dated Sept. 20, 1917, bkpt. sold to the co. all the assets of G. except cash & negotiable bills. The agreement had not been stamped or filed with the registrar of joint stock cos. The capital of the co. was £15,000. By the articles of association the regulations contained in clause 77 of Table A. were not to apply. In Dec., 1917, bkpt. was appointed managing director of the co. at a salary of £1,000 a year for five years from Sept. 20, 1917. The total subscribed capital was £65. The co. did not take over the liabilities of the business which were the liabilities in the bkpcy. Within three months debtor became bkpt. :—*Held :* the agreement of Sept. 20, 1917, was fraudulent & void as against the trustee in bkpcy. as an act of bkpcy. under 1914 Act, s. 1 (1) (*b*).—*Re* GUNSBOURG, *Ex p.* TRUSTEE (1919), 88 L. J. K. B. 562 ; [1918–19] B. & C. R. 108.

SUB-SECT. 3.—FRAUDULENT PREFERENCES.

602. Whether act of bankruptcy per se.]—A voluntary preference of a creditor, though it can be set aside as a fraud on the bkpt. law, is not an act of bkpcy.—*Re* WILKINSON, *Ex p.* STUBBINS (1881), 17 Ch. D. 58 ; 50 L. J. Ch. 547 ; 44 L. T. 877 ; 29 W. R. 653, C. A.

Annotations :—**Refd.** *Re* Kemp, *Ex p.* Luck (1883), 49 L. T. 809. **Mentd.** *Re* Goldsmid, *Ex p.* Taylor (1886), 18 Q. B. D. 295, C. A. ; *Re* Hutchinson (1887), 3 T. L. R. 324, C. A. ; Pratt *v.* Inman (1889), 6 T. L. R. 91 ; New, Prance & Garrard's Trustee *v.* Hunting, [1897] 1 Q. B. 607 ; *Re* Blackpool Motor Car Co., Hamilton *v.* Blackpool Motor Car Co., [1901] 1 Ch. 77 ; *Re* Lake, *Ex p.* Dyer, [1901] 1 K. B. 710, C. A.

603. ——.]—A fraudulent preference is not *per se* an act of bkpcy.—*Re* KEMP, *Ex p.* LUCK (1883), 49 L. T. 809 ; 32 W. R. 296.

604. Giving petitioning creditor preference—To discontinue commission.]—A commission was sued out & afterwards bkpt. paid petitioning creditor £200 & gave security for the remainder of his debt, that the commission should die away :—*Held :* to be an act of bkpcy.—VERNON *v.* HANKEY (1787), Cooke's Bankrupt Laws, 8th ed., p. 116.

Annotation :—**Mentd.** Fowler *v.* Padget (1798), 7 Term Rep. 509.

605. Paying debt after improper fiat issued.]—*Qu. :* whether payment of a debt, after the issuing of an improperly issued fiat, would have constituted an act of bkpcy. under 6 Geo. 4, c. 16, s. 8.—*Re* MUSGROVE, *Ex p.* MUSGROVE, *Ex p.* RUSSELL (1843), 3 Mont. D. & De G. 386 ; 8 Jur. 87, Ct. of R.

Annotations :—**Mentd.** *Re* Greener, *Ex p.* Greener (1880), 15 Ch. D. 457, C. A. ; *Re* Sedgwick, *Ex p.* McMurdo (1888), 60 L. T. 8, C. A.

"Void as fraudulent preference if he were adjudged bankrupt."]—*See* Part XX., *post.*

See, also, cases in sub-sect. 2, *ante.*

SUB-SECT. 4.—DEPARTING OR REMAINING OUT OF JURISDICTION WITH INTENT TO DEFEAT OR DELAY CREDITORS.

606. What must be established—That creditors prevented from recovering debts.]—W., a mercer on Ludgate Hill, went beyond sea, on account of having killed his wife ; his creditors were thereby in fact prevented from recovering their debts :—*Held :* an act of bkpcy. ; otherwise if his creditors had not in fact been thereby prevented from recovering their debts.—*Re* WOODIER (1739), Bull. N. P. 39.

Annotation :—**Consd.** Fowler *v.* Padget (1798), 7 Term Rep. 509.

607. —— That creditors delayed—Intent immaterial.]—H. left England with a young woman, who, as H. was a married man, refused to live with him as his mistress, unless he took her abroad. Deft., a relation of the girl, & a creditor of bkpt., followed them to Holland, & obtained from H. a bill for the amount of his debt :—*Held :* as the effect of the going abroad was to delay his creditors, it was an act of bkpcy., irrespective of his object in so doing, & the assignees of H. were entitled to recover the amount of the bill as money had & received.—RAIKES *v.* POREAU (1786), Cooke's Bankrupt Laws, 7th ed. p. 80.

Annotation :—**Consd.** Fowler *v.* Padget (1798), 7 Term Rep. 509.

PART II. SECT. 2, SUB-SECT. 3.

h. *Giving scheduled creditors preference.*]—The intention of an assignment for the benefit of creditors generally was to include all creditors, but some were omitted from the schedule by mistake : —*Semble :* such deed would be an act of insolvency as amounting to a fraudulent preference of the scheduled creditors.—*Re* HASLAM (1877), 3 V. L. R. 10.—AUS.

Sect. 2.—What is an act of bankruptcy: Sub-sect. 4.

608. —— Intent to delay — Actual delay unnecessary.]—An intent to delay a creditor makes the leaving the realm an act of bkpcy.; it is not necessary that a creditor should actually be delayed. If the departure be not accompanied with such intent, it is no act of bkpcy.—WILLIAMS *v.* NUNN (1809), 1 Taunt. 270; 127 E. R. 837.

609. —— —— At instant of departure.]—Departure from the realm, & the consequential delay of a creditor, is not an act of bkpcy. without proof or necessary inference, of an intention to delay at the instant of departure.—*Re* PARR, *Ex p.* OSBORNE (1813), 2 Ves. & B. 177; 1 Rose, 387; 35 E. R. 286.

Annotations:—**Mentd.** *Re* Lavender, *Ex p.* Lavender (1834), 3 L. J. Bcy. 120; Colombine *v.* Penhall (1850), 14 Jur. 460.

See, also, cases in sub-sects. 5, 6, & 7, *post.*

610. When intent to defeat or delay presumed—Obvious that departure will cause delay.]—If the necessary consequence of a trader's departing the realm is that his creditors must be delayed, he thereby commits an act of bkpcy., since a man is to be considered as foreseeing & meaning to bring about the necessary consequences of his own acts. —RAMSBOTTOM *v.* LEWIS (1808), 1 Camp. 279.

Annotations:—**Mentd.** Lacy *v.* Woolcott (1823), 2 Dow. & Ry. K. B. 458; *Re* Houghton & Watts, *Ex p.* Robinson (1833), Coop. *temp.* Brough. 162.

611. —— ——.]—In determining the intent with which a particular act is done it must be assumed that a man knows the natural & necessary consequences of his act, & where debtor knows that the natural & necessary consequence of his going abroad is to defeat & delay his creditors, he must be held to have done so with that intent, & will be adjudicated a bkpt. accordingly.—*Re* FINNEY, *Ex p.* GOATER (1874), 30 L. T. 620; 22 W. R. 935, L. JJ.

612. —— In case of foreigner returning to his own country.]—Although in a case of a domiciled Englishman the fact of his departure to avoid a debtor's summons would be a strong presumption that he intended to defeat or delay his creditors, yet the same presumption does not apply to a foreigner returning to his own country.—*Re* CRISPIN, *Ex p.* CRISPIN (1873), 8 Ch. App. 374; 42 L. J. Bcy. 65; 28 L. T. 483; 37 J. P. 391; 21 W. R. 491, L. C. & L. J.

Annotations:—**Apld.** *Re* Trench, *Ex p.* Brandon (1884), 25 Ch. D. 500, C. A. **Reid.** *Re* Gutierrez, *Ex p.* Gutierrez (1879), 11 Ch. D. 298, C. A.; *Re* A. B. (1900), 82 L. T. 169, C. A.; Cooke *v.* Vogeler Co., [1901] A. C. 102, H. L. **Mentd.** *Re* Myer, *Ex p.* Pascal (1876), 1 Ch. D. 509, C. A.; *Re* Sawers, *Ex p.* Blain (1879), 41 L. T. 46, C. A.

613. —— ——.]—There is no presumption in the case of a foreigner about to leave England after a temporary stay here, as there might be in the case of a domiciled Englishman going abroad, that he is going away with the intention of defeating his creditors.—*Re* GUTIERREZ, *Ex p.* GUTIERREZ (1879), 11 Ch. D. 298; 40 L. T. 355; 27 W. R. 497, C. A.

614. —— Debtor absenting himself for three years—Though pursuing ordinary business—Onus of proof.] —Where debtor absents himself from England for three years, & thereby delays his creditors, the intent to delay will be presumed (& the departure be a valid act of bkpcy.), although he may be pursuing his regular course of business, & it will rest upon the party wishing to supersede to negative the intent to delay.—*Re* WOOD, *Ex p.* RHODES (1841), 2 Mont. D. & De G. 41; 5 Jur. 580.

See, also, cases in sub-sect. 6, *post.*

615. Admissibility of evidence — Departure & absence continuous acts—Letters from debtor.]—A trader, who had failed to keep an appointment with S. respecting some accounts, on the same morning left England for France, leaving a letter for S. in which, after alluding to his sudden departure, he stated that he should be back in ten days, & in the meantime would make proposals. On the following day he wrote another letter to S. from Calais, stating that the account current between them could be speedily settled, & a month afterwards he wrote a letter from Paris stating that he was under the necessity of remaining in France:—*Held:* the departing the realm & absence abroad being a continuous act, the letters were admissible in evidence.—RAWSON *v.* HAIGH (1824), 2 Bing. 99; 9 Moore, C. P. 217; 2 L. J. O. S. C. P. 130; 130 E. R. 242.

Annotations:—**Consd.** Johnston *v.* Woolf (1835), 2 Scott, 372. **Reid.** Ridley *v.* Gyde (1832), 9 Bing. 349. **Mentd.** *Re* Prescott, *Ex p.* Prescott (1840), 4 Jur. 852; Rouch *v.* G. W. Ry. Co. (1841), 1 Q. B. 51.

See, also, cases in sub-sects. 5, 6, & 7, *post.*

616. Sufficiency of evidence—Departure abroad for proper purposes.]—A commission of bkpcy. on residence abroad, where the departure from the realm was for a fair & proper purpose, & not with a view of defrauding creditors, the trade

PART II. SECT. 2, SUB-SECT. 4.

608 i. *What must be established—Intent to delay.*]—Where the act of bkpcy. relied on is that debtor has departed out of Ireland with intent to defeat or delay his creditors, it is necessary to establish such actual intent. The ct. is not bound to presume such intent merely from the fact that creditors are thereby defeated or delayed.—*Re* RADCLIFFE, [1916] 2 I. R. 534.—**IR.**

610 i. *When intent to defeat or delay presumed.*]—An intention to defraud creditors may be inferred from a purpose to leave Manitoba without showing any consideration for creditors or any desire to pay off the indebtedness, at all events where it does not appear that the intended departure was with the expectation of the more quickly paying off debts.—GREEN *v.* HAMMOND (1885), 3 Man. L. R. 97.—**CAN.**

615 i. *Admissibility of evidence—Statements of debtor's solicitor.*]—H. incurred a debt to B. for board & lodging, & left B.'s hotel without communicating with him. Subsequently S., a solr., called on B.'s solr. & stated that debtor had left for England & would send out money to pay the debt, & afterwards acted as his solr. in the bkpcy. proceedings:—*Held:* S.'s statement was evidence against H. as being made by his solr. duly authorised, & H. had left the state with intent to defeat & delay his creditors.—*Re* HILL, *Ex p.* BURCHMORE (1906), 6 S. R. N. S. W. 162.—**AUS.**

616 i. *Sufficiency of evidence—Departure abroad for proper purposes.*]—Although it is an act of insolvency for debtor to depart out of Victoria with intent to defeat or delay his creditors, yet if he determines to go upon a trip to England for a legitimate trade purpose, & before he goes learns that his creditors will probably prevent his going if they know that he is going, & accordingly in his communications with them fails in that candour & open dealing which the indulgence shown to him by them might have entitled them to expect, & goes to England with the intention of returning after his business is completed, he does not make a departure out of Victoria with intent to defeat or delay his creditors within Insolvency Act, 1890 (No. 1102), s. 37 (iii.).—*Re* CABENA (1895), 21 V. L. R. 290.—**AUS.**

616 ii. —— *Departure with cash to avoid attachment thereof.*]—A., a debtor in Bombay, submitted a statement showing that he had a sum of R.11,000 in cash in his hands. Two of his creditors having served him with a summons in an action of debt, A. left Bombay for Bellary taking the sum of R.11,000 with him, in order (as he admitted) to prevent the two creditors from attaching it:—*Held:* A. had left the jurisdiction of the ct. with intent to defeat & delay his creditors within Indian Insolvency Act, s. 9.—*Re* ARANVAYAL SABHAPATHY, *Ex p.* KARAMALLI JOOSUB (1897), I. L. R. 21 Bom. 297.—**IND.**

616 iii. —— *Statements & conduct of debtor's wife—Debtor's return.*]—The wife of debtor was heard to swear in other proceedings that her husband had gone to America on account of the pressure of a creditor, & subsequently she endeavoured to effect a settlement of the debt:—*Held:* although debtor subsequently returned, the act of bkpcy. was complete.—*Re* KELLEHER, *Ex p.* KILLARNEY UNION GUARDIANS (1896), 31 I. L. T. 57.—**IR.**

continued by a partner, & petitioning creditor's debt subsequent, superseded.—*Ex p.* MUTRIE (1800), 5 Ves. 576; 31 E. R. 746.

617. —— —— Coupled with fear of arrest.]—A trader having business both in England & in Spain, has a right to go to the latter country to look after his concerns, & though his creditors are thereby delayed, it is no act of bkpcy. But if he likewise goes abroad from the fear of arrest, though it concur with the justifiable motive, that of looking after his foreign business, it is an act of bkpcy.—WARNER *v.* BARBER (1816), Holt, N. P. 175.

618. —— —— & immediate return.]—A petition for adjudication in bkpcy. against two partners, A. & B., alleged, as the act of bkpcy., that they had absented themselves with intent to defeat or delay their creditors. The petition was directed, under 1870 Rules, r. 65, to be heard forthwith. B. had gone only to take his wife & children to Paris, & returned immediately. He appeared when the petition was heard, admitted insolvency, but opposed the adjudication, stating that he wished to present a petition for liquidation & he tendered evidence; but the registrar, on learning that it only related to the circumstances of his going abroad disregarded it as immaterial, & adjudged the partners bkpts.:—*Held:* the order could not be sustained, for the above rule only applied where debtor was keeping out of the way so that the ordinary course of proceedings could not be taken, & if he appeared, he was entitled to insist on the proceedings being conducted in the ordinary course.—*Re* BRELAZ, *Ex p.* LOPEZ (1871), 6 Ch. App. 894; 25 L. T. 403; 19 W. R. 1106, L. JJ.

619. —— Departure to avoid arrest.]—If a trader, whose house of trade is in Ireland comes to England on business & again quits this country to avoid an arrest by a creditor, it is such a departing the realm as to constitute an act of bkpcy.—WILLIAMS *v.* NUNN (1809), 1 Taunt. 270; 127 E. R. 837.

620. —— Pressure of debts not conclusive.]—Pressure of debts, though strong, is not conclusive evidence of intention to delay a creditor by departure from the realm.—*Re* PARR, *Ex p.* OSBORNE (1813), 1 Rose, 387; 2 Ves. & B. 177; 35 E. R. 286.

621. —— Departure to avoid debtor's summons.]—In the case of a domiciled Englishman, the fact of his leaving England after service of a writ, & so escaping a debtor's summons, would afford a strong presumption that he intended to defeat & delay his creditors.—*Re* CRISPIN, *Ex p.* CRISPIN (1873), 8 Ch. App. 374; 42 L. J. Bcy. 65; 28 L. T. 483; 37 J. P. 391; 21 W. R. 491, L. C. & L. J.

Annotations:—**Apld.** *Re* Gutierrez, *Ex p.* Gutierrez (1879), 11 Ch. D. 298, C. A. **Consd.** *Re* Trench, *Ex p.* Brandon (1884), 25 Ch. D. 500, C. A. **Mentd.** *Re* Myer, *Ex p.* Pascal (1876), 1 Ch. D. 509, C. A.; *Re* Sawers, *Ex p.* Blain (1879), 41 L. T. 46, C. A.; *Re* A. B. (1900), 82 L. T. 169, C. A.; Cooke *v.* Vogeler Co., [1901] A. C. 102, H. L.

622. —— Failure to leave funds in England—Honest intention compatible with trade.]—A trader who leaves England & proceeds to Ireland (where he also carries on trade), with an honest intention, compatible with trade, does not thereby commit an act of bkpcy., although he never returns, & although he leaves no funds in England for the payment of his debts.—WINDHAM *v.* PATERSON (1815), 1 Stark. 144; 2 Rose, 466.

Annotation:—**Mentd.** *Re* Notley, *Ex p.* Notley (1833), 3 L. J. Bcy. 1.

623. —— —— Some intention on departure of returning.]—A trader, being in debt to several persons, left England in June, 1831, for America with some intention of returning, but did not actually return, nor did he make provision for the payment of all his debts:—*Held:* the continued absence of bkpt., in the circumstances, amounted to an act of bkpcy.—*Re* KIRKMAN, *Ex p.* KIRKMAN (1833), 3 Deac. & Ch. 450; 3 L. J. Bcy. 81.

624. —— —— Leaving clerk empowered to carry on business.]—If a trader goes abroad, leaving a general power of attorney with his clerk to transact all his business for him, but provides no means of paying bills of exchange which fall due in his absence, he commits an act of bkpcy.—*Re* BRYANT, *Ex p.* KILNER (1837), 3 Mont. & A. 722; 2 Deac. 324.

625. —— —— Constantly stating intention to return.]—A trader going abroad for a legitimate purpose remained abroad, & made no provision for payment of his debts, nor sent money for that purpose. In his letters he constantly stated his intention to come home in a month or six weeks, but fixed no definite time:—*Held:* a remaining abroad with intent to delay his creditors, & an act of bkpcy.—*Re* COHN, *Ex p.* COHN (1860), 2 L. T. 90.

626. —— Remaining abroad with intent to delay.]—An English trader having gone abroad, & remained there with the intent to defeat or delay his creditor:—*Held:* under 1849 Act, s. 67, guilty of a continuing act of bkpcy.—BUNNY *v.* HART (1857), 11 Moo. P. C. C. 189; 14 E. R. 667, P. C.

627. —— ——.]—A trader's remaining abroad, with intent to defeat or delay his creditors, is, under 1849 Act, s. 67, a continuing act of bkpcy., whether his going abroad was or was not an act of bkpcy.

A trader went abroad with intent to delay his creditors, so that his departure was an act of bkpcy., & remained abroad with the same intent. A petition for adjudication was filed more than twelve months after his leaving England:—*Held:* as he had, within twelve months before the filing of the petition, been remaining abroad, with intent to delay his creditors, the adjudication was not invalidated by s. 88.—*Re* BUNNY, *Ex p.* BUNNY (1857), 1 De G. & J. 309; 26 L. J. Bcy. 83; 29 L. T. O. S. 318; 3 Jur. N. S. 1141; 5 W. R. 838; 44 E. R. 743, L. JJ.

628. —— Letter from trader abroad.]—A letter from a trader, who has gone abroad in the course of his trade, connected with circumstances here, may be sufficient evidence of an act of bkpcy.—*Re* DOYLE, *Ex p.* HAGUE (1810), 1 Rose, 150.

629. —— Letters explaining sudden departure postponing settlement—Eventually stating intention to reside abroad.]—A trader, who had failed to keep an appointment with S. respecting some accounts, on the same morning left England for France, leaving a letter for S. in which, after alluding to his sudden departure, he stated that he should be back in ten days, & in the meantime would make proposals. On the following day he wrote another letter to S. from Calais, stating that the account current between them could be speedily settled, & a month afterwards he wrote a letter from Paris stating that he was under the necessity of remaining in France:—*Held:* the departing the realm & absence abroad being a continuous act, these letters were sufficient to establish an act of bkpcy., by showing the intent with which such trader departed.—RAWSON *v.* HAIGH (1824), 2 Bing. 99; 9 Moore, C. P. 217; 2 L. J. O. S. C. P. 130; 130 E. R. 242.

Annotations:—**Consd.** Ridley *v.* Gyde (1832), 9 Bing. 349. **Refd.** Johnston *v.* Woolf (1835), 2 Scott, 372. **Mentd.** *Re* Prescott, *Ex p.* Prescott (1840), 4 Jur. 852; Rouch *v.* G. W. Ry. Co. (1841), 1 Q. B. 51.

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630. —— Announcement of intention never to return.]—If a trader leave the realm for the purposes of trade, but whilst he is absent, announce his intention never to revisit England, he commits an act of bkpcy. by absenting himself.—WINDHAM, ETC. (ASSIGNEES OF FLETCHER) *v.* PATERSON (1815), 2 Rose, 466; 1 Stark. 144.

Annotation:—**Distd.** *Re* Notley, *Ex p.* Notley (1833), 3 L. J. Bcy. 1.

631. —— Issuing circular during absence that he was in financial difficulties.]—Debtor, having obtained an advance from his bankers, went abroad for business purposes. Six months later his solrs. issued a circular calling a meeting of his creditors, & informing them that he was in financial difficulties. The creditors met & requested debtor to realise his assets abroad. He neglected to reply to their communications, & his solrs. refused to accept service of a writ. His London office was closed:—*Held:* there was sufficient evidence of intention of remaining out of England to defeat & delay creditors.—*Re* CAMPBELL, *Ex p.* CAMPBELL (1887), 4 Morr. 198, D. C.

632. —— Remaining at permanent residence abroad—Conversation with creditor.]—A domiciled Englishman went with his family, to reside in France where he took a house. He was not then being pressed by any creditors in England. For a period of fourteen months he was in England, carrying on the business of a newspaper which he had purchased, & he then had a furnished lodging in London. During that period he retained his house in France, & his wife & family lived in it. During the same period he contracted a debt to a solr. in London. At the end of the fourteen months he discontinued the business, & went back to his residence in France. Subsequently with his family, he occupied for nine months a furnished house in England, his house in France being let furnished; at the end of the nine months he returned to that house. He then continued to reside there, paying occasional visits to England. During one of these visits he accidentally met the solr., who asked him why he had not paid his debt & he answered that his newspaper speculation had left him with a number of claims, & he thought if he kept abroad he should be able to settle them more easily. The solr. presented a bkpcy. petition against debtor, alleging as an act of bkpcy. that he had remained out of England with intent to defeat or delay his creditors:—*Held:* as debtor was remaining out of England at his own permanent residence abroad, no intent to defeat or delay his creditors could be imputed to him from that circumstance alone, & the conversation with petitioning creditor was not sufficient to prove such an intent.—*Re* TRENCH, *Ex p.* BRANDON (1884), 25 Ch. D. 500; 53 L. J. Ch. 576; 50 L. T. 41; *sub nom. Re* FRENCH, *Ex p.* BRANDON, 32 W. R. 601, C. A.

633. —— Secret departure from foreign port—Return to debtor's own estate abroad.]—L., whose domicil of origin was English, resided in the Argentine Republic, where he had considerable property. In 1885 on his petition a decree *nisi* was made dissolving L.'s marriage with M. & an order was made for alimony, but the ct. refused to make the decree absolute until provision had been made for the child of the marriage, costs being given to M. L. was in England about this time & was about to return to the Argentine Republic by a vessel sailing from Southampton, but he did not arrive at Southampton & eventually returned secretly on board a different vessel, in which he shipped at Lisbon. A bkpcy. petition having been presented against L. on the ground that he had left England with intent to defeat & delay his creditors, & that he had stayed away with the same object, & the registrar having made a receiving order:—*Held:* the mere returning to reside abroad could not be considered to prove an intention to defeat & delay creditors, but the registrar was justified on the evidence in deciding that debtor departed in order to defeat & delay the enforcement of the proceedings against him by the particular creditor, & the order must be upheld.—*Re* LANGWORTHY, *Ex p.* LANGWORTHY (1887), 3 T. L. R. 544, C. A.

See, also, cases in sub-sects. 5, 6, & 7, *post.*

SUB-SECT. 5.—DEPARTING FROM DWELLING-HOUSE WITH INTENT TO DEFEAT OR DELAY CREDITORS.

634. What must be established—Departure to avoid payment of just debt.]—Absconding to avoid an attachment upon an award for non-delivery of goods pursuant to the award, is not an act of bkpcy., but it must be a departing from the dwelling-house to avoid the payment of a just debt, & not the delivery of goods, for that is a duty only.—LINGOOD *v.* EADE (1747), 1 Atk. 196; 26 E. R. 127.

Annotation:—**Apld.** Fowler *v.* Padget (1798), 7 Term Rep. 509.

635. —— Intent to delay—Not that creditor was actually delayed.]—In order to constitute an act of bkpcy. by a trader in departing from his dwelling-house, it is not alone sufficient that a creditor should be thereby delayed, but the departure must also have been with that intent.—FOWLER *v.* PADGET (1798), 7 Term Rep. 509; 101 E. R. 1103.

Annotations:—**Consd.** Robertson *v.* Liddell (1808), 9 East, 487. **Distd.** Williams *v.* Nunn (1809), 1 Taunt. 270. **Consd.** Mersey Docks & Harbour Board *v.* Henderson (1888), 13 App. Cas. 595, H. L. **Refd.** R. *v.* Prince (1875), L. R. 2 C. C. R. 154, C. C. R.; R. *v.* Tolson (1889), 23 Q. B. D. 168, C. C. R. **Mentd.** Lloyd *v.* Heathcote (1820), 5 Moore, C. P. 129; Benson *v.* Dunn (1870), 23 L. T. 848.

636. —— —— ——.]—The departure of a trader from his dwelling-house, with intent to delay his creditors, is an act of bkpcy., though no creditor be thereby in fact delayed.—ROBERTSON *v.* LIDDELL (1808), 9 East, 487; 103 E. R. 659.

Annotations:—**Refd.** Williams *v.* Nunn (1809), 1 Taunt. 270; Chenoweth *v.* Haley (1813), 1 M. & S. 676; Lloyd *v.* Heathcote (1820), 2 Brod. & Bing. 388; Harvey *v.* Ramsbottom (1822), 1 B. & C. 55; Stewart *v.* Moody (1835), 1 Cr. M. & R. 777; Rouch *v.* G. W. Ry. Co. (1841), 1 Q. B. 51; Woodhouse *v.* Murray (1867), 36 L. J. Q. B. 289.

637. —— —— Departure under groundless apprehension.]—Quitting the dwelling-house with the intention of delaying a creditor, though under the impression of a groundless apprehension, is an act of bkpcy.—*Ex p.* BAMFORD (1809), 15 Ves. 449; 33 E. R. 824, L. C.

Annotations:—**Consd.** Roach *v.* G. W. Ry. Co. (1841), 10 L. J. Q. B. 89. **Refd.** Robson *v.* Rolls (1833), 9 Bing. 648. **Mentd.** Surtees *v.* Ellison (1829), 9 B. & C. 750; Bailie *v.* Grant (1832), 9 Bing. 121, H. L.; *Re* Mostyn, *Ex p.* Griffiths (1853), 22 L. J. Bcy. 50, L. JJ.; *Re* Worsley, [1901] 1 K. B. 309, C. A.; *Re* Allen, *Ex p.* Shaw (1914), 112 L. T. 194, C. A.; *Re* Clark, *Ex p.* Pope & Owles, [1914] 3 K. B. 1095, C. A.

638. —— Intent to defeat or delay—Mere departure insufficient.]—The fact of debtor having

634i. *What must be established—Trading.*]—Where the act of bkpcy. relied on is that debtor, being a trader, has departed from his dwelling-house, it must be shown that debtor was a trader at the time of the alleged acts.—*Re* RADCLIFFE, [1916] 2 I. R. 534.—IR.

departed from his dwelling-house in itself announces nothing. He may have gone to bury his wife or his mother, or to a meet of fox hounds. But that which the law holds, & rightly holds, to be the important fact is, that he has departed "with intent to defeat or delay his creditors." If he does it with that intent, it is an act of bkpcy. (BACON, C.J.).—*Re* SKELTON, *Ex p.* COATES (1877), 5 Ch. D. 979; 36 L. T. 806; *affd.* 5 Ch. D. 981, C. A.

Annotations:—**Consd.** *Re* Johnson, *Ex p.* Johnson (1883), 25 Ch. D. 112, C. A.; *Re* Fiddian, Squire, *Ex p.* Fiddian, Squire (1892), 9 Morr. 95, D. C.

639. —— Creditor delayed.]—In order to constitute an act of bkpcy. by departing from a dwelling-house, the creditor must be delayed.—BARNARD *v.* VAUGHAN (1799), 8 Term Rep. 149; 101 E. R. 1315.

Annotations:—**Refd.** Robertson *v.* Liddell (1806), 3 Smith, K. B. 347. **Mentd.** Wydown's Case (1807), 14 Ves. 80, L. C.

640. —— Intention to avoid creditors—Not that creditor called.]—Evidence of a trader having left his house to avoid his creditors is a sufficient act of bkpcy., though no creditor called in his absence.—HAMMOND *v.* HINCKS (1804), 5 Esp. 139.

Annotation:—**Refd.** Robertson *v.* Liddell (1808), 9 East, 487.

641. —— Debtor absconding—Not that creditor called.]—That a creditor should have called is not required for the act of bkpcy. by absconding.—WYDOWN'S CASE (1807), 14 Ves. 80; 33 E. R. 451.

Annotations:—**Mentd.** Ledbetter *v.* Salt (1828), 4 Bing. 623; *Re* Digan (1849), 14 L. T. O. S. 293.

642. —— Debtor absconding to avoid arrest—Not that writs actually issued.]—Where the act of bkpcy. is the absconding to avoid being arrested, general proof of debtor's so absconding is sufficient, without showing any writs to have actually issued.—WILSON *v.* NORMAN (1795), 1 Esp. 333.

643. —— Debtor alive & in some other place.]—Where a petitioning creditor alleges as an act of bkpcy. against his debtor that he has absented himself from his dwelling-house with intent to defeat & delay his creditors, the *onus* is upon the creditor to show that debtor is alive & in some other place; & in a case in which the evidence went to show that debtor was dead at the time when the alleged act of bkpcy. was committed, the Ct. of Appeal, on the application of his exors., annulled the adjudication which had been made against him.—*Re* STANGER, *Ex p.* GEISEL (1882), 22 Ch. D. 436; 53 L. J. Ch. 349; 48 L. T. 405; 31 W. R. 264, C. A.

See, also, cases in sub-sect. 4, *ante,* sub-sects. 6 & 7, *post.*

644. When act complete.]—An act of bkpcy. by leaving his house to avoid a creditor, without collusion, is complete the instant of departure, & not affected by subsequent residence with petitioning creditor.—*Re* Aspinall, *Ex p.* GARDNER (1812), 1 Ves. & B. 45; 1 Rose 377; 35 E. R. 18, L. C.

Annotation:—**Mentd.** *Re* Wailey, *Ex p.* Alexander (1832), 1 L. J. Bcy. 79, Ct. of R.

645. Existence of intent to delay question for jury.]—Whether a departing the dwelling-house be accompanied with an intent to delay a creditor is a question of fact for a jury to decide upon all the circumstances.—WILLIAMS *v.* NUNN (1809), 1 Taunt. 270; 127 E. R. 837.

646. —— Debtor leaving message for creditor.]—A trader left a message at his house for a creditor who had in his absence called for a debt, that he could spare no money & would not pay him that day, & would go out of the way & stay till dinner time:—*Held:* it was for the jury to consider whether he absented himself to delay a creditor.—VINCENT *v.* PRATER (1812), 4 Taunt. 603; 2 Rose, 275; 128 E. R. 467.

647. —— Change of residence by debtor.]—It is a question for the jury whether a trader's change of residence is a departing from his dwelling-house with intent to delay creditors.—YOUNG *v.* WRIGHT (1816), 6 Taunt. 540; 2 Marsh. 233; 128 E. R. 1145.

648. —— Object of debtor departing & remaining away uncertain.]—Where a trader whose goods are under seizure quits his home, it is for the jury to say whether he departs with the *bonâ fide* intention to endeavour to procure the means of removing the execution, or whether, having gone for that purpose, he stays away for the purpose of avoiding his creditors.—BATCHELOR *v.* VYSE (1834), 4 Moo. & S. 552.

Annotation:—**Mentd.** Aldred *v.* Constable (1844), 6 Q. B. 370.

649. Admissibility of evidence—Letters written during absence—Asking for time on bills of exchange.]—A trader, in embarrassed circumstances, absented himself from his house from Feb. 16 till Mar. 9. Upon an issue, whether he had committed an act of bkpcy. on or before Mar. 5, two letters written by him on Jan. 16, preceding, asking for time on two bills of exchange payable by him in Feb., were received in evidence to show the motive of his absence.—SMITH *v.* CRAMER (1835), 1 Bing. N. C. 585; 1 Hodg. 124; 1 Scott, 541; 4 L. J. C. P. 190; 131 E. R. 1242.

650. —— —— Stating that absence to avoid writs—Declaration & act of bankruptcy need not be contemporaneous.]—A letter written by a trader during his absence from home, stating that he was absent to avoid writs, is admissible evidence of an act of bkpcy., without proof that any such writs were out, or that he was under any pressure from creditors. In order to make the declaration admissible evidence of an act of bkpcy., it is not essential that the declaration & act of bkpcy. should be contemporaneous.—ROUCH *v.* GREAT WESTERN RY. CO. (1841), 1 Q. B. 51; 2 Ry. & Can. Cas. 505; 4 Per. & Dav. 686; 10 L. J. Q. B. 89; 5 Jur. 821; 113 E. R. 1049.

651. ——To explain conduct—Declaration subsequent to act of bankruptcy.]—P. sent a letter from his dwelling-house to his place of business, stating that he was unable to meet his engagements, & desiring that he might be denied to any creditor who might call. Immediately after dispatching this letter, he left home, & remained absent during the whole of that & the following day. A witness proved that P. called on the day in question at a house & expressed an apprehension of being sent to the Fleet, & stated that he was in no hurry to get home, & would not go very early, as he had creditors who would lay hold of him, & that he did not leave till after dark. The jury were told that if they believed the statements made by the witness, P. on that occasion committed an act of bkpcy.; they said they believed the witness, but they did not think he spoke with *bona fides*:—*Held:* P. had committed an act of bkpcy., & evidence of his conduct & conversations on the day subsequent to the date mentioned, was not admissible to explain his conduct on that day.—JOHNSTON *v.* WOOLF (1835), 2 Scott, 372.

See, also, No. 615, *ante,* & cases in sub-sects. 6 & 7, *post.*

652. Sufficiency of evidence—Departure to avoid writ—Admission on return of purpose of departure.]—H. rode out of town, & returned in the evening, before which a bailiff had been at his shop to arrest him. The next morning he sent for the bailiff, & told him he went out in order to get

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the term of pltf., & now the return of the writ was out, if they would take out a new writ he would give bail, which was done accordingly :—*Held :* an act of bkpcy.—MAYLIN *v.* EYLOE (1728), 2 Stra. 809 ; 93 E. R. 863.

Annotation :—**Mentd.** Fowler *v.* Padget (1798), 7 Term Rep. 509.

653. —— Departure to get creditor to withdraw execution—Not returning after failure.]—A trader at Bath left her dwelling-house & went to London, for the purpose of persuading a creditor to withdraw his execution, & left word of the place to which she had gone, but failing to procure the withdrawing of the execution, did not return to her dwelling-house :—*Held :* this was no act of bkpcy.—ALDRIDGE *v.* IRELAND (1784), 3 Doug. K.B. 397 ; 99 E. R. 715.

Annotations :—**Mentd.** Balme *v.* Hutton (1833), 9 Bing. 471, Ex. Ch. ; Garland *v.* Carlisle (1833), 2 Cr. & M. 31, Ex. Ch.

654. —— Departure on pretext to get money without making attempt to procure same.]—A trader, who is not denied to his creditors calling for money, who sees them, & pretends to go out to get money, but does not return, nor endeavour to get money, making it only a pretext, commits thereby an act of bkpcy.—BIGG *v.* SPOONER (1798), 2 Esp. 651.

655. —— Sheriff's officer refused admittance after departure.]—In order to constitute an act of bkpcy., by departing from the dwelling-house, it is not sufficient that a sheriff's officer, who comes to levy a *fi. fa.* on the trader's effects, is refused admittance after the trader has left his house.—BARNARD *v.* VAUGHAN (1799), 8 Term Rep. 149 ; 101 E. R. 1315.

Annotations :—**Refd.** Robertson *v.* Liddell (1806), 3 Smith, K. B. 347 ; Wydown's Case (1807), 14 Ves. 80.

656. —— Leaving message that he could spare no money—Departure to avoid annoyance by creditors.]—A trader left a message at his house, for a creditor, who had in his absence called for a debt, that he could spare no money, & would not pay him that day, & would go out of the way & stay till dinner time :—*Held :* (1) this evidence warranted the conclusion, that he did not absent himself to delay a creditor ; (2) so also where he absented himself from his house, where his creditors were, to avoid irritation & harsh language.—VINCENT *v.* PRATER (1812), 4 Taunt. 603 ; 2 Rose, 275 ; 128 E. R. 467.

657. —— Departure without arranging for carrying on business—On account of domestic dissensions.]—Where a trader departs from his dwelling-house on account of domestic dissensions, if he makes no arrangements for carrying on his business in his absence, & he foresees that as a necessary consequence his establishment must be broken up, & his creditors must be delayed, which events accordingly happen, he thereby commits an act of bkpcy.—HOLROYD *v.* WHITEHEAD (1814), 3 Camp. 530.

Annotation :—**Expld.** Windham *v.* Paterson (1815), 1 Stark. 144, N. P.

658. —— Statement of debtor on return—That he absented himself to avoid writ.]—The declaration of bkpt. on his return that he had absented himself to avoid a writ against him, is sufficient evidence of an act of bkpcy. without any other proof of the existence of the writ, or of the debt on which it was founded, or of the creditors of bkpt.—NEWMAN *v.* STRETCH (1829), Mood. & M. 338.

Annotation :—**Consd.** Rouch *v.* G. W. Ry. Co. (1841), 1 Q. B. 51.

659. —— Departure with resolution not to return except in certain event.]—A., a trader, departed from his dwelling-house in the ordinary course of business, but with a resolution not to return, unless he received a certain favourable communication from a creditor. The favourable communication arrived, & A. returned to his house in the ordinary course of his business :—*Held :* this was not a departure with intent to delay creditors, so as to constitute an act of bkpcy.—FISHER *v.* BOUCHER (1830), 10 B. & C. 705 ; 5 Man. & Ry. K. B. 589 ; 8 L. J. O. S. K. B. 306 ; 109 E. R. 612.

Annotations :—**Consd.** Robson *v.* Rolls (1833), 9 Bing. 648. **Refd.** Key *v.* Shaw (1832), 8 Bing. 320 ; Hare *v.* Waring (1838), 3 M. & W. 362. **Mentd.** *Re* A Disputed Adjudication (1850), 15 L. T. O. S. 8.

660. —— Departure without leaving address—No arrangement for payment of debts.]—A trader, on an execution being put into his house, shut up his shop & went from home for two days, without leaving any directions, in case of creditors calling for the payment of their debts. A creditor called for this purpose during his absence, & was unable to discover where debtor was to be found :—*Held :* all these circumstances constituted an act of bkpcy.—*Re* AUSTEN, *Ex p.* AUSTEN (1837), 2 Deac. 533 ; 7 L. J. Bcy. 1, Ct. of R.

Annotation :—**Folld.** *Re* Downing (1855), 26 L. T. O. S. 187.

661. —— —— After procuring goods on credit.]—A woman, who kept a boarding-house in London, ordered large quantities of goods of different tradesmen without having the means of paying them, & after they were delivered secretly left her house & went to live in lodgings at Reading, where she had previously secured a retreat, leaving no notice where she was to be found :—*Held :* she must be taken to have departed from her dwelling-house with intent to delay her creditors & thereby to have committed an act of bkpcy.—*Re* BIRCH, *Ex p.* BIRCH (1842), 2 Mont. D. & De G. 659.

662. —— —— Without leaving any money—Taking furniture & tools with him.]—Debtor, being considerably indebted, left his house without leaving any money, & taking his tools & the greater part of his furniture, without saying why or where he was going, & leaving directions to that effect :—*Held :* a departing with intent to defeat or delay his creditors, & an act of bkpcy.—HOBSON *v.* BROWN (1855), 1 Jur. N. S. 920.

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660 i. *Sufficiency of evidence—Departure without leaving address.*]—G., being liable as acceptor on a bill of exchange, absented himself from his residence on the day it became due, but advertised his intention to remove, & went to another residence. He had no account at the bank where the bill was payable. He had his letters directed to the house of his son-in-law, who told inquirers that he did not know where he was. Many efforts were made, but without success to ascertain where he could be found, in order to serve him with writs or notices or to demand payment, but during this time he had been seen nearly every week, going about the streets in his customary way, & his departure from his former residence was for the purpose of change :—*Held :* the departure of G. from his residence was not an act of insolvency.—*Re* GORDON (1871), 10 N. S. W. S. C. R. 321.—**AUS.**

660 ii. —— ——*Shop closed.*]—A trader went from home, stating that he intended to call on a creditor, to whom he was largely indebted, with a view of settling his account, but did not do so, & in his absence his shop was shut up & an execution put in. The shop remained shut for three or four days, & no directions were left for creditors who might call for payment of their debts :—*Held :* an act of bkpcy.—*Re* DOWNING (1855), 26 L. T. O. S. 187.—**IR.**

660 iii. —— *Departure to sleep at friend's house.*] — Debtor, wishing to consult his attorney about signing a declaration of insolvency, appointed to meet a creditor's attorney after seeing his own, but, finding him from home, returned home at nine p.m., &, leaving a note for the creditor's attorney, in case he should call, went out with his wife to sleep at a friend's place :—*Held :* an act of bkpcy.—*Re* DONOVAN (1866), 11 Ir. Jur. 18.—**IR.**

663. —— —— Adoption of assumed name.]—Debtor, previous to a judgment against her, adopted an assumed name, & after the judgment removed, leaving no address, nor giving any to her solr. through whom she was being pressed :—*Held :* she had committed an act of bkpcy.—*Re* ALDERSON, *Ex p.* JACKSON, [1895] 1 Q. B. 183 ; 64 L. J. Q. B. 188 ; 1 Mans. 495 ; 15 R. 12.

664. —— Departure to avoid unpleasantness—Of execution.]—*Semble :* the mere fact of a trader going away from home, because it was unpleasant to remain in his house when an execution was in it, could not of itself be an act of bkpcy.—*Re* AUSTEN, *Ex p.* AUSTEN (1837), 2 Deac. 533; 7 L. J. Bcy. 1, Ct. of R.

Annotation :—**Refd.** *Re* Downing (1855), 26 L. T. O. S. 187.

665. —— Departure to file his petition.]—The mere departure of a trader from his dwelling-house, for the purpose of going to the district Ct. of Bkpcy. to make himself a bkpt., is not *per se* an act of bkpcy.—*Re* LEWIS, *Ex p.* GREENSLADE (1860), 2 L. T. 611.

666. —— Placing farm in charge of brother—Failure to keep appointment with creditor—Arranging for sale of stock & effects by auction.]—Debtor, a farmer, pressed by his creditors, arranged to sell his stock & furniture by auction. He left his dwelling-house, & placed his farm in charge of his brother, who informed his bankers, who were creditors, that he would forward debtor's letters. Debtor having failed to keep an appointment with his bankers, they presented a petition, alleging that he had departed from his dwelling-house with intent to defeat or delay his creditors :—*Held :* there was evidence, on which the ct. could find that he had no intention to defeat or delay his creditors.—*Re* WOOLSTENHOLME, *Ex p.* FOSTER & Co. (1887), 4 Morr. 258, D. C.

See, also, cases in sub-sect. 4, *ante*, sub-sects. 6 & 7, *post.*

SUB-SECT. 6.—"OTHERWISE ABSENTING HIMSELF" WITH INTENT TO DEFEAT OR DELAY CREDITORS.

667. What must be established—Not actual physical absence.] — In order to show that debtor has absented himself, it is not necessary to show actual physical absence from a particular place.—*Re* ALDERSON, *Ex p.* JACKSON, [1895] 1 Q. B. 183 ; 64 L. J. Q. B. 188 ; 15 R. 12, D. C.

668. —— Keeping out of way—Mere inability to pay insufficient.]—P. had a running account with B. his banker. On receiving part of the balance due to him, instead of a receipt he gave B. a promissory note, which B. assigned to H. H. sued B. on the note & recovered. No proof was made of bkpcy. at the time of the assignment, only that he could not pay it, but never kept out of the way :—*Held :* that did not amount to an act of bkpcy.—PAKENHAM *v.* BLAND (1725), Cas. *temp.* King, 42 ; 25 E. R. 212, L. C.

669. —— Not that actual delay took place.]—A trader's absenting himself from any place, with intent to delay a creditor, is an act of bkpcy. ; & it is immaterial whether a creditor be actually delayed or not.—HALLEN *v.* HOMER (1823), 1 C. & P. 108.

670. —— Intent to delay.]—Depositions taken before comrs. of bkpt., stating that a trader promised to meet one of his creditors at the office of his solrs., in order to give him security for a debt, but that he did not attend the appointment, but altogether absented himself, are not of themselves sufficient evidence of the commission of an act of bkpcy. under 49 Geo. 3, c. 121, s. 10, as it was not stated that he absented himself with an intent to delay such creditor.—TUCKER & TOLEMAN *v.* JONES (1824), 2 Bing. 2 ; 2 L. J. O. S. C. P. 98 ; 130 E. R. 204 ; *sub nom.* TOLEMAN *v.* JONES, 9 Moore, C. P. 24.

Annotations :—**Folld.** Key *v.* Shaw (1832), 8 Bing. 320. **Distd.** Robinson *v.* Carrington (1833), 1 Mont. & A. 1.

See, also, cases in sub-sects. 4 & 5, *ante*, sub-sect. 7, *post.*

671. When intent to defeat or delay presumed — Failure to keep appointment.] — Debtor appointing a time & place to meet & pay his creditor, & failing to keep the appointment, must be presumed, in the absence of evidence to the contrary, to have absented himself with intent to delay his creditor, & thereby commits an act of bkpcy.—WIDGER *v.* BROWNING (1827), 9 Dow. & Ry. K. B. 306 ; 5 L. J. O. S. K. B. 77.

Annotations :—**Distd.** *Re* Lavender, *Ex p.* Lavender (1834), 4 Deac. & Ch. 484, 495. **Folld.** *Re* Rawlins (1843), 2 L. T. O. S. 212. **Mentd.** *R. v.* Kimbolton (1837), 1 Nev. & P. K. B. 606.

672. —— ——.]—As to whether a mere failure to keep an appointment with a creditor amounts to an act of bkpcy., a judge may infer intent to defeat & delay creditors, unless the failure be explained.—*Re* RAWLINS (1843), 2 L. T. O. S. 212.

673. —— Leaving no one to answer inquiries.]—If a trader absents himself from his usual place of business, without leaving any one to answer inquiries, an intention to delay creditors will be presumed, if it be proved that creditors were actually delayed.—*Re* PAUL (1857), 28 L. T. O. S. 342.

674. —— Shutting up warehouse & counting-house.]—The shutting-up a warehouse & counting-house is an act by which the ct. will presume that creditors may be delayed ; & such an act is an act of bkpcy., although no creditor appears to have been delayed.—*Re* POOLE & BRYAN, *Ex p.* Poole (1860), 3 L. T. 59.

See, also, cases in sub-sect. 4, *ante.*

675. Admissibility of evidence—Communications between debtor & attorney.]—A trader, at the suggestion of his attorney, called a meeting of his creditors, to be held at a given time & place, & on the morning of that day went to the attorney's office, & inquired of him whether he could safely attend the meeting without being arrested for debt. The attorney having advised him to remain at the office, until it was ascertained whether the creditors would engage to give him a safe conduct, the trader remained at the office accordingly, for upwards of two hours, to avoid being arrested by some or one of his creditors, until after the attorney had attended at & returned from the meeting :—*Held :* what passed between the attorney & the trader was admissible in evidence upon an issue whether the latter had committed an act of bkpcy. on that occasion.—BRAMWELL *v.* LUCAS (1824), 2 B. & C. 745 ; 4 Dow. & Ry. K. B. 367 ; 2 L. J. O. S. K. B. 161 ; 107 E. R. 560.

Annotations :—**Consd.** Clark *v.* Clark (1830), 1 Mood. & R. 3 ; Greenhough *v.* Gaskell (1833), Coop. *temp.* Brough. 96. **Folld.** Sawyer *v.* Birchmore (1835), 3 My. & K. 572. **Consd.** Desborough *v.* Rawlins (1838), 3 My. & Cr. 515. It is not very easy to come to the conclusion to which the ct. in *Bramwell* v. *Lucas* came in point of fact. But the case shows that the privilege only applies to cases in which the client makes a communication to his solr. with a view to obtaining his legal advice (LORD COTTENHAM, C.). **Dbtd.** *Re* Mullens, *Ex p.* Mullens (1849), Fonbl. 11. **Refd.** Mackenzie *v.* Yeo (1842), 1 Notes of Cases, 516 ; Ford *v.* Tennant (1863), 32 Beav. 162.

676. —— Declarations of debtor made after absence.]—The declarations of a trader, made shortly after an absence, are not admissible to

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PART II. SECT. 2, SUB-SECT. 6.

667 i. *What must be established—Trading.*]—Where the act of bkpcy. relied on is that debtor, being a trader, has otherwise absented himself, it must be shown that debtor was a trader at the time of the alleged act.—*Re* RADCLIFFE, [1916] 2 I. R. 534.—IR.

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prove such absence an act of bkpcy.—LEES *v.* MARTON (1832), 1 Mood. & R. 210, N. P.

See, also, No. 615, *ante*, & cases in sub-sect. 5, *ante*, sub-sect. 7, *post*.

677. Sufficiency of evidence—From whom absenting himself—Must be from particular creditor.] —A trader does not commit an act of bkpcy. unless he absents himself from some particular creditor.—BERNASCONI *v.* FAREBROTHER (1830), 10 B. & C. 549; L. & Welsb. 213; 5 Man. & Ry. K. B. 364; 8 L. J. O. S. K. B. 203; 109 E. R. 555; *subsequent proceedings* (1832), 3 B. & Ad. 372.

Annotation:—**Mentd.** Wilton *v.* Chambers (1835), 1 Har. & W. 116.

678. —— From what place absenting himself — Counting-house — Without intention of returning.] —A trader, having a counting-house in town, & a dwelling-house in the country, left the former (to which he never returned), taking his books with him, & slept at his dwelling-house a few nights, when he finally left that also:—*Held:* having quitted his counting-house without the *animus revertendi*, he began to absent himself from that day, & thereby committed an act of bkpcy.—JUDINE *v.* DA COSSEN (1805), 1 Bos. & P. N. R. 234; 127 E. R. 450.

Annotations:—**Refd.** Robertson *v.* Liddell (1806), 3 Smith, K. B. 347; Gillingham *v.* Laing (1816), 6 Taunt. 532.

679. —— —— Public-house used for business.] —A trader who has a settled home, or counting-house, but takes up a temporary abode at a public-house, in the place to which his business carries him, commits an act of bkpcy. by departing from such public-house with intent to delay his creditors.—HOLROYD *v.* GWYNNE (1809), 2 Taunt. 176; 1 Rose, 113; 127 E. R. 1044.

Annotation:—**Mentd.** *Re* Tollemache, *Ex p.* Ford, Huntingtower's Case (1843), 1 L. T. O. S. 83.

680. —— —— Place of business—To avoid arrest—Taking away books.]—Where there were two partners, one of whom resided at Manchester & the other in London, & the London partner having left his own home without intent to delay his creditors, & having been a few days on a visit at Manchester, both of them left the house of business there to avoid an arrest, at the same time carrying their books of account along with them:—*Held:* they both there committed an act of bkpcy.—SPENCER *v.* BILLING (1812), 3 Camp. 310.

681. —— —— —— Place of abode.]—A trader does not commit an act of bkpcy. by absenting himself, unless he absents himself from his place of abode, or place of business.—BERNASCONI *v.* FAREBROTHER (1830), 10 B. & C. 549; 5 Man. & Ry. K. B. 364; L. & Welsb. 213; 8 L. J. O. S. K. B. 203; 109 E. R. 555; *subsequent proceedings* (1832), 3 B. & Ad. 372.

Annotation: **Mentd.** Wilton *v.* Chambers (1835), 1 Har. & W. 116.

682. —— —— —— To procure evidence — To get pecuniary assistance.] — A trader absented himself for three or four days from his place of business, & in his absence a bill of exchange was presented for payment & was dishonoured; & application was also made for payment of other bills. The trader was adjudicated bkpt., the act of bkpcy. being this absence "with intent to delay his creditors." One of the comrs. in the country annulled the bkpcy., the alleged bkpt. swearing that his absence was occasioned by an attempt of his to get up evidence of perjury against one of his workmen & to obtain pecuniary assistance. Pending this dispute as to the adjudication, the trader signed a declaration of insolvency:—*Held:* the decision of the comr. must be affirmed, on the ground that there was not sufficient evidence to support the adjudication, but in the circumstances, the trader must be refused his costs, as his "declaration of insolvency," whilst applying to annul an adjudication, was inconsistent with an honest desire for the equal distribution of his assets.—*Re* HORTON, *Ex p.* BARNEY (1862), 4 De G. F. & J. 503; 32 L. J. Bcy. 41; 7 L. T. 488; 9 Jur. N. S. 286, L. C.

683. —— —— Shop—To get bills discounted—Shopman instructed to deny debtors —No evidence of attempt to raise money.]—Two partners in trade left their shop, stating their purpose to be to get some bills discounted, or to get some means to satisfy demands, & told their shopman, if any creditor called, to make some excuse. On the next day the shopman, without further authority, denied them, although at home, to a creditor, who had called on the preceding day, when they were also denied. No evidence of any attempt to get bills discounted was offered:—*Held:* the jury had rightly considered their intention in leaving the shop to be to delay creditors.—DEFFLE *v.* DESANGES (1819), 8 Taunt. 671; 129 E. R. 545.

684. —— —— Any place—To avoid creditor.] —If a trader absents himself from any place to avoid a creditor, it is an act of bkpcy.—CURTEIS *v.* WILLES (1824), 1 C. & P. 211; 4 Dow. & Ry. K. B. 224; Ry. & M. 58.

685. —— —— Room in which meeting creditor.] —A creditor called upon bkpt., by appointment. Bkpt. left the room, & did not return, & his wife told the creditor that he had gone out:—*Held:* sufficient evidence to warrant the jury in inferring that bkpt. left the house with intent to avoid a creditor.—CHARRINGTON *v.* BROWN (1826), 11 Moore, C. P. 341; 4 L. J. O. S. C. P. 141.

Annotation:—**Refd.** *Re* A Disputed Adjudication (1850), 15 L. T. O. S. 8.

686. —— —— Place of meeting of creditors —Returning after meeting dissolved.]—A trader, having attended a meeting of his creditors, was desired by them to withdraw until they could come to some resolution on the state of his affairs. He accordingly retired into the outer office, where he was unexpectedly served with a copy of a writ. This induced him to send a clerk into the room where his creditors were for his hat, & then he went away, but returned in an hour. His creditors had dispersed by then:—*Held:* his thus absenting himself from the place of meeting amounted to a clear act of bkpcy.—*Re* DEAN, *Ex p.* DEAN (1841), 2 Mont. D. & De G. 127, Ct. of R.

687. —— —— Stand in market-place—Knowledge that claims likely to be made.]—Bkpt. was a corn-merchant, having a stand in a market-place, at which he was in the habit of attending weekly to transact his business. He did not attend on one occasion, & in the absence of a satisfactory account being given for his non-attendance, & it further appearing that he was aware of certain claims likely to be made on him:—*Held:* his non-attendance amounted to an act of bkpcy.—JOHNSON *v.* HUNTINGFIELD (LORD) (1850), 14 L. T. O. S. 444.

688. —— Shutting up business premises—Banking house—By sole resident & managing partner—Whether act of bankruptcy by all partners.]—Where one of three partners in a banking concern, who resided at the place where the banking house was, & was the only partner who transacted the business, the other two residing at a distance

from the banking house, shut it up & stopped payment :—*Held :* this was not evidence of a joint act of bkpcy. by all three.—MILLS *v.* BENNETT (1814), 2 M. & S. 556 ; 2 Rose, 269 ; 105 E. R. 488.

689. —— —— Shop—With intention not to reopen.]—The locking up of a shop by debtor with the intention not to reopen it :—*Held :* an act of bkpcy.—*Re* ANDERSON, *Ex p.* NICHOLSON (1877), 37 L. T. 40.

690. —— —— —— Leaving no address—Married woman trader joining husband.]—A married woman, who was carrying on a business, left her place of business & shut up her shop, leaving no address, & joined her husband. There were trade debts incurred by her remaining undischarged, & there was some evidence that she was attempting to evade service of legal process :—*Held :* she was absenting herself with intent to defeat or delay her creditors, & the fact that she had gone to join her husband at his request was not sufficient to negative that conclusion.—*Re* WORSLEY, [1901] 1 K. B. 309 ; 70 L. J. Q. B. 93 ; 84 L. T. 100 ; 8 Mans. 8, C. A.

Annotation :—**Mentd.** *Re* Clark, *Ex p.* Pope & Owles, [1914] 3 K. B. 1095, C. A.

691. —— —— Warehouse—Leaving no one to answer inquiries—Departure to sell book debts.]—Debtor had promissory notes falling due. He left his warehouse shut up for three days, while he was trying to sell some book debts. His business required his frequent absence from home, & it was his practice to close his warehouse, which was near his dwelling-house, while away :—*Held :* in the circumstances, having left no one to answer enquiries, he must be taken to have intended the consequences of his conduct, & he had committed an act of bkpcy.—*Re* M'KEAND, *Ex p.* M'KEAND (1889), 5 T. L. R. 564 ; 6 Morr. 240, D. C.

692. —— Breaking appointment with creditor—Instructing friend to deny him.]—A newsvendor, who frequented the Royal Exchange for the purpose of collecting intelligence for a newspaper, appointed a creditor to meet him on the Royal Exchange, & afterwards directed a friend, if the creditor inquired there for him, to say he was not there :—*Held :* this was an "otherwise absenting himself," which constituted an act of bkpcy. within 1 Jac. 1, c. 15, s. 2.—GILLINGHAM *v.* LAING (1816), 6 Taunt. 532 ; 128 E. R. 1142 ; *sub nom.* GIMMINGHAM *v.* LAING, 2 Marsh. 236.

Annotations :—**Distd.** Toleman *v.* Jones (1824), 9 Moore C. P. 24. **Refd.** Bernasconi *v.* Farebrother (1830), 8 L. J. O. S. K. B. 203.

693. —— —— With intent to delay.]—If debtor breaks an appointment with a creditor, with intent to delay him, it is an absenting himself.—BUTCHER *v.* WROUGHTON (1829), Mont. & M. 438, n.

694. —— —— At creditor's house.]—*Semble :* a breach of an appointment by a trader to call at his creditor's house to pay a debt is not an act of bkpcy.—LEES *v.* MARTON (1832), 1 Mood. & R. 210, N. P.

695. —— ——.]—Mere failure to keep an appointment with a creditor is not an act of bkpcy.—KEY *v.* SHAW (1832), 8 Bing. 320 ; 1 Moo. & S. 462 ; 131 E. R. 417.

Annotation :—**Mentd.** Richardson *v.* Pratt (1885), 52 L. T. 614.

696. —— —— On account of absence to procure funds.]—A country trader promised to attend an appointment to pay his creditor. He, however, went to London to procure funds & wrote to the creditor that that would prevent his keeping the appointment :—*Held :* he had not committed an act of bkpcy. by absenting, there being no intent to delay.—*Re* LAVENDER, *Ex p.* LAVENDER (1834), 4 Deac. & Ch. 484 ; 2 Mont. & A. 11.

697. —— —— To attend creditors' meeting—Appointment made by debtor's solicitor.]—When a trader in insolvent circumstances failed to attend a meeting of creditors, which had been convened by his solr. at the place where he carried on business :—*Held :* in the circumstances, although he might not have personally promised to attend, & although the solr. attended, yet (judging of intention by overt acts) he had committed the act of bkpcy. of absenting himself with intent to delay & defeat his creditors.—*Re* BEER, *Ex p.* BEER (1841), 1 Mont. D. & De G. 390 ; 10 L. J. Bcy. 33 ; 5 Jur. 104.

698. —— —— —— Called in debtor's absence on his instructions.]—An insolvent trader left home to collect money to pay out a distress for rent, leaving instructions with his book-keeper to call a meeting of his creditors for a particular day, & promising to attend :—*Held :* his non-attendance was an act of bkpcy.—*Re* ROBERTS (1852), 19 L. T. O. S. 351.

699. —— —— —— —— Made by continuing partner after dissolution—Notice served on debtor.]—A trader, on a dissolution of partnership, left at the place of business a direction that letters were to be addressed to him at a particular post office at a shop. The continuing partner afterwards instructed a solr. to call a meeting of creditors, & the solr. notified this to the retiring partner, who neither sanctioned the meeting nor attended it :—*Held :* neither of these omissions constituted an act of bkpcy.—*Re* HOOPER, *Ex p.* ADDISON (1849), 3 De G. & Sm. 580 ; 18 L. J. Bcy. 13 ; 13 Jur. 601 ; 64 E. R. 615.

700. —— —— Appointments not at debtor's usual place of business.] — Where debtor, upon applications made to him by creditors for payment of their debts, made appointments with

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692 i. *Sufficiency of evidence—Breaking appointment with creditor—To take up acceptance.*]—A trader appointed to call at his creditor's house on a certain day, to arrange to take up the trader's acceptance, falling due on that day. The trader failed to keep the appointment, or pay any money on account of the bill :—*Held :* not keeping the appointment was an act of bkpcy.—*Re* O'NEILL (1859), 9 I. Ch. R. 279. —**IR.**

697 i. —— —— *To attend creditors' meeting—Wife attending for debtor.*]—A trader who calls a meeting of his creditors & does not attend, & whose shop is shut on the day of meeting, commits an act of bkpcy., although his wife, who conducts his business, attends for him & offers to give the creditors all the information they could require.—*Re* WEST (1853), 21 L. T. O. S. 24.—**IR.**

k. —— —— *Gomastah departing from principal's place of business.*]—*Held :* in the circumstances an act of insolvency on the principal's part.—*Re* BRIJMOHAN DOBAY, 2 C. W. N. 306.—**IND.**

l. —— ——.]—*Held :* not an act of insolvency on the principal's part, it being a question of fact in each case whether the gomastah occupied such a position that the principal stood or fell by his acts, & whether the gomastah's departure from the place of business should or should not be the act of the principal.—KASTUR CHAND RAI BAHADUR *v.* DHANPAT SINGH BAHADUR (1895), I. L. R. 23 Calc. 26 ; L. R. 22 Ind. App. 162.—**IND.**

m. —— ——.]—D. carried on business in Calcutta through his gomastah P., who carried on the business on the second storey of the business premises, having his residence on the third storey, the whole of the premises belonging to D. P. stopped payment & retired to the third storey, but was accessible to all creditors either in the office where business was usually carried on or in the private room on the third storey :—*Held :* (1) the retirement of P. to his rooms on the third storey was not a departure with the intention to defeat & delay the creditors of D. ; (2) the departure must be a departure by debtor personally, & could not be committed by any other person on his behalf.—*Re* DHANPUT SINGH (1893), I. L. R. 20 Calc. 771 ; *affd.* KASTUR CHAND RAI BAHADUR *v.* DHANPAT SINGH BAHADUR (1895), I. L. R. 23 Calc. 26 ; L. R. 22 Ind. App. 162 ; 11 T. L. R. 493, P. C.—**IND.**

Sect. 2.—What is an act of bankruptcy: Subsects. 6 & 7.]

them to meet him at specified times & places with reference to a settlement of their demands, but failed to keep such appointments :—*Held :* the failures to keep the appointments constituted acts of bkpcy., although the places at which the appointments were made were not his usual places of business.—RUSSELL *v.* BELL (1842), 10 M. & W. 340; 152 E. R. 500.

701. —— —— Not excused by illness in family — Subsequent attendance at Bankruptcy Court.]—A trader in insolvent circumstances, with three executions in his house, who neglects to keep an appointment made at half-past nine a.m. with a creditor for the purpose of signing a declaration of insolvency, on the plea that his so attending would be likely to bring premature labour on his wife, but who nevertheless attends at the Ct. of Bkpcy. at eleven o'clock, thereby commits an act of bkpcy.—*Re* CHREES, *Ex p.* CHREES (1858), 31 L. T. O. S. 107.

702. —— —— Appointment conditional—On debtor having succeeded in raising money.]—Neglecting to keep an appointment made with a creditor & bring him the bills of a third party, or cash if he could get it, for the purpose of meeting acceptances of the trader falling due in a few days, is not an act of bkpcy., such appointment being conditional merely upon his obtaining the money or bills, & imposing no legal obligation for the trader, if unsuccessful, to keep it.—*Re* POOLE & BRYAN, *Ex p.* POOLE (1860), 3 L. T. 59.

703. —— —— —— —— Debtor remaining at place of business.]—Debtor promised to call at an appointed time on a creditor & pay the debt. Having failed to procure the money he did not call, but he was to be found at his own place of business :—*Held :* the failure to keep the appointment did not constitute an absenting himself with intent to defeat or delay the creditor, & no act of bkpcy. had been committed.—*Re* STEPHANY, *Ex p.* MEYER (1871), 7 Ch. App. 188 ; 41 L. J. Bcy. 33 ; 25 L. T. 733 ; 20 W. R. 173, L. JJ.

Annotation :—**Refd.** *Re* Alderson, *Ex p.* Jackson (1894), 15 R. 495.

704. —— ——No intent to delay—Creditors not thereby delayed.]—If a man absent himself from a creditor, or from a promise to meet a creditor, either at the creditor's or his own house, it may be held to be an act of bkpcy., but where debtor promised to attend at the office of an accountant (acting on behalf of the creditors) after a meeting of creditors, & failed to do so, having been harshly treated by the accountant the day before :—*Held :* debtor's breach of his promise did not delay his creditors for a moment, nor was intended to delay, & was not an act of bkpcy.—*Re* A DISPUTED ADJUDICATION, *Ex p.* DRAYSON (1865), 12 L. T. 28.

705. —— Debtor secreting himself in theatre —On seeing creditor.]—Debtor saw his creditor at a theatre & secreted himself under the stage for the purpose of avoiding him :—*Held :* this was an "otherwise absenting himself" which constituted an act of bkpcy. within 1 Jac. 1, c. 15, s. 2.—GILLINGHAM *v.* LAING (1816), 6 Taunt. 532 ; 128 E. R. 1142 ; *sub nom.* GIMMINGHAM *v.* LAING, 2 Marsh. 236.

Annotations :—**Distd.** Tucker & Toleman *v.* Jones (1824), 2 Bing. 2. **Mentd.** Bernasconi *v.* Farebrother (1830), 8 L. J. O. S. K. B. 203.

See, also, cases in sub-sects. 4 & 5, *ante,* sub-sect. 7, *post.*

SUB-SECT. 7.—BEGINNING TO KEEP HOUSE WITH INTENT TO DEFEAT OR DELAY CREDITORS.

706. What must be established—That person denied was creditor—That creditor was in fact denied.]—Though a man with intent to delay his creditors orders himself to be denied, yet unless he be in fact denied to a creditor, it will be no act of bkpcy., & it is necessary to prove that the person denied was a creditor.—JACKMAR *v.* NIGHTINGALE (1740), Bull. N. P. 40.

707. —— —— Unless debtor believed him to be such.]—If a trader deny himself to a person, who desires that he may be told that a certain bill of exchange, mentioning the parties to it, is dishonoured, & that he wishes to see him in consequence, such denial is an act of bkpcy., without further proof of the party being a creditor, if the jury believe that bkpt. so considered him.—BLEASBY *v.* CROSSLEY (1825), 2 C. & P. 213.

708. —— Act of keeping house—Intent to delay insufficient.]—A person, who keeps house & declares that he does so to avoid the consequences of a former arrest, commits an act of bkpcy. The intent to defraud his creditors would not make him a bkpt. without the doing of the act, *i.e.* keeping house.—DICKINSON *v.* FOORD (1758), Barnes, 160 ; 94 E. R. 856.

Annotation :—**Distd.** *Re* Lavender, *Ex p.* Lavender (1834), 2 Mont. & A. 11.

709. —— —— Not intent with which act done.]—Debtor who keeps house & denies himself to a creditor, though not with the intention of defeating him, but rather with a view of paying his creditors, commits an act of bkpcy., the intent with which the act was done being immaterial.—RICHARDSON *v.* PRATT (1885), 52 L. T. 614.

710. —— That there was denial—Act not complete until denial.]—Where a trader gave orders to be denied on May 26, but was not in fact denied till the 28th :—*Held :* there was no act of bkpcy. till the 28th.—HAWKES *v.* SANDS (1784), 3 Doug. K. B. 429 ; 99 E. R. 732.

Annotation :—**Distd.** Belcher *v.* Gummow (1847), 9 Q. B. 873.

711. —— —— With intent to delay—Keeping house with intent to delay insufficient.]—In order to constitute an act of bkpcy. debtor must be denied to a creditor, with intent to defraud or hinder that creditor ; "keeping house" with that intent is not alone sufficient.—GARRET *v.* MOULE (1794), 5 Term Rep. 575 ; 101 E. R. 322.

712. —— —— Not essential.]—Denial to a creditor is not essential to an act of bkpcy. by beginning to keep house.—BAYLY *v.* SCHOFIELD (1813), 1 M. & S. 338 ; 2 Rose, 100 ; 105 E. R. 127.

Annotations :—**Consd.** Lloyd *v.* Heathcote (1820), 5 Moore, C. P. 129. **Refd.** Gillingham *v.* Laing (1816), 6 Taunt. 532 ; Curteis *v.* Willes (1824), 1 C. & P. 211. **Mentd.** Abraham *v.* George (1822), 11 Price, 423 ; Shone *v.* Lucas (1823), 3 Dow. & Ry. K. B. 218 ; Cutten *v.* Sanger, Smith, Fisher, etc. (1828), 2 G. & J. 459, Ex. Ch. ; De Tastet *v.* Le Tavernier (1836), 1 Keen, 161 ; Bowser *v.* Colby (1841), 1 Hare, 109 ; R. *v.* Saddlers' Co. (1863), 10 H. L. Cas. 404 ; London & Counties Assets Co. *v.* Brighton Grand Concert Hall & Picture Palace, [1915] 2 K. B. 493, C. A.

713. —— —— That debtor secreted himself — Instruction to deny insufficient.]—Debtor, in embarrassed circumstances, gave directions that he should be denied to all persons. There was no proof that any person was in fact denied, nor that he secreted himself. The jury found the denial was with intent to delay his creditors :—*Semble :* this would not be an act of bkpcy.—HARE *v.* WARING (1838), 3 M. & W. 362 ;

1 Horn & H. 90; 7 L. J. Ex. 118; 150 E. R. 1184.

Annotation :—**Mentd.** Alsager *v.* Close (1842), 10 M. & W. 576.

714. —— Intent to delay—No actual delay.]—A beginning to keep house with intent to delay creditors constitutes an act of bkpcy. although no creditor is actually delayed thereby.—LLOYD *v.* HEATHCOTE (1820), 2 Brod. & Bing. 388; 5 Moore, C. P. 129; 129 E. R. 1017.

Annotations :—**Folld.** Harvey *v.* Ramsbottom (1822), 1 B. & C. 55. **Consd.** Fisher *v.* Boucher (1830), 10 B. & C. 705. **Refd.** Belcher *v.* Gummow (1847), 9 Q. B. 873; Phillips *v.* Naylor (1858), 3 H. & N. 14.

715. —— Authority of third party making denial.]—Where debtor is denied by a third party, there must be evidence that the denial was made with debtor's knowledge & consent.—*Re* CURTIS, *Ex p.* CURTIS (1893), 9 T. L. R. 387, D. C.

See, also, cases in sub-sects. 4, 5, & 6, *ante.*

716. Proper direction to jury.]—A trader having been denied to a creditor who called for money, was after a little time seen peeping over his wife's shoulder. Upon another occasion, seeing a creditor coming, he retired behind a partition at the back of his shop, & his wife coming forward, said he was not at home :—*Held :* a jury were properly directed to consider whether the trader "had kept his house, had wilfully secluded himself, *i.e.*, had withdrawn himself from a part of the house where he was likely to meet a creditor, to a more retired part."—KEY *v.* SHAW (1832), 8 Bing. 320; 1 Moo. & S. 462.

Annotations :—**Refd.** Robinson *v.* Carrington (1833), 1 Mont. & A. 1; Richardson *v.* Pratt (1885), 52 L. T. 614.

717. Effect of subsequently going at large.]—Keeping house is no act of bkpcy., if the party go afterwards at large.—ANON. (1583), Cro. Eliz. 13; 78 E. R. 279.

718. Admissibility of evidence—Statement by witness that several persons called—Though unable to say whether or not they were creditors.]—When the act of bkpcy. relied on is a denial to creditors, a witness proving that several persons called, whom the witness believed to be creditors, but could not say whether in fact they were so or not, is evidence to go to the jury.—JAMESON *v.* EAMER (1795), 1 Esp. 381.

719. —— Admission by debtor that he had been denied.]—A trader being arrested on Aug. 23, obtained his liberty upon undertaking to attend to execute a bail-bond, but broke his word; & on Sept. 8, admitted to the bailiff that he was at home, when the bailiff had called & the trader had been denied to him :—*Held :* the omission to attend to execute the bail-bond did not amount to an act of bkpcy., & the declaration of the trader on the 8th was not admissible.—SCHOOLING *v.* LEE (1822), 3 Stark. 149.

Annotation :—**Mentd.** Robinson *v.* Carrington (1833), 1 Mont. & A. 1.

720. —— ——.]—Debtor after being denied to a creditor, acknowledged in the course of the same day to a third person, that he had given orders for that purpose, adding "I knew that he wanted money, & I would not let him have any" :—*Held :* this acknowledgment was evidence against debtor to complete the act of bkpcy.—*Re* PRESCOTT, *Ex p.* PRESCOTT (1840), 1 Mont. D. & De G. 199; 4 Jur. 852, Ct. of R.

Annotation :—**Mentd.** *Re* Lennox, *Ex p.* Lennox (1885), 16 Q. B. D. 315, C. A.

See, also, Nos. 615, 649, *et seq.*, 675 *et seq.*, *ante.*

721. Sufficiency of evidence—Lying in concealment.]—The following were acts of bkpcy. under 21 Jac. 1, c. 19 :—(1) lying in concealment by a surety; (2) incurring trade debts & afterwards giving up business & lying in concealment; (3) trading from time to time & giving up the business, leaving the stock-in-trade in another's hands, & still sharing the profits & losses, & incurring debts & lying in concealment; (4) lying in concealment for one hour or one day to delay or defraud creditors.—HEYLOR *v.* HALL (1622), Palm. 325; 81 E. R. 1105.

Annotation :—**Folld.** Bailie *v.* Grant (1832), 9 Bing. 121.

722. —— Withdrawal to more retired part of house—To avoid personal application for money.]—If a trader withdraws from one part of his house where he had before usually sat, & where there was free access to him, to a more retired part of it, to avoid personal applications for money, by means whereof his creditors are prevented from importuning him, this is a beginning to keep house.—DUDLEY *v.* VAUGHAN (1808), 1 Camp. 271.

Annotations :—**Folld.** Lloyd *v.* Heathcote (1820), 2 Brod. & Bing. 388; Cumming *v.* Baily (1830), 6 Bing. 363. **Apld.** Richardson *v.* Pratt (1885), 52 L. T. 614.

723. —— —— On creditor calling on business.]—A country trader was in the habit of coming up occasionally to London, & staying a day or two at a friend's house, where he wrote his letters, & used to order goods to be sent to him there. On a particular day he told his friend not to inform a creditor that he was in town, because he would be bothering him for his money. Shortly afterwards the creditor called at the house upon business, whereupon bkpt. went into a back warehouse to avoid seeing him :—*Held :* this was a "beginning to keep house" so as to support a commission of bkpcy.—CURTEIS *v.* WILLES (1824), 1 C. & P. 211; 4 Dow. & Ry. K. B. 224; Ry. & M. 58.

724. —— Going to office—To avoid public arrest.]—A trader being informed, by the attorney of his petitioning creditors, that he had delivered a warrant to arrest him to a sheriff's officer, who was seeking him for the purpose of executing it, was advised by the same attorney to repair to his office, to avoid the publicity of being arrested in the street, which he did, & remained there a considerable time :—*Held :* he had not committed an act of bkpcy.—MILLS *v.* ELTON (1816), 3 Price, 142; 146 E. R. 216.

725. —— Closing doors & shutters of bank—Though banker not domiciled there.]—Closing the doors & shutters of a bank is a "beginning to keep house," although the banker be not domiciled at the bank.—CUMMING *v.* BAILY (1830), 6 Bing. 363; L. & Welsb. 206; 4 Moo. & P. 36; 8 L. J. O. S. C. P. 103; 130 E. R. 1320.

Annotations :—**Mentd.** Carr *v.* Burdiss (1835), 1 Cr. M. & R. 782; *Re* Hunt, *Ex p.* Simpson (1844), 14 L. J. Bcy. 1; Edwards *v.* Cooper (1847), 11 Q. B. 33.

726. —— Abstaining from going where otherwise he would have gone—Through apprehension of arrest.]—If a trader, through apprehension of being arrested, abstain from going to a place, to which, but for such apprehension, he would have gone, such conduct on his part amounts to an act of bkpcy.—ROBSON *v.* ROLLS (1833), 9 Bing. 648; 2 Moo. & S. 786; 2 L. J. C. P. 80; 131 E. R. 757.

721 i. *Sufficiency of evidence—Posting up false notice of absence from house.*]—Debtor endeavoured to conceal his presence in his house by posting a notice on the front of the house to the effect that he was away from home, and by other artifices in order to avoid his creditors :—*Held :* debtor had committed an act of insolvency, by keeping house with intent to defeat or delay his creditors.—HOLDGATE & SON *v.* SHURMER (1905), 26 N. L. R. 710.—**S. AF.**

Sect. 2.—What is an act of bankruptcy: Subsect. 7.]

Annotations :—**Follď.** Robinson *v.* Carrington (1833), 1 Mont. & A. 1. **Distd.** *Re* Lavender, *Ex p.* Lavender (1834), 2 Mont. & A. 11. **Apld.** Rouch *v.* G. W. Ry. Co. (1840), 1 Q. B. 51.

727. —— Denial—Generally—Conclusive evidence if unexplained.]—Denial to a creditor, if unexplained, is conclusive evidence of an act of bkpcy. by beginning to keep house, but it is not the only evidence by which it may be established.—BAYLY *v.* SCHOFIELD (1813), 1 M. & S. 338; 2 Rose, 100; 105 E. R. 127.

Annotations :—**Refd.** Gillingham *v.* Laing (1816), 6 Taunt. 532; Lloyd *v.* Heathcote (1820), 5 Moore, C. P. 129; Curteis *v.* Willes (1824), 1 C. & P. 211. **Mentd.** Abraham *v.* George (1822), 11 Price, 423; Shone *v.* Lucas (1823), 3 Dow. & Ry. K. B. 218; Cutten *v.* Sanger (1828), 2 Y. & J. 459, Ex. Ch.; De Tastet *v.* Le Tavernier (1836), 1 Keen, 161; Bowser *v.* Colby (1841), 1 Hare, 109; R. *v.* Saddlers' Co. (1863), 10 H. L. Cas. 404, H. L.

728. —— —— Order for denial—Sometimes to deny debtor to everybody.]—Debtor's servant had orders sometimes to deny him to everybody :—*Held :* an act of bkpcy.—ROUND *v.* HOPE BYDE (1779), 1 Cooke's Bankrupt Laws, 7th ed., p. 105.

Annotation :—**Refd.** Lloyd *v.* Heathcote (1820), 5 Moore, C. P. 129.

729. —— —— —— To any that called.]—A trader upon being arrested for debt, escaped from the officer & fled into the house of another, & was pursued by the officer & inquired for at the house, but was denied & the door kept fast. Whilst he remained there he declared that he did it for fear of other creditors, & when it was dark returned to his own house & gave directions to deny him to any that called, & he continued nearly a month in his bedchamber :—*Held :* this constituted one or more act or acts of bkpcy.—BAYLY *v.* SCHOFIELD (1813), 1 M. & S. 338; 2 Rose, 100; 105 E. R. 127.

Annotations :—**Refd.** Gillingham *v.* Laing (1816), 6 Taunt. 532; Lloyd *v.* Heathcote (1820), 5 Moore, C. P. 129; Curteis *v.* Willes (1824), 1 C. & P. 211. **Mentd.** Abraham *v.* George (1822), 11 Price, 423; Shone *v.* Lucas (1823), 3 Dow. & Ry. K. B. 218; Cutten *v.* Sanger (1828), 2 Y. & J. 459, Ex. Ch.; De Tastet *v.* Le Tavernier (1836), 1 Keen, 161; Bowser *v.* Colby (1841), 1 Hare, 109; R. *v.* Saddlers' Co. (1863), 10 H. L. Cas. 404, H. L.

730. —— —— —— ——.]—The solr. to an alleged bkpt. deposed that bkpt. was indebted to him; that when he called upon him to ask for the money, bkpt. stated that a number of persons were suing him, & asked whether witness could not get him time; & that when he was going away bkpt. told his wife to deny him to any creditor who might call :—*Held :* the general order to deny was a sufficient act of bkpcy.—*Re* MULLENS, *Ex p.* MULLENS (1849), Fonbl. 11.

731. —— —— —— —— At dinner time—Or while engaged in business.]—A trader directed his servant "that if any one should come whilst he was at dinner or engaged in business, she should deny him" :—*Held :* such instructions did not amount to a direction for a general denial, & although a creditor called & was denied, it was no act of bkpcy.—SHEW *v.* THOMSON (1816), Holt, N. P. 159; 2 Rose, 468.

732. —— —— —— —— Debtor ill in bed—Matter for jury.]—Where a trader ordered his servant to say that if any creditors called, he was not at home, & he was accordingly denied, but was in bed ill at the time :—*Held :* it was properly left to the jury, whether this was a beginning to keep house, with an intent to commit an act of bkpcy., & they were warranted in finding that it did.—LAZARUS *v.* WAITHMAN (1821), 5 Moore, C. P. 313.

Annotations :—**Mentd.** Balme *v.* Hutton (1833), 9 Bing. 471; Garland *v.* Carlisle (1833), 4 Moo. & S. 24, Ex. Ch.

733. —— —— —— To any person whom servants did not know—No creditor actually denied.]—A trader having been arrested, desired his servants not to let into the house any persons whom they did not know, as he was afraid of being arrested again. On the next morning the doors of the house were kept shut, & no person was admitted until it had been ascertained from the window who he was :—*Held :* an act of bkpcy. was committed on that morning, although no creditor was actually denied.—HARVEY *v.* RAMSBOTTOM (1822), 1 B. & C. 55; 2 Dow. & Ry. K. B. 142; 1 L. J. O. S. K. B. 25; 107 E. R. 21.

Annotations :—**Distd.** Fisher *v.* Boucher (1830), 10 B. & C. 705. **Refd.** Newman *v.* Stretch (1829), Mood. & M. 338. **Mentd.** Belcher *v.* Gummow (1847), 9 Q. B. 873.

734. —— —— —— To particular party—Such party not calling.]—A trader being under apprehension of arrest gave directions to his servant to deny him in case A., a sheriff's officer, called :—*Held :* the sheriff's officer not having called, this of itself was not any evidence of a beginning to keep house.—FISHER *v.* BOUCHER (1830), 10 B. & C. 705; 5 Man. & Ry. K. B. 589; 8 L. J. O. S. K. B. 306; 109 E. R. 612.

Annotations :—**Follď.** Hare *v.* Waring (1838), 3 M. & W. 362. **Refd.** Key *v.* Shaw (1832), 8 Bing. 320; Robson *v.* Rolls (1833), 9 Bing. 648. **Mentd.** *Re* A Disputed Adjudication (1850), 15 L. T. O. S. 8.

735. —— —— Unauthorised denial—Subsequently approved.]—Where debtor had been denied to a creditor, & at a subsequent time not ascertained had approbated the denial, a commission taken out ten months later was superseded.—*Ex p.* FOSTER (1810), 17 Ves. 414; 1 Rose, 49; 34 E. R. 160, L. C.

Annotations :—**Mentd.** *Ex p.* Lanchester (1811), 17 Ves. 512, L. C.; *Ex p.* Proston (1812), 1 Rose, 259; *Re* Pownall, *Ex p.* Pownall (1834), 3 L. J. Bcy. 55.

736. —— —— —— Authority to deny on previous occasion.]—Two traders in partnership left their shop, & told their shopman that they were going out to endeavour to get some bills of exchange discounted, & directed him to say that they were not in the way, or to make some excuse for them, in case a creditor should call. On that & the following day a creditor called, when they were both at home, & desired to see either the one or the other of them, when the shopman denied them without being authorised by them so to do :—*Held :* the jury were warranted in concluding that they absented themselves with an intent to delay their creditors.—CAPPER *v.* DESANGES (1819), 3 Moore, C. P. 4.

737. —— —— —— Statement that debtor busy.]—A servant of C. denied him to a creditor, saying he was busy :—*Held :* if bkpt. was busy & therefore denied himself, it was no act of bkpcy.—STAFFORD *v.* CLARK (1823), 1 C. & P. 24.

738. —— —— —— —— Acquiesced in.]—If a trader in his own house hears himself denied to a creditor, & does not come forward, this, if done with intent to delay creditors, is an act of bkpcy., though he has given no directions to be denied.—SMITH *v.* MOON (1829), Mood. & M. 458.

739. —— —— To whom—Creditor.]—The person denied must be a creditor.—BRAMLEY *v.* MUNDEE (1756), Bull. N. P. 39.

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727 i. —— *Denial—Shop closed by distress for rent—Debtor ill in bed.*]—A creditor applied on several days at the dwelling-house of a trader for payment of his debt, but on each occasion was informed by the trader's shopman that the trader (who was then in the house) had gone elsewhere without leaving any funds for payment of the debt :—*Held :* there was sufficient evidence to show that the trader "began to keep house with the intent to defeat or delay his creditors," within Irish 1872 Act, s. 21, & an act of bkpcy. had been committed, although upon those occasions the trader was ill in bed, & his shop was closed by his landlord, who had distrained for rent.—*Re* WARD (1876), I. R. 10 Eq. 438; 10 I. L. T. 182.—IR.

740. —— —— —— **Servant of acknowledged agent of creditor.**]—Denial to a servant, calling for a debt by direction of the acknowledged agent of the creditor, & by appointment of debtor, & though debtor was seen by the servant through a window, & heard giving directions to deny him, is an act of bkpcy.—*Ex p.* BAMFORD (1809), 15 Ves. 449 ; 33 E. R. 824, L. C.

Annotations :—**Mentd.** Surtees *v.* Ellison (1829), 9 B. & C. 750 ; Bailie *v.* Grant (1832), 9 Bing. 121 ; Robson *v.* Rolls (1833), 9 Bing. 648 ; Rouch *v.* G. W. Ry. Co. (1841), 1 Q. B. 51 ; *Re* Mostyn, *Ex p.* Griffiths (1853), 22 L. J. Bcy. 50 ; *Re* Worsley, [1901] 1 K. B. 309, C. A. ; *Re* Allen, *Ex p.* Shaw (1914), 112 L. T. 194, C. A. ; *Re* Clark, *Ex p.* Pope & Owles, [1914] 3 K. B. 1095, C. A.

741. —— —— **To what creditors—Creditor holding unmatured bill.**] — A. gave two promissory notes to L. While the notes were current, L. indorsed them to M. for goods delivered. Before the due date A. absconded, & L., on M.'s going to him, procured himself to be denied :—*Held :* since there was no debt presently due from L. to M., which M. could demand, this was not such a keeping house as to be an act of bkpcy.—*Ex p.* LEVI (1733), 2 Eq. Cas. Abr. 96 ; 7 Vin. Abr. 61, pl. 14 ; 22 E. R. 82.

742. —— —— —— **Creditor not in concert—Concerted act of bankruptcy.**]—A concerted denial is not evidence of an act of bkpcy., unless in fact there was a denial to a creditor, who was not in concert.—CALLEY *v.* HOPKINS (1785), cited 1 Madd. at p. 252 ; 56 E. R. 93.

Annotation :—**Folld.** *Ex p.* Binmer (1816), 1 Madd. 250.

743. —— —— —— **Creditor demanding payment—Not demanding to see debtor personally.**]—If a trader is denied when at home to a creditor, who merely demands payment of a debt, but does not ask to see him personally, this is not evidence of a beginning to keep house so as to constitute an act of bkpcy.—DUDLEY *v.* VAUGHAN (1808), 1 Camp. 271.

Annotations :—**Consd.** Lloyd *v.* Heathcote (1820), 2 Brod. & Bing. 388. **Refd.** Cumming *v.* Bailey (1830), 6 Bing. 363 ; Richardson *v.* Pratt (1885), 52 L. T. 614.

744. —— —— —— **Creditor seeking to buy goods.**]—Act of bkpcy. by denial to a creditor who called, not for money, but to buy goods, meaning to take his debt out in that way.—*Ex p.* WHITE (1814), 3 Ves. & B. 128 ; 35 E. R. 427.

745. —— —— —— ——.] — Where a trader, desirous of avoiding the access of his creditors upon their ordinary demands, & in a course of business, had given orders generally to be denied, & was denied to a creditor who had called at his house, not for payment of his debt, but in order to cover it by buying goods to the amount of his debt :—*Held :* he had committed the act of bkpcy. of beginning to keep house with intent to delay creditors.

It is not their object in calling which is contemplated, but his intention in being denied (LORD ELDON, C.).—*Ex p.* HARRIS (1814), 2 Rose, 67.

746. —— —— —— **Tax collector.**]—If a trader keeps house, & causes himself to be denied to a tax-gatherer, who calls for the taxes, it is an act of bkpcy.—JEFFS *v.* SMITH (1810), 2 Taunt. 401 ; 1 Rose, 117 ; 127 E. R. 1133.

747. —— —— —— ——.]—Denial to a collector of king's taxes is as much an act of bkpcy. as denial to any other creditor.—SANDERSON *v.* LAFEREST (1823), 1 C. & P. 46.

748. —— —— —— **Collector of church & highway rates.**] — A denial to the collector of church & highway rates, who called for assessments due from him, after a general order to be denied to all comers, is an act of bkpcy., & such order is sufficient evidence of a beginning to keep house, with an intent to delay creditors.—LLOYD *v.* HEATHCOTE (1820), 2 Brod. & Bing. 388 ; 5 Moore, C. P. 129 ; 129 E. R. 1017.

Annotations :—**Folld.** Harvey *v.* Ramsbottom (1822), 1 B. & C. 55. **Refd.** Fisher *v.* Boucher (1830), 10 B. & C. 705 ; Phillips *v.* Naylor (1858), 3 H. & N. 14. **Mentd.** Belcher *v.* Gummow (1847), 9 Q. B. 873.

749. —— —— —— **Creditor seeking return of goods sold.**] — A trader bought goods to be paid for by bill. A few days after the goods had been delivered the seller called & demanded a return of his goods, & at the same time threatened to have the trader arrested for swindling in taking in the goods when he knew he was in insolvent circumstances. He requested to see the trader, who refused to see him :—*Held :* not sufficient to raise a presumption of a " beginning to keep house with intent to delay a creditor " so as to constitute an act of bkpcy.—CLEMENTS *v.* M'KIBBEN (1857), 2 H. & N. 62 ; 157 E. R. 262.

750. —— —— **At what time denial—Eleven o'clock at night.**] — A person's denying himself to a creditor, who calls at eleven o'clock at night, is no act of bkpcy., for it cannot be said to be done with an intent to defraud his creditors, which is the ingredient required to make a man a bkpt. —*Re* HALL, *Ex p.* HALL (1753), 1 Atk. 201 ; 26 E. R. 130.

751. —— —— —— **Sunday.**]—Denial on a Sunday is not an act of bkpcy.—*Re* PRESTON, *Ex p.* PRESTON (1813), 2 Ves. & B. 311 ; 2 Rose, 21 ; 35 E. R. 338.

752. —— —— —— **Dinner time—Though creditor actually delayed.**]—A trader, who is denied by his own orders to a creditor in the habit of calling upon him to demand a debt when he is at dinner, does not commit an act of bkpcy. if his intent be to avoid interruption at that hour, & not to delay the creditor, although the creditor be thereby delayed.—SMITH *v.* CURRIE (1813), 3 Camp. 349.

Annotation :—**Distd.** Lloyd *v.* Heathcote (1820), 5 Moore, C. P. 129.

See, also, No. 731, *ante.*

753. —— —— —— **After shop shut—Shop shut earlier than usual.**] — If a trader, who is in the rules of the King's Bench prison, come to his own shop out of the rules, & is there denied to a clerk of a creditor, it appearing by the evidence that the shop was shut up for the evening, but at an earlier hour than usual, it is proper to be left to the jury to say, whether bkpt. had himself denied, to delay his creditor, or whether it was because the clerk called at an unseasonable hour. If the jury find the former, their verdict establishes an act of bkpcy.—HUGHES *v.* GILLMAN (1825), 2 C. & P. 32 ; 10 Moore, C. P. 480 ; 3 L. J. O. S. C. P. 199.

754. —— —— **At what place—Debtor's lodgings or any place where he is known to be.**]—A creditor has a right to call on his debtor for his money at debtor's lodgings, or other place where he knows him to be, though it is not his place of business, & a denial to a creditor there is as much an act of bkpcy. as if it were his place of business.—PARK *v.* PROSSER (1824), 1 C. & P. 176.

755. —— —— **Whether purged — By payment on same day as denial.**]—A. was denied in the morning by express order to the holder of a bill which was due :—*Held :* it was a complete act of bkpcy., though he afterwards paid the bill before five o'clock in the same day, & though, by the custom of merchants in London, the payer of a bill had the whole day on which it became due, till five o'clock, to discharge it in.—COLKETT *v.* FREEMAN (1787), 2 Term Rep. 59 ; 100 E. R. 33.

Sect. 2.—What is an act of bankruptcy: Sub-sects. 7, 8 & 9.]

Annotations :—**Refd.** Gillingham *v.* Laing (1816), 6 Taunt. 532 ; Richardson *v.* Pratt (1885), 52 L. T. 614.

756. —— —— —— By seeing creditor on same day.]—A denial to a creditor, though debtor afterwards sees him on the same day, is an act of bkpcy.—WOOD *v.* THWAITES (1800), 3 Esp. 245.

757. —— —— —— By interviewing creditor immediately after denial.]—If a trader gives a general order to be denied, & is denied to a creditor, it is a beginning to keep house, though he immediately overtakes him, & says he was not afraid of him.—MUCKLOW *v.* MAY (1809), 1 Taunt. 479 ; 127 E. R. 920.

Annotation :—**Refd.** Richardson *v.* Pratt (1885), 52 L. T. 614.

See, also, cases in sub-sects. 4, 5, & 6, *ante.*

SUB-SECT. 8.—ALLOWING GOODS SEIZED TO BE SOLD OR HELD BY SHERIFF FOR TWENTY-ONE DAYS.

758. "Procuring" goods to be taken in execution—Not complete till goods actually taken.]—A person by suffering judgment to go by default does not "procure" his goods to be taken in execution under 6 Geo. 4, c. 16, s. 3, so as to be an act of bkpcy., although his goods be afterwards taken, in an execution sued out upon that judgment.

A person's "procuring" his goods to be taken in execution has no effect as an act of bkpcy., till the goods are actually taken.—GIBSON *v.* KING (1842), Car. & M. 458, N. P.

Annotation :—**Apprvd.** Belcher *v.* Gummow (1847), 9 Q. B. 873.

759. ——.]—An act of bkpcy., under 6 Geo. 4, c. 16, s. 3, by "procuring" the party's own goods to be taken in execution is not committed till the actual seizure. Upon such seizure, the commission of the act of bkpcy. is not carried back by relation to any earlier period.—BELCHER *v.* GUMMOW (1847), 9 Q. B. 873 ; 16 L. J. Q. B. 155 ; 9 L. T. O. S. 148 ; 11 Jur. 286 ; 115 E. R. 1510.

Annotation :—**Mentd.** *Re* Mullens (1849), 14 L. T. O. S. 137.

760. Procuring bills of exchange to be taken in execution.]—*Held :* under 6. Geo. 4, c. 16, s. 3, a party procuring bills of exchange, his property, to be taken in execution with intent to defeat creditors, after the passing of Judgments Act. 1838 (c. 110), committed an act of bkpcy., though, at the time when the former Act passed, bills of exchange were not liable to be taken in execution. —EDWARDS *v.* COOPER (1847), 11 Q. B. 33 ; 10 L. T. O. S. 160 ; 116 E. R. 386.

761. Under 1869 Act, s. 6—Whether sale must be by sheriff.]—A creditor seized six horses of a contractor in execution on a judgment. The sheriff did not sell, but it was arranged that debtor should himself sell the horses to the creditor for the debt & sheriff's costs, the creditor letting the horses to debtor under an agreement determinable at will on either side. Debtor was in insolvent circumstances at the time of the transaction, & he filed a petition in liquidation a few days afterwards, but not until after the horses had been taken away by the creditor :—*Held :* this was a seizure & sale within 1869 Act, s. 6 (5).—*Re* MORTIMER, *Ex p.* PEARSON (1873), 8 Ch. App. 667 ; 42 L. J. Bcy. 44 ; 28 L. T. 796 ; 21 W. R. 688, L. JJ.

Annotation :—**Mentd.** *Re* Wilkinson, *Ex p.* Clater, *Ex p.* Beckett-Denison (1883), 48 L. T. 648.

762. —— Not act of bankruptcy until both seizure & sale.]—On Nov. 25, the sheriff seized the goods of a trader under a writ of execution for £191, & on Dec. 16, another seizure was made for a debt of £32. On Dec. 30, debtor filed a liquidation petition. At this time the sheriff was still in possession, but no sale had been made. On Jan. 22, a trustee was appointed :—*Held :* the creditor for the £32 was entitled to proceed to a sale under his execution.

None of the legal rights of a creditor for £32 are taken away. No act of bkpcy. could be committed by reason of the levy under the first writ until there had been both seizure & sale, & no sale has even yet taken place (BACON, C.J.).—*Re* PEACOCK, *Ex p.* LOVERING (1874), L. R. 17 Eq. 452 ; 43 L. J. Bcy. 58 ; 29 L. T. 897 ; 22 W. R. 365.

Annotation:—**Mentd.** *Re* Pearce, *Ex p.* Crossthwaite (1885), 14 Q. B. D. 966.

763. —— Not act of bankruptcy unless petition presented within fourteen days of sale.]—An execution levied by seizure & sale of debtor's goods, being an act *in invitum,* is not necessarily an act of bkpcy. within 1869 Act, s. 6, unless a petition in bkpcy. against debtor is presented under s. 87, within fourteen days after the sale. Observations as to the distinction between voluntary & involuntary acts of bkpcy.—*Re* ROGERS, *Ex p.* VILLARS (1874), 9 Ch. App. 432 ; 43

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n. *No return made by sheriff.*]—A writ of *fi. fa.* on a judgment having been delivered to the sheriff for execution, his officer stated that he was unable to find any goods on which to levy. The sheriff made no return to the writ, & decided to hold it during its currency on the ground that property might come into debtor's hands during that time : —*Held :* as the sheriff had not made any return to the writ, an act of bkpcy. had not been committed.—*Re* MEYERS, 3 J. R. N. S. 22.—**N.Z.**

o. *Sufficiency of return by sheriffs—Form & signature.*]—Where, in the printed body of the return of the bailiff who executed the warrant of distress, by an error the name of the assistant bailiff (who did not execute the warrant) was inserted, but it was correctly signed by the bailiff who had made the return :—*Held :* the return was good, & established the act of bkpcy. alleged.—*Re* SOMERVILLE (1909), 28 N. Z. L. R. 1055.—**N.Z.**

p. *Acceptance by creditor of promissory note for balance of debt after seizure & sale.*]—Within five days of sale of goods of debtor, a judgment creditor, in discharge of his debt, accepted promissory notes of debtor for the difference between the whole debt & the amount realised by the sale, & then in the hands of the sheriff :—*Held :* no act of bkpcy.—*Re* SPENCE, *Ex p.* LLOYD (1888), 9 N. S. W. L. R. 170.—**AUS.**

q. *Return of nulla bona—Subsequent execution on immovable property.*]—To a writ of execution against a debtor a return of *nulla bona* was made, but debtor allowed the sheriff to execute upon certain immovable property in order to satisfy the judgment. Another creditor thereupon applied for the sequestration of debtor's estate on the ground that there had been a return of *nulla bona :*—*Held :* the estate should be sequestrated.—HURLEY *v.* WESSELS (1884), 2 C. L. J. 52.—**S. AF.**

r. *Execution returned unsatisfied—Debtor owning real estate.*]—An order *nisi* for sequestration was obtained on a petition by a resident in Fiji by his attorney under power. The act of insolvency alleged was an execution issued on a judgment obtained in the county ct. at Melbourne in favour of petitioner which had been returned as unsatisfied in full :—*Held :* although debtor had plenty of real estate, effect must be given to Insolvency Act, 1890, s. 37 (8), which enacted that if in any ct. judgment had been obtained in proceedings instituted by a creditor & execution had been returned unsatisfied, insolvency proceedings might be taken.—*Re* ANDERSON, [1909] V. L. R. 465.—**AUS.**

s. *Acquiescence of debtor—Effect of.*]—S. allowed judgments to be given against him & his goods & assets to be attached & alienated so as to prefer certain creditors :—*Held :* S. had not committed an act of insolvency as the act of insolvency must come from debtor, & he had simply done nothing.—*Ex p.* GROBBELAAR (1915), O. P. D. 13.—**S. AF.**

t. —— ——.]—A trader who willingly procures his goods to be taken in execution, to the intent that or whereby his creditors may be defeated or delayed from the recovery of their just debts, should be deemed a bkpt., within 11 & 12 Geo. 3, c. 8, s. 1, even though the debt of the execution creditor were a fair & *bonâ fide* debt.—BROWN *v.* BARR (1828), 1 Hud. & B. 543 ; 1 Ir. L. Rec. 1st ser. 382.—**IR.**

See, also, cases in Sect. 2, sub-sect. 12, *post.*

L. J. Bcy. 76; 30 L. T. 348; 38 J. P. 533; 22 W. R. 603, L. C. & L. JJ.

Annotations:—**Distd.** Burns-Burns *v.* Brown, [1895] 1 Q. B. 324, C. A. **Refd.** *Re* Husband, *Ex p.* Dawes (1875), L. R. 19 Eq. 438. **Mentd.** *Re* Condon, *Ex p.* James (1874), 9 Ch. App. 609, L. JJ.; Crew *v.* Terry (1877), 2 C. P. D. 403; *Re* McHenry, *Ex p.* McHenry (1883), 24 Ch. D. 35, C. A.; Figg *v.* Moore, [1894] 2 Q. B. 690; *Re* Thellusson, *Ex p.* Abdy (1919), 88 L. J. K, B. 1210, C. A.

See, now, 1914 Act, ss. 1 (1) (*c*), 40 (3).

764. "Any civil proceeding in High Court"—Order to enforce award as judgment.]—An order giving leave to enforce an award in the same manner as a judgment or order to the same effect was made in the High Ct. under Arbn. Act, 1889 (c. 49), s. 12, upon an application by originating summons. A writ of *fi. fa.* was issued & the goods of debtor were seized & sold by the sheriff:—*Held:* debtor had committed an act of bkpcy., under 1890 Act, s. 1, because execution had been levied against him by seizure of his goods under process in a civil proceeding in the High Ct. & the goods had been sold by the sheriff.—*Re* A BANKRUPTCY PETITION, *Ex p.* CAUCASIAN TRADING CORPN., LTD., [1896] 1 Q. B. 368; 74 L. T. 47; 12 T. L. R. 226; *sub nom. Re* B., *Ex p.* CAUCASIAN TRADING CORPN., LTD.; 65 L. J. Q. B. 346; *sub nom. Re* BIRCH, *Ex p.* CAUCASIAN TRADING CORPN., LTD., 44 W. R. 439; 3 Mans. 1, C. A.

Annotations:—**Mentd.** China Steam Navigation Co. *v.* Van Laun (1905), 22 T. L. R. 26; *Re* A Debtor (1906), 96 L. T. 131, C. A.; *Re* A Bankruptcy Notice, [1907] 1 K. B. 478, C. A.; *Re* Colman & Watson, [1908] 1 K. B. 47, C. A.

765. "Held by sheriff for twenty-one days"—Only one act of bankruptcy though goods held longer.]—*Held:* the act of bkpcy. created by 1890 Act, s. 1, consisted of (1) the seizure by the sheriff, & (2) his remaining in possession for twenty-one days, & if the sheriff remained in possession for a period exceeding twenty-one days under the same seizure, that did not constitute a further or continuing act of bkpcy.—*Re* BEESTON, [1899] 1 Q. B. 626; 68 L. J. Q. B. 344; 80 L. T. 66; 47 W. R. 475; 43 Sol. Jo. 300; 6 Mans. 27, C. A.

766. "For twenty-one days"—How time calculated.]—To constitute an act of bkpcy. by seizure of debtor's goods by the sheriff's holding them for twenty-one days, the holding by the sheriff must be for twenty-one whole days excluding the day of seizure.—*Re* NORTH, *Ex p.* HASLUCK, [1895] 2 Q. B. 264; 64 L. J. Q. B. 694; 72 L. T. 854; 59 J. P. 724; 11 T. L. R. 417; 39 Sol. Jo. 560; 2 Mans. 326; 14 R. 436, C. A.

Annotations:—**Apld.** Mason *v.* Bolton's Library, [1912] 2 K. B. 520. **Consd.** Mason *v.* Bolton's Library, [1913] 1 K. B. 83, C. A. **Mentd.** Goldsmiths' Co. *v.* West Metropolitan Ry. Co., [1904] 1 K. B. 1, C. A.

767. —— —— Interpleader summons issued but no order made thereon.]—On May 20, 1911, the sheriff seized the goods of a judgment debtor under a writ of *fi. fa.*, & on June 9 (the twentieth day after the seizure) took out an interpleader summons which was heard on June 12, when, the third party claim being admitted, an order was made by consent that the sheriff should sell & pay the amount of the claim & his costs of the execution. The sheriff on the next day sold the goods. The judgment debtor having become bkpt., his trustee in bkpcy. claimed the proceeds of sale from the judgment creditors, on the ground that the judgment debtor had committed an act of bkpcy. by reason of the sheriff having been in possession for twenty-one days:—*Held:* (1) inasmuch as the sheriff had not been ordered to withdraw, & no interpleader issue had been ordered on the interpleader summons, the proviso to 1890 Act, s. 1, had no application, & the enacting part of the sect. remained unimpaired; (2) the act of bkpcy. was committed & the trustee in bkpcy. was entitled to the proceeds of the sale.—MASON *v.* BOLTON'S LIBRARY, LTD., [1913] 1 K. B. 83; 107 L. T. 673; 57 Sol. Jo. 96; *sub nom.* CHEIWYND'S TRUSTEE *v.* BOLTON'S LIBRARY, LTD., 82 L. J. K. B. 217; 20 Mans. 1, C. A.

See, now, 1914 Act, s. 1 (1) (*e*).

SUB-SECT. 9.—FILING DECLARATION OF INABILITY TO PAY DEBTS OR PRESENTING BANKRUPTCY PETITION.

768. Filing petition for liquidation by arrangement.]—A trader entered into a contract to deliver goods at a stated time at a specified price. He performed part of the contract, but before the time or times for the performance of the remainder he petitioned under 1849 Act, s. 211 *et seq.*, but no arrangement being effected, he was adjudicated bkpt. on that petition:—*Held:* the original petition for arrangement created a valid act of bkpcy. under s. 76.—*Re* LAWFORD, *Ex p.* HARRISON (1856), 26 L. J. Bcy. 30; 28 L. T. O. S. 197; 3 Jur. N. S. 228; 5 W. R. 193, L. JJ.

Annotations:—**Apprvd.** Monk *v.* Sharp (1857), 2 H. & N. 540. **Apld.** *Re* Robinson & Robson, *Ex p.* Robinson *v.* Robson (1858), 32 L. T. O. S. 230.

769. —— Petition not dismissed—No petition for adjudication filed within two months.]—On June 26, pltfs., traders, petitioned the Ct. of Bkpcy. for protection, under 1849 Act, s. 211. They filed an account of debts, & made a proposal according to s. 214. At an adjourned meeting on Aug. 6, pltfs. did not attend, & neither the proposal nor any modification of it was accepted, whereupon the meeting was adjourned to the public ct. & pltfs. were

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a. *What is declaration of insolvency.*]—The declaration of insolvency mentioned in Irish 1857 Act, s. 96, means merely that the trader is at the time of making it unable to meet his immediate engagements, & has no reference to the possible or probable state of his assets.—*Re* SMITH & CO. (1859), 8 I. Ch. R. 374.—**IR.**

b. ——.]—Debtor, a few days before the falling due of a large bill which he owed, informed the trustees of his marriage settlement that he was in a state of insolvency. Being served with a summons & plaint at their suit, he signed a consent for judgment:—*Held:* an act of bkpcy.—*Re* DONOVAN (1865), 11 Ir. Jur. 18.—**IR.**

c. ——.]—A trader, who accompanies one of the trustees of his marriage settlement to obtain advice touching his affairs, & hears the attorney advise the trustee to issue an execution, thereby commits an act of bkpcy.; & the fact of his signing a declaration of insolvency will not be evidence that such was not his original intention.—*Re* NOLAN (1860), 6 Ir. Jur. 71.—**IR.**

d. —— *Admission of debt—By one of two partners.*]—F., a member of the firm of R. F. and Co., wrote to the sister of C. the other member, admitting the firm's insolvency. A few days after, C., in a letter to pltfs., signed in the firm name, acknowledged the inability of the firm to pay the debt due them for which pltfs. were pressing, or their general liabilities in full, whereupon pltfs. procured the issue of a writ of attachment under Insolvent Act, 1875. A petition by F. to set the proceedings aside was dismissed by the county ct. judge. On appeal it was contended that C. could not bind F. by the acknowledgment of insolvency, & pltfs. could not take any advantage of F.'s letter of which they knew nothing at the time of issuing the writ, & which was not directed to them:—*Held:* the county ct. judge was justified both in directing the writ to issue, & in dismissing F.'s petition to set it aside. —BANK OF NEW BRUNSWICK *v.* FLAHERTY (1879), 19 N. B. R. 407.—**CAN.**

e. *Imprisonment of debtor.*]—When after service of the summons a trader debtor is arrested, & he is in prison at the time of the return of the summons, the creditor must proceed under 20 & 21 Vict., c. 60, s. 104, the imprisonment being a lawful impediment to the attendance of the trader debtor. —*Re* A TRADER DEBTOR (1869), 3 I. L. T. Jo. 781.—**IR.**

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adjudged bkpts. under s. 223. The adjudication was not founded on the petition of a creditor, nor was pltfs'. petition dismissed:—*Held:* the filing the petition for arrangement was not an act of bkpcy., that petition never having been actually dismissed, & no petition for an adjudication of bkpcy. having been filed within two months, in pursuance of s. 76.—MONK *v.* SHARP (1857), 2 H. & N. 540; 27 L. J. Ex. 29; 30 L. T. O. S. 187; 3 Jur. N. S. 1327; 6 W. R. 129; 157 E. R. 222.

Annotations:—**Expld.** Paull *v.* Best (1863), 3 B. & S. 537. **Refd.** Lee *v.* Rowley (1858), 30 L. T. O. S. 273; *Re* Bissell, *Ex p.* Duignan (1871), 6 Ch. App. 605, L. C. & L. JJ. **Mentd.** *Re* Robinson & Robson, *Ex p.* Robinson *v.* Robson (1858), 32 L. T. O. S. 230; Topping *v.* Keysell (1864), 16 C. B. N. S. 258; The Wasp (1867), L. R. 1 A. & E. 367.

770. —— In form prescribed by 1870 Rules.]—The filing of a petition for liquidation by arrangement in the form prescribed by 1870 Rules:—*Held:* an act of bkpcy.—*Re* BISSELL, *Ex p.* DUIGNAN (1871), 6 Ch. App. 605; 40 L. J. Bcy. 68; 25 L. T. 286; 19 W. R. 1127, L. C. & L. JJ.

Annotations:—**Refd.** Megrath *v.* Gray, Gray *v.* Megrath (1874), L. R. 9 C. P. 216. **Mentd.** *Re* Hall, *Ex p.* Rocke (1871), 40 L. J. Bcy. 70, C. A.; *Re* Watson, *Ex p.* Hoare (1873), L. R. 16 Eq. 625.

771. Declaration not to be used unless necessary — Discretion to creditors to use.]—Bkpt., at the suggestion of his creditors, tors, signed a declaration of insolvency, upon the alleged understanding "that it should not be made use of or inserted in the *Gazette*, unless it afterwards became necessary to do so." It was sought to set aside a fiat in bkpcy., on the ground that no act of bkpcy. had been committed, unless signing the declaration were an act of bkpcy., & that the fiat had been taken out in breach of good faith:—*Held:* in the absence of evidence of bad faith, the discretion as to its insertion rested with the creditors.—*Re* ROWE, *Ex p.* ROWE (1839), Mont. & Ch. 334.

772. Contract not to do any act by which assigned goods might become charged or alienated — Filing declaration of insolvency breach of stipulation.]—There is nothing illegal or contrary to the policy of the bkpcy. laws in a stipulation by the assignor on an assignment of goods, under which they are to remain in his possession, not to do any act by means of which the goods assigned might become charged or alienated, or whereby the assignment might become ineffective, or the assignor might be deprived of them, & it is a breach of such stipulation for the assignor, while the goods are in his possession, to file a declaration of insolvency.—HILL *v.* COWDERY (1856), 1 H. & N. 360; 25 L. J. Ex. 285; 27 L. T. O. S. 204; 4 W. R. 681; 156 E. R. 1242.

Annotation:—**Mentd.** Croft *v.* Lumley (1858), 6 H. L. Cas. 672, H. L.

773. Filing declaration—When complete.]—The filing of a declaration of inability to pay by a debtor is complete on the delivery of the document by a properly authorised person to the proper officer at the proper office, with intent that it should be filed or placed on record in the ordinary manner.—RANSFORD *v.* MAULE (1873), L. R. 8 C. P. 672; 42 L. J. C. P. 231; 21 W. R. 740.

SUB-SECT. 10.—FAILURE TO COMPLY WITH DEBTOR'S SUMMONS OR BANKRUPTCY NOTICE.

A. Issue of Summons or Notice.

(a) In General.

774. How request made — Judgment creditor corporation.]—Where the judgment creditor is a corpn., the request for the issue of a bkpcy. notice can be made in the prescribed form by the solr. of the corpn. on its behalf, without authorisation under seal.—*Re* PARKES, *Ex p.* PNEUMATIC TYRE CO. (1896), 3 Mans. 95, D. C.

775. From what court issued—Court within whose jurisdiction debtor resides.]—A debtor's summons for a debt exceeding £50 was issued out of a county ct. within the jurisdiction of which debtor's father lived, the creditors being unable to find out his residence. The summons was served upon debtor in London, debtor having, after the summons was issued, stated that he resided at a house in London, to which the goods in respect of which the debt arose had been sent:—*Held:* as debtor's summons had been issued out of a ct. within the jurisdiction of which debtor did not reside, neglect to comply with it was not an act of bkpcy.—*Re* PLUMMER, *Ex p.* BOYLE (1874), 30 L. T. 2, C. A.

776. —— —— Or carries on business—What constitutes residence or carrying on business.]—*Held:* debtor, who was employed as a clerk in a bank, the office of which was within the district of the London Bkpcy. Ct., was, within 1870 Rules, r. 17, "carrying on business" within the district of that ct., which had jurisdiction to grant a debtor's summons against him.

Debtor's private residence was in one of the suburbs, outside the district of the London Ct.:—*Held:* he was also "residing" within the district of the London Ct.—*Re* BOWIE, *Ex p.* BREULL (1880), 16 Ch. D. 484; 50 L. J. Ch. 384; 43 L. T. 580; 29 W. R. 299, C. A.

Annotations:—**Consd.** Graham *v.* Lewis (1888), 22 Q. B. D. 1, C. A.; Lewis *v.* Graham (1888), 20 Q. B. D. 780. **Distd.** *Re* Bright (1901), 18 T. L. R. 37, C. A. **Consd.** Goerz *v.* Bell, [1904] 2 K. B. 136; Cain *v.* Butler (1916), 85 L. J. K. B. 804, D. C. **Mentd.** *Re* Clark, *Ex p.* Pope & Owles, [1914] 3 K. B. 1095, C. A.

777. Effect of issue of notice—On judgment in detinue—Property in chattel abandoned.]—Pltf., who has obtained a judgment in detinue, is deemed to have abandoned his property in the detained chattel if he issues a bkpcy. notice on his judgment & founds a bkpcy. petition on the non-compliance therewith.—*Re* A DEBTOR (NO. 9 OF 1907), *Ex p.* PETITIONING CREDITORS (1907), 97 L. T. 140; 23 T. L. R. 618.

See, now, 1914 Act, s. 98 (3), 1915 Rules, r. 24.

(b) In what Circumstances—Whether Execution has been stayed.

778. Interpleader summons pending.]—On July 8, 1887, judgment was recovered against debtor, & execution was issued, under which the sheriff levied on July 11. On July 13, a third party having claimed the goods, an interpleader summons was issued by the sheriff. On the same day, July 13, a bkpcy. notice under 1883 Act, s. 4 (1) (*g*), was served by the judgment creditor upon debtor, on which a receiving order was subsequently made against him in the county ct.:—*Held:* at the time when the bkpcy. notice was issued the creditor was not in a position to issue execution.—*Re* PHILLIPS, *Ex p.* PHILLIPS (1888), 5 Morr. 40, D. C.; *subsequent proceedings*, 5 Morr. 187, D. C.

Annotations:—**Distd.** *Re* Sedgwick, *Ex p.* Sedgwick (1888), 5 Morr. 262, C. A. **Apld.** *Re* Follows, *Ex p.* Follows, [1895] 2 Q. B. 521.

779. —— No return by sheriff.]—Where goods taken in execution have been claimed by a third party before return by the sheriff, & an interpleader summons has been taken out & is pending, the execution creditor cannot issue execution, & cannot serve a bkpcy. notice on debtor.—*Re* FOLLOWS,

Ex p. FOLLOWS, [1895] 2 Q. B. 521 ; 65 L. J. Q. B. 15 ; 73 L. T. 222 ; 39 Sol. Jo. 726 ; 2 Mans. 495 ; 15 R. 621, D. C.

780. Interpleader order made—Creditor obtaining leave to withdraw.]—Where goods taken in execution under a judgment are claimed by a third party, & an interpleader order is made, under which the sheriff withdraws from possession, execution on the judgment has been stayed, & the judgment creditor cannot issue a bkpcy. notice before the trial of the interpleader issue, & the fact that the execution creditor has obtained leave to withdraw from the interpleader makes no difference.—*Re* FORD, *Ex p.* FORD (1886), 18 Q. B. D. 369 ; 56 L. J. Q. B. 188 ; 56 L. T. 166 ; 3 Morr. 283.

Annotations :—**Distd.** *Re* Bates, *Ex p.* Lindsey (1887), 57 L. T. 417, D. C. **Apld.** *Re* Phillips, *Ex p.* Phillips (1888), 5 Morr. 40, D. C. **Folld.** *Re* Follows, *Ex p.* Follows, [1895] 2 Q. B. 521. **Distd.** *Re* H. B., [1904] 1 K. B. 94, C. A. **Mentd.** Lee *v.* Dangar, Grant, [1892] 1 Q. B. 231 ; *Re* Debtor, *Ex p.* Judgment Creditor (1902), 71 L. J. K. B. 664, C. A.

781. —— On payment of sum into court—Execution stayed as regards such sum.]—Judgment was recovered against debtor for £446, & execution was issued under which the sheriff levied, but a third party having claimed the goods, an interpleader order was obtained, whereby on payment of £20 into ct. by claimant, the sheriff was directed to withdraw. A bkpcy. notice having been served on debtor :—*Held :* there had been no stay except as to £20, & the creditor was entitled to issue a bkpcy. notice.—*Re* BATES, *Ex p.* LINDSEY (1887), 57 L. T. 417 ; 35 W. R. 668 ; 4 Morr. 192, D. C.

Annotations :—**Consd.** *Re* Child, *Ex p.* Child, [1892] 2 Q. B. 77. **Distd.** *Re* Miller, *Ex p.* Miller (1893), 10 Morr. 183, D. C. **Consd.** *Re* Debtor (478 of 1908), [1908] 2 K. B. 684, C. A. **Refd.** *Re* Follows, *Ex p.* Follows, [1895] 2 Q. B. 521.

782. Writ of fieri facias issued—No return at issue of notice.]—A judgment creditor had levied execution by writ of *fi. fa.*, but the sheriff had not made a return to the writ of execution at the time of issue of the bkpcy. notice :—*Held :* the issue of the bkpcy. notice was bad.—*Re* COCHRANE (undated), cited Mackenzie & Clarke on Bankruptcy, 7th ed., p. 306.

783. Seizure under writ of fieri facias—Subsequent withdrawal at request of creditor.]—Where the sheriff under a writ of *fi. fa.* seizes only the goods of a stranger, & then by the instructions of the judgment creditor withdraws from possession without making any return, this does not amount to a stay of execution so as to prevent the judgment creditor from serving a bkpcy. notice.—*Re* DEBTOR, *Ex p.* SMITH, [1902] 2 K. B. 260 ; 71 L. J. K. B. 664 ; 87 L. T. 314 ; 50 W. R. 609 ; 18 T. L. R. 683 ; 46 Sol. Jo. 614 ; 9 Mans. 243, C. A.

784. Garnishee order nisi.]—A garnishee order *nisi* obtained by a judgment creditor attaching all debts due to the judgment debtor to answer the judgment is not either payment of the debt or an execution, & does not operate as a stay of execution on the judgment so as to preclude the creditor from issuing a bkpcy. notice.—*Re* H. B., [1904] 1 K. B. 94 ; 73 L. J. K. B. 1 ; 89 L. T. 592 ; 10 Mans. 361, C. A. ; *sub nom. Re* JUDGMENT DEBTOR, *Ex p.* JUDGMENT CREDITOR, 52 W. R. 178 ; 20 T. L. R. 32, C. A.

Annotations :—**Distd.** *Re* G. J., *Ex p.* G. J., [1905] 2 K. B. 678, C. A. **Expld.** *Re* A Debtor (No. 2 of 1912), *Ex p.* The Debtor (1912), 106 L. T. 895, D. C. **Distd.** *Re* Vogel, *Ex p.* Anglo-Eastern Contract Co. (1913), 109 L. T. 325.

785. Garnishee order absolute.]—A judgment creditor cannot serve a bkpcy. notice in respect of the judgment debt, if such debt has been attached by a garnishee order absolute, although the debt in respect of which the garnishee order was made has been paid by the judgment creditor before serving the bkpcy. notice, the garnishee order operating as a stay of execution upon the judgment until it is discharged by an order of the ct.—*Re* CONNAN, *Ex p.* HYDE (1888), 20 Q. B. D. 690 ; 57 L. J. Q. B. 472 ; 59 L. T. 281 ; 4 T. L. R. 423 ; 5 Morr. 89, C. A.

Annotations :—**Distd.** *Re* Dennis, *Ex p.* Dennis (1888), 60 L. T. 348, C. A. **Mentd.** *Re* Follows, *Ex p.* Follows, [1895] 2 Q. B. 521, D. C.

786. —— Nothing paid under order.]—A judgment creditor obtained a garnishee order absolute, whereby it was ordered that the garnishees should pay to the judgment creditor the amount of the judgment debt out of a debt due from them to the judgment debtor. Nothing was in fact paid under the order :—*Held :* execution on the judgment was not thereby stayed, but a bkpcy. notice might properly issue, notwithstanding the garnishee order.—*Re* RENISON, *Ex p.* GREAVES, [1913] 2 K. B. 300 ; 82 L. J. K. B. 710 ; 108 L. T. 811 ; 57 Sol. Jo. 445 ; 20 Mans. 115, D. C.

787. —— No actual receipt of debt.]—The trustee in bkpcy. of a judgment creditor, who has obtained leave to issue execution, can serve a bkpcy. notice on the judgment debtor in respect of the judgment debt, without taking any steps to discharge a garnishee order absolute, the receiving order revoking a garnishee order not completed by actual receipt of the debt.—*Re* BAGLEY, [1911] 1 K. B. 317 ; 80 L. J. K. B. 168 ; 103 L. T. 470 ; 55 Sol. Jo. 48 ; 18 Mans. 1, C. A.

Annotation :—**Mentd.** *Re* Wilson, [1916] 1 K. B. 382, C. A.

788. Appointment of receiver.]—Where a judgment creditor has obtained the appointment of a receiver by way of equitable execution, but debtor is not thereby prevented from paying the judgment debt, the existence of the receiver is not a "stay" of execution, & the judgment creditor may serve a bkpcy. notice upon debtor in respect of his judgment.—*Re* BOND, *Ex p.* CAPITAL & COUNTIES BANK, LTD., [1911] 2 K. B. 988 ; 81 L. J. K. B. 112 ; 19 Mans. 22 ; *sub nom. Re* LUPTON, *Ex p.* LUPTON, 55 Sol. Jo. 717, D. C.

Annotations :—**Expld. & Apld.** *Re* Renison, *Ex p.* Greaves, [1913] 2 K. B. 300. **Mentd.** Chetwynd's Trustee *v.* Bolton's Library (1912), 82 L. J. K. B. 217, C. A.

(c) At whose Instance.

789. Receiver in Chancery.]—A receiver in Ch. has power, without any order from the judge who appointed him, to take out a debtor's summons for a sum due to him in that capacity.—*Re* LEWIS, *Ex p.* HARRIS (1876), 2 Ch. D. 423 ; 45 L. J. Bcy. 71 ; 34 L. T. 261 ; 24 W. R. 851.

Annotation :—**Expld.** *Re* Sacker (1888), 58 L. J. Q. B. 4, C. A. That judgment really was that the receiver in that particular case was a good petitioning creditor, because he was the holder of a bill of exchange (LORD ESHER, M.R.).

790. Infant.]—An infant creditor may issue a debtor's summons in his own name. *Semble :* in such case debtor would be entitled, if he asked for it, to have some adult person named as security for the costs of the summons.—*Re* BROCKLEBANK, *Ex p.* BROCKLEBANK (1877), 6 Ch. D. 358 ; 46 L. J. Bcy. 113 ; 37 L. T. 282 ; 25 W. R. 859, C. A.

791. Creditor in position to issue execution—Executor.]—The creditor who issues a bkpcy. notice must be in a position to issue execution ; & an exor. must first obtain leave of the ct.—*Re* WOODALL, *Ex p.* WOODALL (1884), 13 Q. B. D. 479 ; 53 L. J. Ch. 966 ; 50 L. T. 747 ; 32 W. R. 774 ; 1 Morr. 201, C. A.

Annotations :—**Apld.** *Re* Ford, *Ex p.* Ford (1886), 18 Q. B. D. 369, D. C. **Apprvd.** *Re* Ide, *Ex p.* Ide (1886), 17 Q. B. D. 755, C. A. **Expld.** *Re* Keeling, *Ex p.* Blanchett (1886), 17 Q. B. D. 303, C. A. **Distd. & Expld.** *Re* Goldring, *Ex p.* Harper (1888), 22 Q. B. D. 87, C. A. **Distd.** *Re*

Sect. 2.—What is an act of bankruptcy: Subsect. 10. A. (c), (d) & (e), i.]

Clements, *Ex p.* Clements, [1901] 1 K. B. 260, D. C. **Refd.** Goodman *v.* Robinson (1886), 18 Q. B. D. 332, D. C. **Mentd.** *Re* Bagley, [1911] 1 K. B. 317, C. A.

792. Creditor holding garnishee order.] — A creditor who holds garnishee orders covering sums due to debtor to an amount exceeding the debt due to the creditor, can nevertheless obtain a debtor's summons against debtor, & proceed thereon to have him adjudged a bkpt.—*Re* TUPPER (1874), 9 Ch. App. 312; 30 L. T. 102; 22 W. R. 381, L. JJ.

793. Liquidator in voluntary winding up.]—The liquidator in the voluntary winding up of a co. may serve a bkpcy. notice upon a judgment debtor of the co.—*Re* WINTERBOTTOM, *Ex p.* WINTERBOTTOM (1886), 18 Q. B. D. 446; 56 L. J. Q. B. 238; 56 L. T. 168; 4 Morr. 5, D. C.

Annotations :—**Distd.** *Re* Bates, *Ex p.* Lindsey (1887), 4 Morr. 192, D. C. **Apld.** *Re* Arkell, *Ex p.* Arkell (1889), 6 Morr. 182, D. C.; *Re* Bassett, *Ex p.* Lewis (1895), 2 Mans. 177, L. JJ. **Distd.** *Re* De Murrieta, *Ex p.* South American & Mexican Co. (1896), 12 T. L. R. 238, C. A. **Refd.** *Re* Judgment Debtor (530 of 1908), [1908] 2 K. B. 474, C. A.; *Re* A Debtor (No. 305 of 1911), [1911] 2 K. B. 718, C. A.

794. Assignee of judgment debt.]—The words "creditor who has obtained a final judgment" in 1883 Act, s. 4 (1) (*g*), do not include an assignee of the judgment debt.—*Re* KEELING, *Ex p.* BLANCHETT (1886), 17 Q. B. D. 303; 55 L. J. Q. B. 327; 34 W. R. 538; 2 T. L. R. 617; 3 Morr. 157, C. A.

Annotations :—**Distd.** Goodman *v.* Robinson (1886), 18 Q. B. D. 332, D. C. **Folld.** *Re* Ide, *Ex p.* Ide (1886), 55 L. J. Q. B. 484, C. A. **Apld.** *Re* Gardiner, *Ex p.* Coulson (1887), 20 Q. B. D. 249, D. C. **Folld.** *Re* Goldring, *Ex p.* Harper (1888), 22 Q. B. D. 87, C. A. **Apld.** *Re* Clements, *Ex p.* Davis (1900), 70 L. J. Q. B. 58, D. C.

See, now, 1914 Act, s. 1 (1) (*g*).

795. Equitable mortgagee—Foreclosure decree & order for sale obtained—Sale not practicable.] — A creditor, who, as equitable mtgee., has obtained a foreclosure decree & an order for sale of the property of debtor, is still, if no such sale is found to be possible, at liberty to serve a bkpcy. notice on debtor & to take further proceedings.—*Re* KELDAY, *Ex p.* MESTON (1888), 36 W. R. 585; 4 T. L. R. 478, C. A.

Annotation :—**Mentd.** *Re* Cole, *Ex p.* Attenborough, [1898] 1 Q. B. 290, D. C.

796. Creditor who has assigned debt—Admission of debt by debtor.] — A creditor, after assigning his debt, filed an affidavit of such debt, under 1849 Act, s. 18, & caused the alleged debtor to be served with a demand of immediate payment, & summoned him before the Ct. of Bkpcy. to state whether or not he admitted the demand of the creditor. The registrar, before whom the summons was heard, declining to enter into the question whether the debt had been assigned, & requiring the alleged debtor to state whether he admitted the debt or any part thereof, debtor filed an admission as to part of the debt & a deposition that he had a good answer to the residue of the creditor's demand :—*Held :* the creditor was not justified in making an affidavit of debt after assignment without the concurrence of the assignee, & the alleged debtor was entitled to have his admission & deposition taken off the file. *Semble :* a proceeding by summons of a trader debtor, if taken by the assignor & assignee of a debt jointly, would not be objectionable.—*Re* TAYLOR, *Ex p.* TAYLOR (1859), 3 De G. & J. 480; 28 L. J. Bcy. 9; 33 L. T. O. S. 2; 5 Jur. N. S. 527; 7 W. R. 273; 44 E. R. 1353, L. JJ.

797. Creditor who has granted equitable assignment of judgment debt.]—A merely equitable assignment of the judgment debt by a judgment creditor does not deprive him of the right to issue a bkpcy. notice, for the assignor is a trustee, & the estate remains vested in him.—*Re* PALMER, *Ex p.* BRIMS, [1898] 1 Q. B. 419; 67 L. J. Q. B. 316; 77 L. T. 709; 46 W. R. 342; 14 T. L. R. 175; 42 Sol. Jo. 215; 5 Mans. 50, C. A.

Annotation :—**Distd.** *Re* A Debtor, *Ex p.* The Debtor, [1908] 1 K. B. 344, C. A.

798. Trustee in bankruptcy of judgment creditor.] —The trustee in the bkpcy. of a judgment creditor is not entitled to issue a bkpcy. notice against the judgment debtor in respect of the judgment debt. —*Re* GOLDRING, *Ex p.* HARPER (1888), 22 Q. B. D. 87; 58 L. J. Q. B. 3; 60 L. T. 138; 37 W. R. 228; 5 T. L. R. 29; 5 Morr. 265, C. A.

Annotation :—**Refd.** *Re* Clements, *Ex p.* Clements, [1901] 1 K. B. 200.

See, now, 1914 Act, s. 1 (1) (*g*).

799. —— No leave to issue execution.]—The trustee in bkpcy. of a judgment creditor, who has obtained an order under R. S. C. Ord. 17, r. 4, making him a party to the action, but has not obtained leave to issue execution under Ord. 42, r. 23, is not "a person who is for the time being entitled to enforce a final judgment" within 1890 Act, s. 1, & is not entitled to issue a bkpcy. notice against the judgment debtor in respect of the judgment debt.—*Re* CLEMENTS, *Ex p.* CLEMENTS, [1901] 1 K. B. 260; 83 L. T. 464; 49 W. R. 176; 45 Sol. Jo. 81, D. C.

Annotation :—**Overd.** *Re* Bagley, [1911] 1 K. B. 317, C. A.

800. —— Leave to issue execution obtained.]—The trustee in bkpcy. of a judgment creditor, who has obtained leave to issue execution, can serve a bkpcy. notice on the judgment debtor.—*Re* BAGLEY, [1911] 1 K. B. 317; 80 L. J. K. B. 168; 103 L. T. 470; 55 Sol. Jo. 48; 18 Mans. 1, C. A.

Annotation :—**Mentd.** *Re* Wilson, [1916] 1 K. B. 382.

801. Creditor who has committed act of bankruptcy.]—A creditor, who had himself committed an act of bkpcy., served a bkpcy. notice upon his debtor :—*Held :* the bkpcy. notice was invalid, inasmuch as such a notice must be given by a person competent to receive & give a good discharge for the debt in respect of which the notice was given, & the creditor, in view of his own act of bkpcy., was not such a person.—*Re* A DEBTOR, [1912] 2 K. B. 533; 81 L. J. K. B. 1169; 107 L. T. 3; 56 Sol. Jo. 689; 19 Mans. 309, C. A.

(d) Against whom.

802. Husband & wife—Trading debt of wife in separate business—Husband having given notice that wife's business was independent of him.]—A married woman carried on in her maiden name a millinery business separately from her husband. A debtor's summons was issued against the husband & wife, claiming the payment of a sum due upon some bills of exchange drawn by the summoning creditor upon & accepted by the wife in her maiden name, & dishonoured. The husband applied to the ct. to dismiss the summons. He deposed that he never authorised his wife to pledge

PART II SECT. 2, SUB-SECT. 10.—A. (c).

794 i. *Assignee of judgment debt.]*—Cannot make use of the assignor's name for purpose of issuing a bkpcy. notice.—*Re* BARNARD, *Ex p.* BARNARD (1894), 15 N. S. W. B. 28.—**AUS.**

794 ii. ——.]—The assignee of a judgment for sufficient amount, though a trustee of the money due thereon for other persons, is entitled to obtain in his own name a debtor's summons.—*Re* O'BRIEN, *Ex p.* MORRIS (1893), 31 L. R. Ir. 111.—**IR.**

his credit, & that five years previously he had given notice to the summoning creditor that he had nothing to do with his wife's business. On this evidence, which was uncontradicted, the registrar stayed the proceedings on security being given by the husband:—*Held:* on the evidence the husband was not liable for the debt, & the issuing of the summons was an abuse of the procedure, & the summons must be dismissed with costs.—*Re* SHEPHERD, *Ex p.* SHEPHERD (1879), 10 Ch. D. 573; 48 L. J. Bcy. 35; 39 L. T. 652; 27 W. R. 310, C. A.

803. Convict.]—Notwithstanding 33 & 34 Vict. c. 23, s. 8, a convicted felon can pay a debt which is claimed by a debtor's summons issued & served on him after his conviction, & if he fails to pay the debt within the time limited by the summons, he will commit an act of bkpcy., upon which an adjudication can be made against him.—*Re* HARRIS, *Ex p.* GRAVES (1881), 19 Ch. D. 1; 51 L. J. Ch. 1; 45 L. T. 397; 46 J. P. 70; 30 W. R. 51; 15 Cox, C. C. 118, C. A.

Annotation:—**Mentd.** *Re* Levy & Debenture Corpn. (1894), 8 R. 820.

Foreigner.]—*See* Nos. 193 *et seq.*, *ante*.

Infant.]—*See* Nos. 218 *et seq.*, *ante*.

Lunatic.]—*See* Nos. 238 *et seq.*, *ante*.

Married woman.]—*See* Nos. 251 *et seq.*, *ante*.

804. Partner—Judgment against firm.]—Where final judgment has been obtained against a firm, a bkpcy. notice cannot issue against a partner, against whom execution could not have issued upon the judgment without leave.—*Re* IDE, *Ex p.* IDE (1886), 17 Q. B. D. 755; 55 L. J. Q. B. 484; 35 W. R. 20; 2 T. L. R. 884; 3 Morr. 239.

Annotations:—**Mentd.** *Re* Ford, *Ex p.* Ford (1886), 18 Q. B. D. 369; *Re* Child, *Ex p.* Child, [1892] 2 Q. B. 77; *Re* Debtor (No. 837 of 1912), [1912] 3 K. B. 242, C. A.

805. One of several joint judgment debtors.]—Upon a joint judgment against two or more persons, a bkpcy. notice may be issued against one only.—*Re* LOW, *Ex p.* GIBSON, [1895] 1 Q. B. 734; 64 L. J. Q. B. 362; 72 L. T. 450; 59 J. P. 292; 43 W. R. 405; 11 T. L. R. 298; 39 Sol. Jo. 348; 2 Mans. 169; 14 R. 371, C. A.

Annotations:—**Mentd.** *Re* Murrieta, *Ex p.* South American & Mexican Co. (1896), 3 Mans. 35, C. A.; *Re* Debtor (478 of 1903), [1903] 2 K. B. 684, C. A.

806. Non-existent firm — Judgment against dissolved firm — Notice good against one partner.]—Judgment was recovered, in default of appearance, against a late partnership firm of W. Brothers, in an action brought against it after its dissolution, for a debt incurred during the partnership. The writ had been served on each of the late partners. A bkpcy. notice in the usual form & following the judgment was then addressed to W. Brothers, & served personally on each of the late partners. The judgment creditor presented a petition against one partner alone:—*Held:* under 1883 Act, s. 115 bkpcy. proceedings on the judgment would lie against the firm notwithstanding its dissolution, & the bkpcy. notice, though addressed to a then non-existent firm, was sufficient to support a receiving order, against one partner alone.—*Re* WENHAM, *Ex p.* BATTAMS, [1900] 2 Q. B. 698; 69 L. J. Q. B. 803; 83 L. T. 94; 48 W. R. 627; 44 Sol. Jo. 609; 7 Mans. 309, C. A.

(e) In respect of what Judgments or Orders.

i. In General.

807. Judgment against firm—Retired partner not served.]—A partnership consisting of several members was dissolved as to one of them on Dec. 17, & the business was thenceforth continued by the others under the old firm name, & at the old place of business. On Dec. 18 a creditor of the old partnership, who was ignorant of the dissolution, commenced an action against the partners, suing them in the firm name, in respect of a debt contracted before the dissolution. On Dec. 21 the writ was served personally on one of the continuing partners. The retired partner was not served in any way. No appearance was entered to the writ, & on Dec. 29 pltf. signed judgment by default. Execution was issued, but the sheriff found no goods of the partnership upon which to levy. No application was made under R.S.C. 1857 Ord. 42, r. 8, for leave to issue execution against the retired partner. In the following May, the retired partner having had no previous notice of the action, pltf. served him with particulars of demand of the judgment debt, &; he not having paid it, pltf. served him with a debtor's summons founded on the judgment debt. He denied the debt, & applied to the Bkpcy. Ct. to dismiss the summons:—*Held:* the judgment would not support the debtor's summons, & the summons must be dismissed.—*Re* YOUNG, *Ex p.* YOUNG (1881), 19 Ch. D. 124; 51 L. J. Ch. 141; 45 L. T. 493; 30 W. R. 330, C. A.

Annotations:—**Refd.** *Re* Keays, *Ex p.* Keays (1891), 9 Morr. 18, C. A.; *Re* Wenham, *Ex p.* Battams, [1900] 2 Q. B. 698, C. A. **Mentd.** Jackson *v.* Litchfield (1882), 8 Q. B. D. 474, C. A.; Davis *v.* Morris (1883), 10 Q. B. D. 436; Munster *v.* Railton (1883), 11 Q. B. D. 435, C. A.; Shepherd *v.* Hirsch, Pritchard (1890), 45 Ch. D. 231; Ellis *v.* Wadeson, [1899] 1 Q. B. 714, C. A.

See, also, No. 806, *ante*.

808. Judgment by consent—Order not filed under Debtors Act, 1869 (c. 62), s. 27.]—Where a creditor, in whose favour a judgment has been entered up by consent, omits to file the judge's order in accordance with the above sect., he is nevertheless entitled to serve debtor with a bkpcy. notice founded on such judgment.—*Re* RUSSELL, *Ex p.* GUEST (1888), 37 W. R. 21; 4 T. L. R. 781, C. A.

809. Judgment against separate estate of married woman.]—A judgment had been obtained against a married woman trading separately from her husband in the ordinary form in the case of a married woman, *i.e.* against her separate estate & not as a personal judgment:—*Held:* (1) on this judgment a bkpcy. notice could not issue under 1883 Act, s. 4 (1) (*g*), against debtor, for the notice would not be "in accordance with the terms of the judgment," as the notice required the person served to pay the judgment debt, whereas the judgment was only against her separate estate.—*Re* LYNES, *Ex p.* LESTER (M.) & Co., [1893] 2 Q. B. 113; 62 L. J. Q. B. 372; 68 L. T. 739; 58 J. P. 5; 41 W. R. 488; 9 T. L. R. 449; 37 Sol. Jo. 480; 10 Morr. 124; 4 R. 416, C. A.

Annotations:—**Distd.** *Re* Clark, *Ex p.* Beyer, Peacock, [1896] 2 Q. B. 476, C. A. **Refd.** Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559, C. A.; *Re* Hewett, *Ex p.* Levene, [1895] 1 Q. B. 328.

810. Judgment of Court of Session in Scotland—Registered in England.]—A judgment of the Ct. of Session in Scotland, registered in England under Judgments Extension Act 1868 (c. 54) cannot be made the foundation of a bkpcy. notice; the judgment must be obtained in England.—*Re* A

PART II. SECT. 2, SUB-SECT. 10.—A. (e) i.

809 i. *Judgment against married woman.*]—Where a judgment has been obtained against a married woman, in accordance with the form laid down in *Scott* v. *Morley* (1887), 20 Q. B. D. 120, the judgment debtor cannot be adjudged a bkpt. on a debtor's summons issued on foot of the judgment.—*Re* ELLIOTT, [1900] 2 I. R. 439.—**IR.**

810 i. *Judgment of another State—Duly certified & registered.*]—A bkpcy. notice may be issued in New South Wales on a certificate obtained & registered in accordance with Service & Execution of Process Act, 1901 (Commonwealth Act), of a judgment of the Supreme Ct. of another State, on an affidavit stating that the amount for which it is proposed to issue the bkpcy. notice is

Sect. 2.—*What is an act of bankruptcy: Subsect.* 10, *A.* (*e*), i. & ii.]

BANKRUPTCY NOTICE, [1898] 1 Q. B. 383; 67 L. J. Q. B. 308; 77 L. T. 710; 46 W. R. 325; 14 T. L. R. 175; 42 Sol. Jo. 215; 5 Mans. 7, C. A.
Annotation :—**Consd.** Thompson *v.* Gill, [1903] 1 K. B. 760, C. A.

811. Judgment within Courts (Emergency Powers) Acts — Leave of Court.]—*Held :* a male British subject, who, under Military Service Act, 1916 (session 2) (c. 15), was as from June 24, 1916, deemed to be duly enlisted in His Majesty's regular forces & transferred to the Reserve, had not "joined His Majesty's forces" within Courts (Emergency Powers) Act, 1917 (c. 25), until the date of the expiration of his calling up notice, & his creditors could not proceed to execution on a judgment against him in respect of a debt due & payable by him under a contract made before the date of the expiration of his calling up notice without the leave of the ct. being obtained under Courts (Emergency Powers) Act, 1914 (c. 78), & the noncompliance of debtor with a bkpcy. notice founded on such judgment was not an act of bkpcy. within 1914 Act, s. 1 (*g*).—*Re* A DEBTOR (No. 391 of 1918), [1919] 1 K. B. 169; 88 L. J. K.B. 267; 120 L. T. 169; 35 T. L. R. 58; 63 Sol. Jo. 83; [1918-19] B. & C. R. 76, C. A.

812. —— —— Costs in action of contract.]—*Held :* leave under Courts (Emergency Powers) Acts was required before the service of a bkpcy. notice founded on a judgment for costs in an action of contract.—*Re* WACHTER, *Ex p.* GRANT HUGHES & Co. (1918), 62 Sol. Jo. 603.

See Courts (Emergency Powers) Order, 1918 (2 Aug. 1918).

ii. "*Final*" *Judgments or Orders.*

NOTE.—*Since* 1913 *Act* (*see, now,* 1914 *Act, ss.* 1 (1) (*g*), & 2), *a bkpcy. notice will issue upon either a final judgment or final order. In many of the following cases, where it was held that the order was not a final judgment within* 1883 *Act, s.* 4 (1), *a bkpcy. notice would now issue under the present law.*

813. Meaning of term.]—The words "final judgment" mean a judgment obtained in an action by which a previously existing liability of deft. to pltf. is ascertained or established, unless there is something to show an intention to use the words in a more extended sense (COTTON, L.J.). —*Re* CHINERY, *Ex p.* CHINERY (1884), 12 Q. B. D. 342; 53 L. J. Ch. 662; 50 L. T. 342; 32 W. R. 469; 1 Morr. 31, C. A.
Annotations :—**Apprvd.** *Re* Sanders, *Ex p.* Whinney (1884), 13 Q. B. D. 476. **Consd.** *Re* Faithfull, *Ex p.* Moore (1885), 14 Q. B. D. 627, C. A.; *Re* Riddell, *Ex p.* Strathmore (1888), 20 Q. B. D. 512, C. A.; Onslow *v.* I. R. Comrs. (1890), 25 Q. B. D. 465, C. A.; *Re* Binstead, *Ex p.* Dale, [1893] 1 Q. B. 199, C. A. **Distd.** *Re* Owen, *Ex p.* Peters (1900), 83 L. T. 572. **Consd.** *Re* G. J., *Ex p.* G. J., [1905] 2 K. B. 678, C. A. **Refd.** *Re* Cohen, *Ex p.* Schmitz (1884), 12 Q. B. D. 509. **Mentd.** *Re* Ford, *Ex p.* Ford (1886), 18 Q. B. D. 369; *Re* Gardiner, *Ex p.* Coulson (1887), 57 L. J. Q. B. 149; *Re* Combined Weighing & Advertising Machine Co. (1889), 43 Ch. D. 99, C. A.; *Re* Howe Machine Co., Fontaine's Case (1889), 41 Ch. D. 118, C. A.; *Re* Arkell, *Ex p.* Arkell (1889), 6 Morr. 182, D. C.; *Re* A Bankruptcy Notice, *Ex p.* Official Receiver, [1895] 1 Q. B. 609, C. A.; Pritchett & Young *v.* English & Colonial Syndicate (1899), 43 Sol. Jo. 602, C. A.; Geisse *v.* Taylor, [1905] 2 K. B. 658; *Re* Clark, *Ex p.* Pope & Owles, [1914] 3 K. B. 1095, C. A.

814. ——.]—To constitute an order a "final judgment" nothing more is necessary than that there should be a proper *litis contestatio*, & a final adjudication between the parties to it on the merits (LORD SELBORNE, C.).

A "final judgment" is a judgment in an action between parties brought to establish some right of pltf. against deft. If deft. has committed a tort there is a previously existing liability on his part to pltf. (COTTON, L.J.).—*Re* FAITHFULL, *Ex p.* MOORE (1885), 14 Q. B. D. 627; 54 L. J. Q. B. 190; 52 L. T. 376; 33 W. R. 438; 1 T. L. R. 263; 2 Morr. 52, C. A.
Annotations :—**Consd.** *Re* Riddell, *Ex p.* Strathmore (1888), 20 Q. B. D. 512, C. A. I cannot help thinking that the words "upon the merits" might have been omitted, and that the definition should have been "a proper *litis contestatio* and a final adjudication of it between the parties" (LORD ESHER, M.R.); *Re* Henderson, *Ex p.* Henderson (1888), 20 Q. B. D. 509, C. A.; *Re* G. J., *Ex p.* G. J., [1905] 2 K. B. 678, C. A. **Refd.** *Re* Alexander, *Ex p.* Alexander, [1892] 1 Q. B. 216, C. A.; Taylor *v.* Roe, [1894] 1 Ch. 413; *Re* A Debtor (No. 837 of 1912), [1912] 3 K. B. 242, C. A.; *Re* Schenk, *Ex p.* West Hyde Estate Co. (1912), 56 Sol. Jo. 651. **Mentd.** *Re* Binstead, *Ex p.* Dale, [1893] 1 Q. B. 199, C. A.

815. ——.]—A "final judgment" so as to support a bkpcy. notice within 1883 Act, s. 4 (1) (*g*), means a final judgment in an action.—*Re* A BANKRUPTCY NOTICE, *Ex p.* OFFICIAL RECEIVER, [1895] 1 Q. B. 609; 64 L. J. Q. B. 429; 43 W. R. 305; 2 Mans. 164; 14 R. 362, C. A.
Annotation :—**Consd.** *Re* Owen, *Ex p.* Peters (1900), 70 L. J. Q. B. 92.

See, further, JUDGMENTS & ORDERS.

816. "Balance order"—Against contributory in winding up company.]—A "balance order," made in the voluntary winding-up of a co. on a contributory, for the payment of calls which had been made upon him before the commencement of the winding-up, is not a "final judgment," & a bkpcy. notice cannot be issued in respect of such an order. —*Re* SANDERS, *Ex p.* WHINNEY (1884), 13 Q. B. D. 476; 1 Morr. 185, D. C.
Annotations :—**Apprvd.** *Re* Faithfull, *Ex p.* Moore (1885), 14 Q. B. D. 627, C. A.; *Re* Tennant, *Ex p.* Grimwade (1886), 3 Morr. 166, C. A. **Refd.** Pritchett & Young *v.* English & Colonial Syndicate (1899), 43 Sol. Jo. 602, C. A. **Mentd.** *Re* Bankruptcy Notice, *Ex p.* Official Receiver, [1895] 1 Q. B. 609, C. A.

817. *S. P. Re* TENNENT, *Ex p.* GRIMWADE (1886), 17 Q. B. D. 357; 55 L. J. Q. B. 495; 3 Morr. 166, C. A.
Annotation :—**Refd.** Westmoreland Green & Blue Slate Co. *v.* Feilden, [1891] 3 Ch. 15, C. A.

818. Garnishee order absolute.]—A garnishee order absolute is not a "final judgment" against the garnishee, & the judgment creditor who has obtained the order cannot issue a bkpcy. notice against the garnishee in respect of it.—*Re* CHINERY, *Ex p.* CHINERY (1884), 12 Q. B. D. 342; 53 L. J. Ch. 662; 50 L. T. 342; 32 W. R. 469; 1 Morr. 31, C. A.
Annotations :—**Apld.** *Re* Cohen, *Ex p.* Schmitz (1884), 12 Q. B. D. 509. **Distd.** *Re* Faithfull, *Ex p.* Moore (1885), 14 Q. B. D. 627, C. A. **Refd.** *Re* Sanders, *Ex p.* Whinney (1884), 13 Q. B. D. 476; *Re* Howe Machine Co., Fontaine's Case (1889), 41 Ch. D. 118; *Re* Combined Weighing &

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actually due & unpaid.—*Re* RICHARDS, *Ex p.* MALONEY (1902), 3 S. R. N. S. W. 3.—**AUS.**

810 ii. ——*Final decree for payment of costs in divorce suit in Queensland.*]—A bkpcy. notice cannot be issued in New South Wales on a memorial of such a decree.—*Re* O'BRIEN, *Ex p.* HOLLANDER (1895), 16 N. S. W. B. 37.—**AUS.**

f. *Judgment in tort.*]—Failure to satisfy a judgment recovered in tort may be relied upon under Insolvency Stat. s. 37 (8) as well as a judgment recovered in contract.—*Re* ALLEN (1879), 5 V. L. R. 25.—**AUS.**

811 i. *Judgment within Courts (Emergency Powers) Acts—Leave of Court.*]—Procedure by debtor's summons is not execution or enforcement of a judgment or order of any ct. within Cts. (Emergency Powers) Act, 1914, s. 1 (1) (*a*), & it is not necessary to obtain leave of the ct. before issuing such a summons.—*Re* A DEBTOR'S SUMMONS, [1917] 2 I. R. 263.—**IR.**

PART II. SECT. 2, SUB-SECT. 10.—A. (e) ii.

k. *Judgment of non-suit.*]—Is not a "final judgment" within Bkpcy. Act, 1887 (51 Vict. No. 19), s. 4 (1) (*g*).—*Re* DENNEHY, *Ex p.* DENNEHY (1895), 16 N. S. W. B. 40.—**AUS.**

l. *Unsatisfied judgment for costs.*]—*Semble :* an unsatisfied judgment entered up for costs in an action whereon execution has not been stayed, is a "final" judgment within the rules under Bkpcy. Act, 1892.—*Re* PEARSON (1895), 13 N. Z. L. R. 292.—**N.Z.**

Advertising Machine Co. (1889), 43 Ch. D. 99, C. A.; *Re* Binstead, *Ex p.* Dale, [1893] 1 Q. B. 199; Pritchett & Young *v.* English & Colonial Syndicate (1899), 43 Sol. Jo. 602; Geisse *v.* Taylor, [1905] 2 K. B. 658. **Mentd.** *Re* Ford, *Ex p.* Ford (1886), 18 Q. B. D. 369; *Re* Gardiner, *Ex p.* Coulson (1887), 57 L. J. Q. B. 149; *Re* Riddell, *Ex p.* Strathmore (1888), 20 Q. B. D. 512; *Re* Arkell, *Ex p.* Arkell (1889), 61 L. T. 90, D. C.; Onslow *v.* I. R. Comrs. (1890), 25 Q. B. D. 465; *Re* Bankruptcy Notice, *Ex p.* Official Receiver, [1895] 1 Q. B. 609, C. A.; *Re* Owen, *Ex p.* Peters (1900), 83 L. T. 572, D. C.; *Re* G. J., *Ex p.* G. J., [1905] 2 K. B. 678, C. A.; *Re* Clark, *Ex p.* Pope, [1914] 3 K. B. 1095, C. A.

819. Order for payment of alimony pendente lite.] An order for the payment of alimony *pendente lite* is not a "final judgment" against the husband, & a bkpcy. notice cannot be issued against him in respect of arrears due under such order.—*Re* HENDERSON, *Ex p.* HENDERSON (1888), 20 Q. B. D. 509; 57 L. J. Q. B. 258; 58 L. T. 835; 36 W. R. 567; 4 T. L. R. 283; 5 Morr. 52, C. A.

820. Order for repayment of funds invested ultra vires by two trustees—Order on one trustee to indemnify other—Subsequent order fixing amount of indemnity.]—An order was made in the Ch. Div. that a certain investment made by P. & T., trustees under a settlement was a breach of trust, & P. & T. were ordered to pay the money represented by the investment, less their own taxed charges & expenses, into ct. It was further ordered that T. was entitled to indemnity from P. with costs. The amount of such indemnity was fixed by a subsequent order, &, on non-payment, application was made for leave to issue a bkpcy. notice for same against P.:—*Held:* the two orders constituted a "final judgment" on which a bkpcy. notice could be issued.—*Re* POOLE, *Ex p.* TWISADAY (1890), 63 L. T. 321; 7 Morr. 222, D. C.

Annotations:—**Apprvd. & Folld.** *Re* Debtor (No. 837 of 1912), [1912] 3 K. B. 242, C. A. **Refd.** *Re* Schenk, *Ex p.* West Hyde Estate Co. (1912), 56 Sol. Jo. 651.

821. Judgment on bills of exchange—Under R.S.C., Ord. 14.]—Final judgment under the above Ord. was obtained by a co. on two bills of exchange for £250 each, of which debtor was the acceptor, & was entered, & the co. served a bkpcy. notice for the amount of the judgment:—*Held:* a "final judgment."—*Re* A DEBTOR, *Ex p.* THE DEBTOR (No. 2621 of 1902) (1903), 19 T. L. R. 152, C. A.

822. Judgment for sum & costs to be taxed—"Final judgment" as regards sum.]—A creditor recovered judgment against his debtor for £1,500 & costs to be taxed. Before the costs were taxed the creditor served on debtor a bkpcy. notice requiring him to pay the £1,500 judgment debt. The notice not having been complied with, the creditor, after the costs had been taxed, presented a bkpcy. petition in which he alleged that debtor was indebted to him in the sum of £1,513 3*s.* 8*d.*, the amount due on the final judgment, being as to £1,500 money lent & as to £13 3*s.* 8*d.* the costs of the judgment:—*Held:* having regard to the fact that under R.S.C. Ord. 42, r. 18, the creditor had a right to issue execution for the £1,500, independently of the costs, there was a "final judgment" for the £1500.—*Re* G. J., *Ex p.* G. J., [1905] 2 K. B. 678; 74 L. J. K. B. 932; 93 L. T. 193; 12 Mans. 354; *sub nom. Re* DEBTOR, *Ex p.* DEBTOR (1905), 21 T. L. R. 698, C. A.

823. Judgment on order to enforce award.]—A judgment obtained in pursuance of an order purporting to be made under Arbn. Act, 1889 (c. 49), to enforce an award on a submission by entering judgment in accordance therewith, is not a "final judgment" in an action upon which a bkpcy. notice can be founded.—*Re* A BANKRUPTCY NOTICE, [1907] 1 K. B. 478; 76 L. J. K. B. 171; 14 Mans. 1; *sub nom. Re* A DEBTOR, 96 L. T. 131; *sub nom. Re* JUDGMENT DEBTOR, *Ex p.* JUDGMENT CREDITOR, 23 T. L. R. 214; *sub nom. Re* SMILES 51 Sol. Jo. 132, C. A.

824. Order for payment of purchase price of property—On conveyance to be settled by judge—Certificate by master that conveyance settled & executed.]—In an action against debtor for specific performance of a contract to purchase real estate an order was made on Feb. 17, 1911, that upon pltfs. executing a conveyance, to be settled by the judge in case the parties differed, deft. should pay to pltfs. at such time & place to be agreed upon or fixed by the judge, but not before July 6, 1911, the sum of £2,400 representing the agreed amount of principal & interest payable under the contract on Mar. 1, 1911, & it was ordered that pltfs.' costs should be taxed & paid by deft., & that all further proceedings in the action be stayed except for the purpose of carrying the order into effect. On Jan. 12, 1912, the master certified that the conveyance had been settled & executed, & fixed Feb. 12, 1912, as the date for the payment of the £2,400. On Mar. 23, 1912, pltfs. issued & served upon debtor a bkpcy. notice to pay the sum of £2,400:—*Held:* the judgment was a "final judgment" upon which the bkpcy. notice could be founded.—*Re* A DEBTOR (No. 837 of 1912), [1912] 3 K. B. 242; 81 L. J. K. B. 1225; 107 L. T. 506; 19 Mans. 317; *sub nom. Re* SCHENK, *Ex p.* WEST HYDE ESTATE CO., LTD., 56 Sol. Jo. 651, C. A.

Annotation:—**Mentd.** *Re* Clark, *Ex p.* Pope & Owles, [1914] 3 K. B. 1095, C. A.

825. Order for costs—Consent order staying action on payment of costs.]—Defts. to an action for the specific performance of a contract executed the deeds necessary to carry out the contract, & an order was then made, by consent, that, on defts. paying pltf.'s taxed costs of the action, all further proceedings in the action should be stayed. The costs were taxed, & an order was made that defts. should, on or before a day named, pay the taxed amount. Payment was not made within the time appointed:—*Held:* the order for payment was not a "final judgment" & a bkpcy. notice could not be founded on it.—*Re* COHEN, *Ex p.* SCHMITZ (1884), 12 Q. B. D. 509; 53 L. J. Ch. 1168; 50 L. T. 747; 32 W. R. 812; 1 Morr. 55, C. A.

Annotations:—**Apld.** *Re* Riddell, *Ex p.* Strathmore (1888), 20 Q. B. D. 318. **Mentd.** *Re* Sanders, *Ex p.* Whinney (1884), 13 Q. B. D. 476.

826. Inquiry as to damages ordered but not prosecuted.]—At the trial of an action in the Ch. Div., upon motion for judgment in default of pleading, judgment was given ordering & adjudging that deft. should be perpetually restrained from practising as a solr. at Liverpool or otherwise in violation of his covenant with pltf., & the ct. declared that the partnership between pltf. & deft. ought to be dissolved as from the date of pltf.'s notice, & ordered & decreed same accordingly. It was also ordered that an inquiry should be made what was the amount of the damages which pltf. had sustained by reason of deft.'s breach of covenant, & that deft. should, within fourteen days from the date of the chief clerk's certificate, pay the amount of the damages, when certified, to pltf., & that deft. should pay to pltf. his taxed costs of the action. The costs were taxed & were partly paid by deft. The inquiry as to damages was not prosecuted:—*Held:* the order for the payment of costs was a "final judgment," & pltf. was entitled to serve deft. with a bkpcy. notice for the unpaid balance of costs.—*Re* FAITHFULL, *Ex p.* MOORE (1885), 14 Q. B. D. 627; 54 L. J. Q. B. 190; 52 L. T.

Sect. 2.—What is an act of bankruptcy: Sub-sect. 10, A. (e), ii. (f) & (g).]

376 ; 33 W. R. 438 ; 1 T. L. R. 263 ; 2 Morr. 52, C. A.

Annotations :—**Expld.** *Re* Henderson, *Ex p.* Henderson (1888), 20 Q. B. D. 509, C. A. **Apld.** *Re* Alexander, *Ex p.* Alexander, [1892] 1 Q. B. 216, C. A. **Distd.** *Re* Binstead, *Ex p.* Dale, [1893] 1 Q. B. 199, C. A. **Consd.** Taylor *v.* Roe, [1894] 1 Ch. 413. **Refd.** *Re* Schenk, *Ex p.* West Hyde Estate Co. (1912), 56 Sol. Jo. 651. **Mentd.** *Re* Riddell, *Ex p.* Strathmore (1888), 20 Q. B. D. 512, C. A. ; *Re* G. J., *Ex p.* G. J., [1905] 2 K. B. 678, C. A. ; *Re* Debtor (No. 837 of 1912), [1912] 3 K. B. 242, C. A.

827. Action dismissed for want of prosecution.]—In an action in the Ch. Div. deft. obtained under R.S.C. Ord. 27, r. 1, an order for the dismissal of the action for want of prosecution & the payment of costs by pltf. :—*Held :* the order was not a "final judgment" & deft. was not entitled to serve pltf. with a bkpcy. notice in respect of such order.—*Re* RIDDELL, *Ex p.* STRATHMORE (EARL) (1888), 20 Q. B. D. 512 ; 57 L. J. Q. B. 259 ; 58 L. T. 838 ; 36 W. R. 532 ; 4 T. L. R. 329 ; 5 Morr. 59, C. A.

Annotations :—**Apld.** Salaman *v.* Warner, [1891] 1 Q. B. 734, C. A. **Refd.** Taylor *v.* Roe, [1894] 1 Ch. 413. **Mentd.** *Re* Binstead, *Ex p.* Dale, [1893] 1 Q. B. 199, C. A.

828. Suit in Probate Court.]—B. having obtained judgment against debtor in a suit in the Probate Ct., on Sept. 11, an order was made on debtor to pay the costs in the suit, amounting to £113 4*s.* 8*d.* to C., the London agent of B.'s solr. The costs were not paid, & a bkpcy. notice was issued & a receiving order made against debtor on non-compliance with the notice :—*Held :* the order of Sept. 11 was not a "final judgment," & the receiving order must be set aside.—*Re* ARKELL, *Ex p.* ARKELL (1889), 61 L. T. 90 ; 5 T. L. R. 560 ; 6 Morr. 182, D. C.

829. Judgment dissolving partnership & directing accounts.]—The judgment at the trial of an action in the Ch. Div. declared that a partnership between pltf. & deft. ought to be dissolved as from the day on which the writ was issued, & an order was made accordingly. The judgment directed that an account should be taken of all dealings & transactions between pltf. & deft. as co-partners, & that an inquiry should be made of what the property belonging to the partnership consisted, & that payment of what should be found due should be made accordingly, & that a counter-claim of deft. should be dismissed, & that deft. should pay pltf.'s taxed costs, up to & including the trial, including his costs of the counter-claim. The subsequent costs were reserved, & the parties were to be at liberty to apply :—*Held :* this was a "final judgment" in pltf.'s favour for the amount of the taxed costs, & pltf. was entitled to issue a bkpcy. notice against deft. for that amount.—*Re* ALEXANDER, *Ex p.* ALEXANDER, [1892] 1 Q. B. 216 ; 61 L. J. Q. B. 377 ; 66 L. T. 133 ; 40 W. R. 202 ; 8 T. L. R. 99 ; 9 Morr. 13, C. A.

Annotations :—**Expld.** Taylor *v.* Roe, [1894] 1 Ch. 413. **Refd.** *Re* Binstead, *Ex p.* Dale, [1893] 1 Q. B. 199, C. A.

830. Decree nisi for dissolution of marriage.]—In a suit by a husband against his wife for dissolution of the marriage on the ground of her adultery, a decree *nisi* for dissolution was made, the decree containing an order for the payment of petitioner's costs by the co-resp. The decree was afterwards made absolute ; the costs were taxed at £204, & an order was made that the co-resp. should pay the amount within a specified time. He failed to comply with the order :—*Held :* there had not been a "final judgment" for the amount, & petitioner could not issue a bkpcy. notice against the co-resp. in respect of it.—*Re* BINSTEAD, *Ex p.* DALE, [1893] 1 Q. B. 199 ; 62 L. J. Q. B. 207 ; 68 L. T. 31 ; 41 W. R. 452 ; 9 T. L. R. 114 ; 37 Sol. Jo. 117 ; 9 Morr. 319 ; 4 R. 146, C. A.

Annotations :—**Consd.** *Re* Owen, *Ex p.* Peters (1900), 70 L. J. Q. B. 92, D. C. **Refd.** *Re* Hallman, *Ex p.* Ellis & Collier, [1909] 2 K. B. 430. **Mentd.** *Re* Lynes, *Ex p.* Lester (1893), 68 L. T. 739, C. A. ; *Re* Bankruptcy Notice, *Ex p.* Official Receiver, [1895] 1 Q. B. 609, C. A. ; Ivimey *v.* Ivimey, [1908] 2 K. B. 260, C. A. ; Rayment *v.* Rayment & Stuart, Chapman *v.* Chapman & Buist, [1910] P. 271.

831. Order in bankruptcy declaring assignment void as against trustee.]—An order made upon a motion in a bkpcy. declaring an assignment of property by bkpt. in favour of a stranger to the bkpcy. to be void as against the trustee in the bkpcy., & directing the assignee to pay the costs of the motion, is not a "final judgment" & a bkpcy. notice cannot be issued in respect of the costs.—*Re* A BANKRUPTCY NOTICE, *Ex p.* OFFICIAL RECEIVER, [1895] 1 Q. B. 609 ; 64 L. J. Q. B. 429 ; 2 Mans. 164 ; 14 R. 362, C. A.

Annotation :—**Follд.** *Re* Owen, *Ex p.* Peters (1900), 70 L. J. Q. B. 92.

832. Order revoking patent.]—An order made on a petition in the Ch. Div. of the High Ct. of Justice, revoking a patent, & ordering resp. to pay the costs of the petition, under Patents, Designs, & Trade Marks Act, 1883 (c. 57), s. 26, is not a "final judgment," & a bkpcy. notice cannot be founded on such an order.—*Re* OWEN, *Ex p.* PETERS (1900), 70 L. J. Q. B. 92 ; 83 L. T. 572 ; 8 Mans. 24, D. C.

833. Certificate for amount of taxed costs—Amount left blank in judgment.]—Judgment having been given for deft. in an action, the judgment was drawn up in the ordinary form, with a blank left for the amount of the costs. The costs were subsequently taxed & a certificate given for the amount, but the blanks in the judgment were not filled up. A bkpcy. notice was issued for the amount of the taxed costs, on which a petition was presented & a receiving order made against debtor :—*Held :* inasmuch as no execution could issue on the judgment as it then stood, nor upon the taxing master's certificate alone, there was no final judgment, & the receiving order made against debtor must be set aside.—*Re* CRUMP, *Ex p.* CRUMP (1891), 64 L. T. 799 ; 7 T. L. R. 556 ; 8 Morr. 174, D. C.

Annotation :—**Consd.** Hambleton *v.* Brown, [1917] 2 K. B. 93.

834. Judgment on interlocutory order for costs.]—An interlocutory order having been made by the Ct. of Appeal for the payment of costs by applt. in an action in the Q. B. Div., resp. brought an action against applt. for the taxed amount of the costs, & obtained judgment in default of appearance :—*Held :* although a bkpcy. notice could not have been issued against applt. upon the order for payment of costs, yet such a notice could be issued upon the judgment, it being a "final judgment."—*Re* BOYD, *Ex p.* MCDERMOTT, [1895] 1 Q. B. 611 ; 64 L. J. Q. B. 439 ; 72 L. T. 348 ; 2 Mans. 166 ; 14 R. 364, C. A.

Annotations :—**Refd.** Norton *v.* Gregory (1895), 73 L. T. 10, C. A. ; Pritchett *v.* English & Colonial Syndicate, [1899] 2 Q. B. 428, C. A. ; Savill *v.* Dalton, [1915] 3 K. B. 174, C. A.

(f) In respect of what Debts.

835. Debt recoverable at law—Debt due between firms having common partner.]—Where two firms have one partner common to both, a debt from the one firm to the other cannot be made the subject of a notice, under Judgments Act, 1838 (c. 110), s. 8, for the purpose of creating an act of bkpcy., the Act requiring such debt to be recoverable at law.—*Re* JOHNSON, *Ex p.* JOHNSON (1842), 2 Mont. D. & De G. 678 ; 11 L. J. Bcy. 41 ; 6 Jur. 932.

836. Debt exigible.]—Unless a debt is exigible it will not support a debtor's summons under 1869 Act, s. 7; if debtor would have any legal or equitable defence to an action for the debt, the summons ought to be dismissed.—*Re* FOSTER, *Ex p.* FOSTER (1883), 22 Ch. D. 797; 52 L. J. Ch. 577; 48 L. T. 497; 31 W. R. 774, C. A.

837. Dishonoured bill of exchange—Formal proof not necessary.]—When a debtor's summons is sued out upon a dishonoured bill of exchange, it is not necessary to prove the debt with all formalities as at common law. The debt will be sufficiently proved if all the requirements of 1869 Act, & of the rules thereunder, have been properly & distinctly complied with, & it appears that debtor has not been misled by them.—*Re* DEBTOR'S SUMMONS, *Ex p.* LOWENTHAL (1874), 29 L. T. 895.

838. —— Outstanding in hands of third party.]—The acceptance by a judgment creditor of a bill for the amount of his debt operates as an agreement not to enforce that debt during the currency of the bill, & afterwards, notwithstanding dishonour, so long as the bill is outstanding in the hands of a third party to whom it has been indorsed for value by the creditor.

A creditor, who had accepted a bill of exchange for the amount of his judgment debt, which was dishonoured but was outstanding in the hands of a third party, issued a bkpcy. notice upon the judgment under the 1883 Act, s. 4 (1) (g):—*Held:* this was not a debt on which a bkpcy. notice could be served.—*Re* A DEBTOR, *Ex p.* THE DEBTOR, [1908] 1 K. B. 344; 77 L. J. K. B. 409; 98 L. T. 652; 52 Sol. Jo. 174; 15 Mans. 1, C. A.

839. Debt incurred in course of business by married woman—Judgment under Fatal Accidents Act, 1846 (c. 93).]—By reason of the negligence of a servant of debtor, a married woman, then employed by her in connection with her business, the husband & father of the judgment creditors suffered personal injuries which resulted in his death, the judgment creditors obtained final judgment against debtor under the above Act. That final judgment was made the foundation of a bkpcy. notice against debtor; which was issued under 1913 Act, s. 12:—*Held:* the debt in respect of which the final judgment was obtained was an obligation incurred in the course of the conduct of the business of debtor, & she came within the sect.—*Re* ALLEN, *Ex p.* SHAW, [1915] 1 K. B. 285; 84 L. J. K. B. 271; 112 L. T. 194; 59 Sol. Jo. 130; [1915] H. B. R. 39, C. A.

(g) For what Amount.

840. Interest on judgment debt included.]—A judgment creditor, in issuing a bkpcy. notice against debtor, is entitled to include in such bkpcy. notice interest on the judgment debt.—*Re* LEHMANN, *Ex p.* HASLUCK (1890), 62 L. T. 941; 39 W. R. 16; 6 T. L. R. 376; 7 Morr. 181, D. C.

841. —— Income tax not deducted.]—A bkpcy. notice required payment of a sum as being the amount due on a final judgment. In the margin of the notice particulars of the amount claimed were given, namely, debt so much, interest at 4 per cent. to date so much. Objection was taken that this notice was bad, as it claimed interest in full without allowing for income tax which could or ought to have been deducted by debtor:—*Held:* a judgment debt, though by law carrying interest from the date of the judgment, was not a transaction to which the language of the Income Tax Acts relating to "yearly interest of money" applied, & the notice was valid & the receiving order based upon it rightly made.—*Re* COOPER, [1911] 2 K. B. 550; 80 L. J. K. B. 990; 105 L. T. 273; 18 Mans. 211, C. A.

Annotations:—**Mentd.** Gateshead Corpn. *v.* Lumsden, [1914] 2 K. B. 883, C. A.; North London & General Property Co. *v.* Moy, [1917] 2 K. B. 617.

842. —— ——.]—Where statutory interest on a judgment debt is included in a bkpcy. notice, the notice is not invalidated by non-deduction of income tax.—*Re* BOULTER, *Ex p.* MANCHESTER & LIVERPOOL DISTRICT BANKING CO. (1911), 55 Sol. Jo. 554.

843. Balance remaining due—Part of judgment debt paid.]—A creditor, who has obtained a final judgment against debtor, is not entitled to issue a bkpcy. notice for any larger amount than that for which he is entitled to issue execution, & a creditor, who has been paid part of his judgment debt, cannot issue a bkpcy. notice for the whole debt, but only for the balance remaining due after deducting any payments that have been made.—*Re* CHILD, *Ex p.* CHILD, [1892] 2 Q. B. 77; 61 L. J. Q. B. 250; 66 L. T. 204; 40 W. R. 560; 8 T. L. R. 319; 9 Morr. 103, D. C.

Annotations:—**Apprvd.** *Re* Raymond, *Ex p.* Raymond (1892), 66 L. T. 400, C. A. **Folld.** *Re* Miller, *Ex p.* Furniture & Fine Arts Depositories, [1912] 2 K. B. 451, D. C. **Refd.** *Re* Renison, *Ex p.* Greaves, [1913] 2 K. B. 300, D. C.

844. —— ——.]—A bkpcy. notice issued for a smaller sum than the judgment debt, by reason of credit being given for amounts already paid, is a notice to pay in accordance with the terms of the judgment (VAUGHAN WILLIAMS, L.J.)—*Re* H.B., [1904] 1 K. B. 94; 73 L. J. K. B. 1; 89 L. T. 592; 10 Mans. 361; *sub nom. Re* JUDGMENT DEBTOR, *Ex p.* JUDGMENT CREDITOR, 52 W. R. 178; 20 T. L. R. 32, C. A.

Annotations:—**Distd.** *Re* G. J., *Ex p.* G. J., [1905] 2 K. B. 678, C. A. **Expld.** *Re* A Debtor (No. 2 of 1912), *Ex p.* The Debtor (1912), 106 L. T. 895, D. C. **Distd.** *Re* Vogel, *Ex p.* Anglo-Eastern Contract Co. (1913), 109 L. T. 325.

845. —— —— Agreement to accept payment by instalments subject to proviso in case of default.]—Where a judgment creditor, after the issue of a bkpcy. notice, enters into an agreement with his judgment debtor for payment of the debt by instalments, with a provision that failure to pay any instalment shall make the whole unpaid balance of the debt payable, the creditor can issue

PART II. SECT. 2, SUB-SECT. 10.—A. (f).

m. *Unliquidated sum.*]—The debt, upon which a debtor's summons may be granted, must be a liquidated sum, & where goods have been sold by auction, without express stipulation for re-sale on default by the vendee, & upon such default the vendor, electing to treat the sale as annulled, has re-sold the goods, the amount of the loss upon such re-sale does not constitute a "debt," upon which a debtor's summons will be granted.—*Re* H., *Ex p.* H. (1877), 11 I. L. T. 112.—**IR.**

PART II. SECT. 2, SUB-SECT. 10.—A. (g).

n. *Fee on warrant of distress included.*]—A petition for sequestration showed that resp. owed petitioners £51 14*s.* 4*d.* in respect of orders made by a ct. of petty sessions. The debt due to each petitioner was a sum of less than £50, & the debt due to one of the petitioners was stated as being the sum of £19 12*s.* & "5*s.* fees on warrant of distress." Resp. objected that the inclusion of the "5*s.* fees on warrant of distress," not being a sum recoverable as a debt, vitiated debtor's summons:—*Held:* the objection was sustainable.—*Re* WILLIAMS, *Ex p.* ENGLEFIELD, [1919] V. L. R. 566.—**AUS.**

843 i. *Balance remaining due—Part of judgment debt paid.*]—When a judgment has been obtained against a debtor, & he has afterwards paid part of the amount due a subsequent demand upon him for the whole amount of the judgment debt is not a good demand to satisfy the judgment so as to constitute an act of insolvency within Insolvency Act, 1890, s. 37 (viii.).—HAMILTON *v.* WARNE (1907), 4 C. L. R. 1293.—**AUS.**

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on default a bkpcy. notice for the whole balance due on the judgment.—*Re* FEAST, *Ex p.* FEAST (1887), 31 Sol. Jo. 286 ; 4 Morr. 37, C. A.

Annotations :—**Consd.** *Re* H. B., [1904] 1 K. B. 94, C. A. **Folld.** *Re* Vogel, *Ex p.* Anglo-Eastern Contract Co. (1913), 109 L. T. 325.

846. —— —— Whether agreement giving time waiver of judgment.]—A co. obtained a judgment against debtor, who paid £200 under the judgment. The balance remaining unpaid, the co. instituted bkpcy. proceedings, & thereupon an agreement was arrived at, under which debtor paid a further sum, & agreed to pay the balance with interest, at a specified date. The balance of debt was not paid on the specified date, & further time was given by the co. A further sum was paid on account of the balance of debt & interest, & in consideration thereof the time for payment was further extended. The balance remained unpaid, & a fresh bkpcy. notice for the amount of the balance of debt together with interest at 4 per cent. was issued : —*Held :* the co. by the agreement had not waived their judgment, but had merely postponed their recourse to it, &, on debtor's default in payment of the balance due, their rights revived & they were entitled to issue a bkpcy. notice for the balance of the judgment debt.—*Re* VOGEL, *Ex p.* ANGLO-EASTERN CONTRACT CO. (1913), 109 L. T. 325.

847. —— Part paid into court.]—A bkpcy. notice can only be issued for the amount for which execution can be levied, & payment by debtor into the county ct. of part of a judgment debt, although the payment is repudiated by the creditor, operates as a stay of execution *pro tanto*, & a bkpcy. notice issued for the full amount of the judgment debt is bad.—*Re* MILLER, *Ex p.* FURNITURE & FINE ARTS DEPOSITORIES, LTD., [1912] 3 K. B. 1 ; 81 L. J. K. B. 1180 ; 107 L. T. 417 ; 19 Mans. 354 ; *sub nom. Re* DEBTOR (No. 2 of 1912) (BRENTFORD), *Ex p.* JUDGMENT CREDITORS 56 Sol. Jo. 634, C. A.

See, now, C. C. R. Ord. 23, r. 12 (*b*).

848. Agreed assignment of securities not completed.]—An action by P. against debtor was referred for trial to an official referee, & at the time the order referring the action was made it was agreed that certain securities should be assigned to P. On June 18, 1891, the official referee ordered judgment to be entered for P. for about £12,000, & on July 31, judgment was signed in pursuance thereof. On July 22 debtor had executed an assignment of the securities, but the deed was never executed by two other parties who were necessary parties as to some of the securities. In Aug. a bkpcy. notice was issued in respect of the whole judgment debt, & a petition in bkpcy. presented, founded upon non-compliance with that notice, & a receiving order was afterwards made. Debtor contended that the bkpcy. notice, upon which the petition was founded, was bad, because it was issued in respect of the whole judgment debt, & the whole or part of the debt would be satisfied by the securities which had been assigned to the creditor before the issue of the notice :—*Held :* (1) where the assignment of the securities had not been completed, no part of the judgment debt had been satisfied or paid before the issue of the bkpcy. notice, & the notice was good ; (2) the bkpcy. notice would have been bad, if the assignment of the securities had been completed before its issue.—*Re* RAYMOND, *Ex p.* RAYMOND (1892), 9 Morr. 108, n., C. A.

Annotation :—**Consd.** *Re* Renison, *Ex p.* Greaves, [1913] 2 K. B. 300.

849. Judgment for sum & costs—Notice for sum without costs.]—Where a creditor has obtained final judgment for a certain sum & costs to be taxed, a bkpcy. notice served on debtor is not invalid because it is issued in respect of the sum for which judgment was obtained without mentioning the costs, inasmuch as a separate writ of execution can, under R. S. C., Ord. 42, r. 18, be issued for the recovery of the sum apart from the costs.—*Re* G. J., *Ex p.* G. J., [1905] 2 K. B. 678 ; 74 L. J. K. B. 932 ; 93 L. T. 193 ; 12 Mans. 354 ; *sub nom. Re* DEBTOR, *Ex p.* DEBTOR, 21 T. L. R. 698, C. A.

850. Judgment in default reduced by master—Notice for reduced amount.]—Judgment for £746 was given against debtor in default of appearance. On application to set the judgment aside, the master ordered the judgment to stand good for £150 & gave leave to defend as to the balance :—*Held :* the creditor was entitled to issue a bkpcy. notice for the sum of £150 as due under a final judgment for £746, reduced by the master's order to judgment for £150.—*Re* MOSENTHAL, *Ex p.* MARX (1910), 54 Sol. Jo. 751, C. A.

851. Notice for full amount of debt—Notwithstanding garnishee order absolute—No payment received under garnishee order.]—A judgment creditor obtained a garnishee order absolute, ordering the garnishees to pay to the judgment creditor the amount of his judgment debt out of a debt due from them to the judgment debtor. Nothing was in fact paid under the order :—*Held :* the bkpcy. notice might properly be issued for the full amount of the judgment debt, & the judgment creditor was not bound to give credit for the value of the security (if any) afforded by the garnishee order.—*Re* RENISON, *Ex p.* GREAVES, [1913] 2 K. B. 300 ; 82 L. J. K. B. 710 ; 108 L. T. 811 ; 57 Sol. Jo. 445 ; 20 Mans. 115, D. C.

Overstatement of amount due—Amendment of notice.]—*See* Nos. 893, 894, 897, 899, 900, *post.*

B. Form of Summons or Notice.

852. Whether prescribed form essential.]—A debtor's summons was not in the form required by 1849 Act, s. 78, & sched. G. :—*Held :* the summons was bad, & there was a form in the Act which ought to have been followed.—ANON. (1849), 14 L. T. O. S. 275.

PART II. SECT. 2, SUB-SECT. 10.—B.

852 i. *Whether prescribed form essential.*]—In proceeding by a debtor's summons, the form of the summons & the affidavit in support, as prescribed by the rules, should be strictly followed.

The indorsement on the summons stated the amount due to be £10,000 for money had & received by the debtor for the use of the creditor between Oct. 20, 1900, & Oct. 19, 1906, but the affidavit in support omitted to state that an account of the particulars had been given to debtor, & payment had been demanded :—*Held :* the proceedings were not in compliance with the rules.—*Re* MOORE, [1907] 2 I. R. 151 ; 41 I. L. T. 44.—**IR.**

852 ii. ——.]—The particulars of demand & request for payment which are essential to the validity of a debtor's summons need not be in the prescribed form. It is sufficient compliance if particulars as to the nature of the debt & the amount thereof, coupled with a request for payment, have been given to debtor.—C.'S CASE cited (1908) 42 I. L. T. at p. 204, n. —**IR.**

852 iii. ——.]—It is not necessary for the validity of a debtor's summons that the prescribed forms should be literally followed ; it is sufficient if they have been in substance complied with, & that debtor has not been misled & knew of the indebtedness alleged against him.—*Re* SHIEL, [1910] 2 I. R. 399.—**IR.**

852 iv. ——.]—A substantial compliance with the statutory requirements as to particulars of demand is sufficient to support a debtor's summons.

Debtor had been furnished with monthly accounts showing the goods

853. ——.]—A bkpcy. notice must be in the form prescribed by 1886 Rules, Appendix Form 6.—*Re* LYNES, *Ex p.* LESTER (M.) & Co., [1893] 2 Q. B. 113; 62 L. J. Q. B. 372; 68 L. T. 739; 58 J. P. 5; 41 W. R. 488; 9 T. L. R. 449; 37 Sol. Jo. 480; 10 Morr. 124; 4 R. 416, C. A.

Annotations:—**Mentd.** Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559, C. A.; *Re* Hewett, *Ex p.* Levene, [1895] 1 Q. B. 328; *Re* Clark, *Ex p.* Beyer, Peacock, [1896] 2 Q. B. 476, C. A.

854. Whether prescribed form sufficient.]—*Held:* it was sufficient to follow the form of particulars of demand & notice requiring payment given in 1849 Act, sched. G., which provided the forms of particulars of demand & notice requiring payment.—ANON. (1850), 16 L. T. O. S. 5.

855. In whose name—Name of secretary of company—Debt due to company.]—A debtor's summons was issued in the name of the secretary of a registered co. in respect of a debt due to the co.:—*Held:* the summons must be dismissed with costs.—*Re* HODGES, *Ex p.* LEATHLEY (1873), 8 Ch. App. 204; 42 L. J. Bcy. 56; 28 L. T. 323; 21 W. R. 301, L. C. & L. JJ.

Annotations:—**Distd.** *Re* Lowenthal, *Ex p.* Lowenthal (1874), 43 L. J. Bcy. 81, D. C.; *Re* Lancaster, *Ex p.* Wildsmith (1876), 34 L. T. 951, D. C. **Apld.** *Re* Winterbottom, *Ex p.* Winterbottom (1886), 18 Q. B. D. 446, D. C. **Distd.** *Re* Bates, *Ex p.* Lindsey (1887), 57 L. T. 417, D. C. **Apld.** *Re* Arkell, *Ex p.* Arkell (1889), 61 L. T. 90, D. C. **Distd.** *Re* Parkes, *Ex p.* Pneumatic Tyre Co. (1896), 3 Mans. 95, D. C.

See, now, 1914 Act, s. 149.

856. —— **Name of company—Notice by liquidator.**]—Where the liquidator in the voluntary winding up of a co. serves a bkpcy. notice upon a judgment debtor of the co. the notice must be in the name & on behalf of the co.—*Re* WINTERBOTTOM, *Ex p.* WINTERBOTTOM (1886), 18 Q. B. D. 446; 56 L. J. Q. B. 238; 56 L. T. 168; 4 Morr. 5, D. C.

Annotations:—**Expld.** *Re* Bates, *Ex p.* Lindsey (1887), 4 Morr. 192, D. C. **Apprvd.** *Re* Arkell, *Ex p.* Arkell (1889), 6 Morr. 182, D. C. **Folld.** *Re* Bassett, *Ex p.* Lewis (1895), 2 Mans. 177, D. C. **Distd.** *Re* De Murrieta, *Ex p.* South American & Mexican Co. (1896), 12 T. L. R. 238, C. A. **Mentd.** *Re* Judgment Debtor (530 of 1908), [1908] 2 K. B. 474, C. A.; *Re* A Debtor (No. 305 of 1911), [1911] 2 K. B. 718, C. A.

857. Whether several creditors can join in one summons.]—*Qu.:* whether several creditors are at liberty to join in one debtor's summons.—*Re* ONSLOW, *Ex p.* KIBBLE (1875), 10 Ch. App. 373; 44 L. J. Bcy. 63; 32 L. T. 138; 23 W. R. 433, L. JJ.

Annotations:—**Refd.** *Re* Andrew (1875), 1 Ch. D. 358, C. A. **Mentd.** *Re* Lynch, *Ex p.* Lynch (1876), 2 Ch. D. 227; *Re* Blythe, *Ex p.* Banner (1881), 44 L. T. 908, C. A.; *Re* Jones, *Ex p.* Jones (1881), 18 Ch. D. 109, C. A.; *Re* Tollemache, *Ex p.* Revell (1884), 13 Q. B. D. 720, C. A.; *Re* Lennox, *Ex p.* Lennox (1885), 16 Q. B. D. 315, C. A.; Duncan *v.* Dixon (1890), 44 Ch. D. 211; *Re* Leavesley, [1891] 2 Ch. 1, C. A.; Smith *v.* King, [1892] 2 Q. B. 543; *Re* Manchester, Middleton & District Tram. Co., [1893] 2 Ch. 638; *Re* Hawkins, *Ex p.* Troup, [1895] 1 Q. B. 404, C. A.; *Re* G. E. B., [1903] 2 K. B. 340, C. A.; *Re* Debtor (1915), 113 L. T. 704, D. C.

858. ——.]—Two creditors, whose debts together amount to more than £50, though each debt is less, can issue a debtor's summons on which debtor can be adjudicated bkpt.—*Re* ANDREW, *Ex p.* ANDREW (1875), 1 Ch. D. 358; 45 L. J. Bcy. 57; 33 L. T. 556; 24 W. R. 197, C. A.

859. Whether two judgment debts can be included in one notice.]—Two or more judgment debts cannot be included in the same bkpcy. notice.—*Re* LOW, *Ex p.* ARGENTINE GOLD FIELDS, LTD., [1891] 1 Q. B. 147; 60 L. J. Q. B. 265; 63 L. T. 694; 39 W. R. 181; 7 Morr. 302, C. A.

Annotation:—**Folld.** *Re* A Bankruptcy Notice (1906), 96 L. T. 133, C. A.

860. ——.]—An action was settled on the terms of debtor consenting to judgment being entered for A. & B. for £100 & costs, & for A., B., D. & E. for the costs of a counter-claim. A bkpcy. notice was afterwards served on debtor requiring him to pay A. & B. & to D. & E. the amounts claimed by them respectively as due on the judgment:—*Held:* the bkpcy. notice was bad as it included two judgment debts due to different persons.—*Re* A BANKRUPTCY NOTICE (1906), 96 L. T. 133; 14 Mans. 133; *sub nom. Re* A DEBTOR, 23 T. L. R. 169; *sub nom. Re* BRIND, 51 Sol. Jo. 133, C. A.

861. Creditor's name—Effect of omission.]—A bkpcy. notice was served on debtor, which was in the ordinary form, except that it was headed "*Ex p.* ——":—*Held:* the bkpcy. notice was not invalid by reason of the omission of the creditor's name.—*Re* BATES, *Ex p.* LINDSEY (1887), 57 L. T. 417; 35 W. R. 668; 4 Morr. 192, D. C.

Annotations:—**Refd.** *Re* Miller, *Ex p.* Nugent (1893), 69 L. T. 260, D. C. **Mentd.** *Re* Child, *Ex p.* Child, [1892] 2 Q. B. 77; *Re* Follows, *Ex p.* Follows, [1895] 2 Q. B. 521; *Re* Debtor (478 of 1908), [1908] 2 K. B. 684, C. A.

862. Creditor's address—Must be where payment can be made—Place where creditor can be heard of insufficient.]—A bkpcy. notice stated the address of the creditor who issued it to be "White's Club, St. James', S.W." The creditor did not reside at the club, & he was in fact out of England during the whole of the seven days limited by the notice for the payment of the debt. There was evidence that, if debtor had gone to the club, he would have been referred to the creditor's London solr., who held a general power of attorney for the creditor, & could have received payment of the debt on his behalf:—*Held:* an address at which the creditor could not be found, but could only be heard of, so that debtor could not pay the debt there, was not such an address as was required by Bkpcy. Act & Rules, & the notice was invalid.—*Re* STOGDON, *Ex p.* LEIGH, [1895] 2 Q. B. 534; 65 L. J. Q. B 47; 73 L. T. 279; 11 T. L. R. 589; 39 Sol. Jo. 726; 2 Mans. 382; 14 R. 657, C. A.

Annotations:—**Consd.** *Re* Beauchamp, *Ex p.* Beauchamp, [1904] 1 K. B. 572, C. A.; *Re* A Debtor (No. 211 of 1912), [1912] 2 K. B. 533, C. A. **Refd.** *Re* Persse (1911), 55 Sol. Jo. 314, C. A.

863. —— —— —— **Occasional absence.**]—It is not sufficient for a creditor who issued a bkpcy. notice to give in the notice an address at which he can be heard of; the address must be one ordered by & supplied to him during each month, & also with statements of account from time to time showing the balance then due, the liability incurred during a particular period, the credits allowed, & the net amount due, & had been repeatedly requested to make payments on account, but had not, prior to the issuing of a debtor's summons, been furnished with any document stating precisely the sum required to be paid:—*Held:* there had been a substantial compliance with the statutory requirements.—*Re* DEBTOR'S SUMMONS, I.'S CASE (1910), 44 I. L. T. 100. —IR.

857 i. *Whether several creditors can join in one summons.*]—Several creditors may join in issuing a debtor's summons under Insolvency Act, 1915, s. 50.—*Re* WILLIAMS, *Ex p.* ENGLEFIELD, [1919] V. L. R. 566.—AUS.

857 ii. ——.]—An additional form was sanctioned, whereby two or more creditors might join in issuing a joint debtor's summons, though the separate debts might be under £20, if their joint debts were sufficient to support an adjudication.—*Re* D. (1876), 11 I. L. T. 22.—IR.

859 i. *Whether two judgment debts can be included in one notice.*]—A bkpcy. notice founded on three judgment debts:—*Held:* bad.—*Re* MILLS (A DEBTOR) (1913), 32 N. Z. L. R. 801.—N.Z.

862 i. *Creditor's place of business or any place of payment omitted.*]—A bkpcy. notice did not state the registered office or place of business of the creditors or any place at which the money was to be paid:—*Held:* such omission was a defect in substance, & the notice was bad.—*Re* FIDDY (1913), 32 N. Z. L. R. 1346.—N.Z.

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at which debtor can pay him, or secure or compound for the debt. The address must be that of a place at which the creditor is to be found during the seven days limited by the notice, whether the address is of the creditor's residence or of his place of business.

If the address stated in the notice is such an one at the date of the service, the occasional absence of the creditor from the place, even for a whole day, will not render the notice inefficient, unless the absence is such as to deprive debtor of a reasonable opportunity of paying or securing or compounding for the debt according to the terms of the notice. Nor would it make any difference that the address was the temporary home of the creditor, who had no permanent home, or that his absence occurred on the last day of the seven. But if the creditor, after the service of the notice, abandons his place of address, so that it ceases to be a place where at reasonable times he, or some authorised agent on his behalf, can be found to receive payment of the debt, or to deal with the question of security or composition, the bkpcy. notice will cease to be efficient.—*Re* BEAUCHAMP, *Ex p.* BEAUCHAMP, [1904] 1 K. B. 572; 73 L. J. K. B. 311; 90 L. T. 594; 52 W. R. 545; 20 T. L. R. 269; 11 Mans. 5; *sub nom. Re* DEBTOR, *Ex p.* DEBTOR, 48 Sol. Jo. 297, C. A.; *subsequent proceedings, sub nom.* WATT *v.* WATT (1905), 92 L. T. 483, H. L.

Annotations :—**Consd.** *Re* Persee (1911), 55 Sol. Jo. 220. **Refd.** *Re* Debtor (No. 211 of 1912), [1912] 2 K. B. 533, C. A.

864. —— Servant authorised to receive payment at address given—Creditor having two houses.]—A judgment creditor having two houses in different parts of England inserted in a bkpcy. notice the address of the house from which he was absent during the currency of the notice. His butler was at the address given in the notice, & could have received payment of the debt or sent for the creditor at any time during the currency of the notice:—*Held:* the address given was sufficient, & the bkpcy. notice good.—*Re* PERSSE (1911), 55 Sol. Jo. 314, C. A.

Annotations :—**Mentd.** *Re* Pincus, *Re* Hutchinson (1911), 56 Sol. Jo. 36, C. A.; *Re* A Debtor (No. 1838 of 1911), [1912] 1 K. B. 53, C. A.

865. —— —— Creditor abroad.]—A French firm obtained a final judgment against debtor, who resided in England:—*Held:* a bkpcy. notice requiring payment to be made at an address in England, where an agent of the creditor could be found duly authorised to receive payment, would have been good.—*Re* A DEBTOR (No. 1838 of 1911), [1912] 1 K. B. 53; 81 L. J. K. B 107; 105 L. T. 610; 28 T. L. R. 9; 19 Mans. 12; *sub nom. Re* PINCUS, *Re* HUTCHINSON & Co., 56 Sol. Jo. 36, C. A.

See, now, 1914 Act, s. 2 (1).

866. —— Notice founded on county court judgment.]—Where a bkpcy. notice is founded on a county ct. judgment, it must contain a statement of the address of the creditor.—*Re* A DEBTOR (484 OF 1908), [1908] 2 K. B. 692; 77 L. J. K. B. 998; 99 L. T. 461; 24 T. L. R. 777; 52 Sol. Jo. 641; 15 Mans. 304, C. A.

Annotation :—**Refd.** *Re* A Debtor, [1912] 2 K. B. 533, C. A.

867. Party to whom payment to be made—Liquidator of company—Acting under committee.]—Where a bkpcy. notice is issued by the liquidator of a co., it may require debtor to pay or compound for the debt to his satisfaction. The fact that the liquidator is acting under a committee of inspection, whose sanction is necessary to a compromise, makes no difference.—*Re* DE MURRIETA, *Ex p.* SOUTH AMERICAN & MEXICAN CO. (1896), 12 T. L. R. 238; 3 Mans. 35; *sub nom. Re* MURIETTA, *Ex p.* SOUTH AMERICAN & MEXICAN CO. 40 Sol. Jo. 317, C. A.

Annotation :—**Mentd.** *Re* Betts, *Ex p.* The Debtor (1896), 3 Mans. 287, C. A.

868. Description of judgment—Judgment or order.]—In an action against debtor for specific performance of a contract to purchase real estate an order was made on Feb. 17, 1911, that upon pltfs. executing a conveyance, to be settled by the judge in case the parties differed, deft. should pay to pltfs. at such time & place to be agreed upon or fixed by the judge, but not before July 6, 1911, the sum of £2,400 representing the agreed amount of principal & interest payable under the contract on Mar. 1, 1911, & it was ordered that pltfs.' costs should be taxed & paid by defts., & that all further proceedings in the action be stayed except for the purpose of carrying the order into effect. On Jan. 12, 1912, the master certified that the conveyance had been settled & executed, & fixed Feb. 12, 1912, as the date for the payment of the £2,400. On Mar. 23, 1912, pltfs. issued & served upon debtor a bkpcy. notice to pay the sum of £2,400 "due on a final judgment or order" dated Feb. 17, 1911, "whereon execution has not been stayed":—*Held:* (1) the notice was accurate in stating that execution upon the judgment had not been stayed; (2) the judgment was not incorrectly described in the notice as a "judgment or order" & the notice was valid.—*Re* A DEBTOR (No. 837 of 1912), [1912] 3 K. B. 242; 81 L. J. K. B. 1225; 107 L. T. 506; 19 Mans. 317; *sub nom. Re* SCHENK, *Ex p.* WEST HYDE ESTATE CO, 56 Sol. Jo. 651, C. A.

Annotation :—**Refd.** *Re* Clark, *Ex p.* Pope & Owles, [1914] 3 K. B. 1095, C. A.

Amount claimed.]—*See* Nos. 840 *et seq.*, *ante*.

869. —— Only part of judgment debt claimed.]—Where only part of a judgment debt is claimed, the notice should make it clear that no more is claimed as due on the judgment.—*Re* H. B., [1904] 1 K. B. 94; 73 L. J. K. B. 1; 89 L. T. 592; 10 Mans. 361; *sub nom. Re* JUDGMENT DEBTOR, *Ex p.* JUDGMENT CREDITOR, 52 W. R. 178; 20 T. L. R. 32, C. A.

Annotations :—**Distd.** *Re* G. J., *Ex p.* G. J., [1905] 2 K. B. 678, C. A. **Expld.** *Re* A Debtor (No. 2 of 1912), *Ex p.* Debtor (1912), 106 L. T. 895, D. C. **Distd.** *Re* Vogel, *Ex p.* Anglo-Eastern Contract Co. (1913), 109 L. T. 325.

870. "In accordance with terms of judgment"—Decree in favour of plaintiff—Notice to pay plaintiff's solicitor.]—In an action instituted in the Probate Division of the High Ct. for the purpose of establishing a will a decree was made in favour of pltf. with costs, & an order was afterwards drawn up by which it was ordered that deft. should within seven days pay to A., the solr., for pltf., the sum of £113 being the amount of pltf.'s costs. A bkpcy. notice was subsequently issued by pltf. against debtor upon which a receiving order was made in the county ct.:—*Held:* the bkpcy. notice not being issued according to the terms of the judgment did not comply with 1883 Act, s. 4 (1) (*g*), & the receiving order must be set aside.—*Re* ARKELL, *Ex p.* ARKELL (1889), 61 L. T. 90; 5 T. L. R. 560; 6 Morr. 182, D. C.

871. —— Judgment for "H. & others"—Notice by "H. & others (trustee, etc.)."]—The ct. will set aside a bkpcy. notice which varies from the form of the judgment in such a way as to be liable to cause confusion to debtor, or

does not clearly inform him who is the creditor whom he is required to pay.

A writ in an action was issued in the names of H. & several other named pltfs. The statement of claim alleged that pltfs. were trustees of a certain hospital. Judgment was signed by pltfs., who were described in the judgment as "H. & others." A bkpcy. notice was issued by pltfs., calling upon defts. to pay the amount due on the judgment to "H. & others (trustees of St. John's Hospital, Northampton), of the Convalescent Home, Weston Favell, in the county of Northampton":—*Held:* the bkpcy. notice was not in accordance with the terms of the judgment, & ought to be set aside.—*Re* HOWES, *Ex p.* HUGHES, [1892] 2 Q. B. 628; 62 L. J. Q. B. 88; 67 L. T. 213; 40 W. R. 647; 36 Sol. Jo. 629; 4 R. 4, C. A.

Annotations:—**Consd.** *Re* A Judgment Debtor (530 of 1908), [1908] 2 K. B. 474, C. A. **Distd.** *Re* A Debtor (No. 2 of 1912), *Ex p.* The Debtor (1912), 106 L. T. 895, D. C. **Reid.** *Re* Lynes, *Ex p.* Lester, [1893] 2 Q. B. 113, C. A. **Mentd.** *Re* Low, *Ex p.* Gibson, [1895] 1 Q. B. 734, C. A.

872. —— Notice requiring payment in terms of collateral agreement.]—An agreement was entered into between the creditor & debtor for the stay of certain litigation between them, on the terms that debtor should pay to the creditor an agreed sum by five instalments & should consent to judgment being signed against him for that sum. There was no provision in the agreement that the whole debt should become payable on default in payment of any of the instalments, & there was no provision for successive executions on the judgment. Default was made in payment of three instalments, & the creditor issued a bkpcy. notice claiming payment of the amount due in respect of the three overdue instalments, after giving credit for an amount attached under a garnishee order *nisi*, proceedings under which were still pending, the amount so arrived at being described as the debt due under the judgment:—*Held:* the bkpcy. notice did not require payment in accordance with the terms of the judgment, but in accordance with the terms of the judgment as modified by a collateral agreement, & was bad.

Non-compliance with a bkpcy. notice is not an act of bkpcy. so long as the terms of the judgment on which it is founded are controlled by an outside agreement between the judgment debtor & creditor (STIRLING, L.J.).—*Re* H. B., [1904] 1 K. B. 94; 73 L. J. K. B. 1; 89 L. T. 592; 10 Mans. 361; *sub nom. Re* JUDGMENT DEBTOR, *Ex p.* JUDGMENT CREDITOR, 52 W. R. 178; 20 T. L. R. 32, C. A.

Annotations:—**Distd.** *Re* G. J., *Ex p.* G. J., [1905] 2 K. B. 678, C. A.; *Re* A Debtor (No. 2 of 1912), *Ex p.* The Debtor (1912), 106 L. T. 895, D. C.; *Re* Vogel, *Ex p.* Anglo-Eastern Contract Co. (1913), 109 L. T. 325.

873. —— Judgment for sum & costs to be taxed—Notice for sum without costs.]—A creditor recovered judgment against his debtor for £1,500 & costs to be taxed. Before the costs were taxed the creditor served on debtor a bkpcy. notice requiring him to pay the £1,500 judgment debt. The notice not having been complied with, the creditor, after the costs had been taxed, presented a bkpcy. petition in which he alleged that debtor was indebted to him in the sum of £1,513 3*s.* 8*d.*, the amount due on the final judgment, being as to £1,500 money lent & as to £13 3*s.* 8*d.* the costs of the judgment:—*Held:* having regard to the fact that under R. S. C. Ord. 42, r. 18, the creditor had a right to issue execution for the £1,500, independently of the costs, the bkpcy. notice was a valid notice, as it required debtor to pay the judgment in accordance with the terms of the judgment.—*Re* G. J., *Ex p.* G. J., [1905] 2 K. B. 678; 74 L. J. K. B. 932; 93 L. T. 193; 12 Mans. 354; *sub nom. Re* DEBTOR, *Ex p.* DEBTOR, 21 T. L. R. 698, C. A.

874. —— Judgment in trading capacity—Notice to pay to individuals at their private addresses.]—A bkpcy. notice headed "*ex p.* P. & S. trading as H. Brick Co." required debtor to pay to P., of etc., & S., of etc. giving their private addresses, £50 odd, the balance due on a final judgment obtained by them against debtor, unless (among other alternatives) he satisfied the ct. that he had a counter-claim, set-off, or cross-demand against "P. & S. trading as H. Brick Co." which equalled or exceeded the sum claimed by them & which could not have been set up in the action. The judgment was obtained by the creditors in their trading capacity:—*Held:* the notice was calculated to embarrass debtor, inasmuch as it did not follow the terms of the judgment, & ought to be set aside. *Semble:* where judgment has been obtained for a partnership debt by two persons trading as a firm, a proper form of bkpcy. notice would be "Pay to A. & B. trading as etc. or to either of them" (KENNEDY, L.J.).—*Re* A JUDGMENT DEBTOR (No. 530 of 1908), [1908] 2 K. B. 474; 77 L. J. K. B. 968; 99 L. T. 126; 24 T. L. R. 689; 52 Sol. Jo. 567; 15 Mans. 209, C. A.

Annotation:—**Distd.** *Re* A Debtor (No. 2 of 1912), *Ex p.* The Debtor (1912), 106 L. T. 895.

875. —— Judgment to pay registrar of county court—Notice to pay creditor.]—Where a bkpcy. notice is founded on a county ct. judgment it must require payment of the judgment debt to the registrar of the county ct. in accordance with the terms of the judgment; & a bkpcy. notice in the ordinary form requiring payment to the creditor is bad.—*Re* A DEBTOR (No. 484 of 1908), [1908] 2 K. B. 692; 77 L. J. K. B. 998; 99 L. T. 461; 24 T. L. R. 777; 52 Sol. Jo. 641, C. A.

Annotation:—**Distd.** *Re* A Debtor (No. 211 of 1912), [1912] 2 K. B. 533, C. A.

876. —— Notice to pay judgment creditors or their solicitors.]—A bkpcy. notice, which requires debtor to pay the judgment debt to the judgment creditors or their solrs., is not a bkpcy. notice "requiring him to pay the judgment debt in accordance with the terms of the judgment," & is not a good foundation for a receiving order, even if it contains a statement that the solrs. have authority to receive payment of the debt.—*Re* A DEBTOR (No. 305 of 1911), [1911] 2 K. B. 718; 80 L. J. K. B. 1264; 105 L. T. 125; 55 Sol. Jo. 553; 18 Mans. 318, C. A.

Annotation:—**Consd. & Expld.** *Re* A Debtor (No. 1838 of 1911), [1912] 1 K. B. 53, C. A.

877. —— Notice requiring payment without jurisdiction of court.]—A French firm obtained a final judgment against debtor, who resided in England, & served upon him a bkpcy. notice requiring him to pay the amount due on the judgment to the creditors or one or either of them carrying on business at the address of the firm in Paris:—*Held:* the notice was bad, for it required debtor to pay the judgment debt without the jurisdiction of the ct. & was not "in accordance with the terms of the judgment."—*Re* A DEBTOR (No. 1838 of 1911), [1912] 1 K. B. 53; 81 L. J. K. B 107; 105 L. T. 610; 28 T. L. R. 9; 19 Mans. 12; *sub nom. Re* PINCUS, *Re* HUTCHINSON & Co., 56 Sol. Jo 36, C. A.

878. —— Variation in marginal note—Amount due correctly stated.]—Where part of a judgment debt has been extinguished by payment into ct. &

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a bkpcy. notice has been issued for the balance, the notice is not invalidated by reason of a variation from the terms of the judgment to be found in a marginal note thereto, provided that the sum claimed in the notice is the correct amount owing.—*Re* A DEBTOR (No. 2 OF 1912), *Ex p.* THE DEBTOR (1912), 106 L. T. 895; 56 Sol. Jo. 634, D. C.

879. Affidavit of debt—Must be signed by both plaintiffs—Judgment debt due to two parties jointly who are not partners.]—Where a judgment debt is owing to two pltfs. jointly (not copartners), & a debtor's summons under 1861 Act, is taken against deft., it is necessary that both pltfs. should join in the affidavit of debt; it cannot be made by one pltf. on behalf of himself & co-pltf.—ANON. (1864), 12 W. R. 991.

880. —— Sufficiency of description of creditor—Summons by public officer of company.]—B., the public officer of a bank, sued out a debtor's summons against L., a trader, requiring him to pay to the bank the sum claimed by the particulars of demand. The particulars required payment to B. of £2,483 14*s.* 9*d.* owing to the bank as indorsees for value of two dishonoured bills of exchange, stating the dates of the bills, & that they were drawn by L. & accepted by S. & Co. B., in his affirmation in support of the summons, described himself as public officer of the bank, & stated that he had authority to affirm that debtor was duly indebted to the bank as indorsees for valuable consideration:—*Held:* the nature of the debt was sufficiently expressed in the particulars, & 1870 Rules, r. 15, requiring a statement that B. was the public officer, & was authorised to sue out the summons, had been sufficiently complied with.—*Re* LOWENTHAL, *Ex p.* LOWENTHAL (1874), 9 Ch. App. 324; 43 L. J. Bcy. 132; 30 L. T. 282; 22 W. R. 459, L. C. & L. J.

Annotations:—**Consd.** Blaiberg *v.* Parke (1882), 10 Q. B. D. 90. **Mentd.** *Re* Latham, *Ex p.* Latham (1876), 4 Ch. D. 105.

881. —— —— ——.]—An affidavit made by a registered public officer of a co. in support of a debtor's summons described him as such, but contained no statement of the fact, or that he was authorised to sue on behalf of the co.:—*Held:* the affidavit did not comply with 1870 Rules, r. 15, and must be dismissed for irregularity.—*Re* TORKINGTON, *Ex p.* TORKINGTON (1874), 9 Ch. App. 298; 22 W. R. 602, L. C. & L. JJ.

Annotations:—**Consd.** Blaiberg *v.* Parke (1882), 10 Q. B. D. 90. **Refd.** *Re* Lowenthal, *Ex p.* Lowenthal (1874), 9 Ch. App. 324, L. C. & L. J.

C. Service of Summons or Notice.

882. Service out of jurisdiction.] — An Irish creditor had recovered judgment in England against an Irish debtor, whose residence was in Ireland, but who, being Judge Advocate-General, attended at an office in Westminster, & being also a member of Parliament, spent part of his time in London, staying at an hotel. The creditor took out a debtor's summons in England, on an affidavit that debtor was resident at the office. He was at that time at his house in Dublin, & the creditor obtained from the registrar an order to serve the summons in Dublin. Debtor did not comply with it, but gave notice of motion to discharge the order of service, which was refused with costs. The creditor then petitioned for adjudication, & debtor was adjudged bkpt. On appeal from the order of adjudication:—*Held:* (1) a debtor's summons could not be served out of the jurisdiction; (2) debtor was not estopped from disputing the jurisdiction to order service abroad.—*Re* O'LOGHLEN, *Ex p.* O'LOGHLEN (1871), 6 Ch. App. 406; 40 L. J. Bcy. 28; 23 L. T. 878; 19 W. R. 459, L. JJ.

Annotations:—**Distd.** *Re* Morton, *Ex p.* Robertson (1875), L. R. 20 Eq. 733. **Refd.** *Re* Myer, *Ex p.* Pascal (1876), 45 L. J. Bcy. 81, C. A. **Mentd.** *Re* Lancaster, *Ex p.* Lancaster (1876), 3 Ch. D. 498, C. A.

883. By whom served.]—When a debtor's summons is served by the creditor's solr. under 1870 Rules, r. 61, the solr. need not effect the service with his own hand. It may be effected by his clerk, or by the clerk of the country agent of a London solr.—*Re* LANCASTER, *Ex p.* LANCASTER (1876), 3 Ch. D. 498; 35 L. T. 649; 24 W. R. 1010, C. A.

884. ——.]—A debtor's summons may be served by any person authorised by the creditor, & service by an accountant, who had been in the habit of serving summonses for the creditor's solr.:—*Held:* good.—*Re* DENMAN, *Ex p.* DENMAN (1881), 29 W. R. 616.

885. How served—Whether service of original summons essential.]—The original summons to a trader debtor need not be served on him; it is sufficient if it is shown.—ANON. (1849), 14 L. T. O. S. 109.

886. —— Order to deliver to "some adult inmate."]—An order was made that a bkpcy. notice issued against debtor should be deemed to have been duly served on him by delivery of such notice to "some adult inmate" at debtor's usual residence. The bkpcy. notice was delivered to a servant girl in the employ of debtor at his residence, whose age was thirteen years & five months. A receiving order having been made against debtor upon a petition, which alleged as the act of bkpcy. the non-compliance of debtor with the requirements of the bkpcy. notice:—*Held:* the case must go back to the county ct. to be reheard, & the receiving order rescinded.—*Re* EVANCE, *Ex p.* EVANCE (1893), 10 MORR. 146, D. C.

887. On whom served—Receiver or manager in partnership winding up.]—Service of a bkpcy. notice on a receiver & manager, appointed by the ct. in an action for the winding-up of a partnership business, is not service on a person having the control or management of the partnership business within 1890 Rules, r. 260.—*Re* FLOWERS & Co., [1897] 1 Q. B. 14; 65 L. J. Q. B. 679; 75 L. T. 306; 45 W. R. 118; 13 T. L. R. 9; 41 Sol. Jo. 30; 3 Mans. 294, C. A.

888. Substituted service.]—1870 Rules, r. 59, does not apply to substituted service of a debtor's summons, but, if personal service cannot be effected, an order for substituted service may be made under r. 61 after the expiration of the

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PART II. SECT. 2, SUB-SECT. 10.—C.

882 i. *Service out of jurisdiction.*]—A petition was presented against a debtor resident at Perth, West Australia, & described in the petition as "late of Sydney, but at present of Perth." The alleged act of bkpcy. was non-compliance with a bkpcy. notice served on W., debtor's attorney, in New South Wales, under an order granting leave to effect service out of the jurisdiction & substituted service on W. No objection was taken that the ct. had no power to order service of the notice out of the jurisdiction:—*Held:* there was, from the statutory affidavit verifying the petition & the order granting leave to serve the bkpcy. notice out of the jurisdiction, sufficient evidence of domicil in New South Wales, & the order sequestrating the estate of debtor was rightly made.—*Re* KERLE, *Ex p.* SIMPSON (1898), 19 N. S. W. B. 26.—**AUS.**

882 ii. ——.]—A debtor's summons was served under an order for substituted service, on the solr. of a debtor, neither carrying on trade nor residing in Ireland:—*Held:* there was no jurisdiction to order substituted service.—*Re* MURRAY, [1916] 2 I. R. 554.—**IR.**

time limited by r. 59 for effecting personal service, & the substituted service must be effected within such reasonable time as the ct. may fix.—*Re* WHALLEY, *Ex p.* WARBURG (1883), 25 Ch. D. 336 ; 53 L. J. Ch. 336 ; 32 W. R. 542, C. A.

889. —— What court has jurisdiction to order.]—The jurisdiction to make an order for substituted service of a debtor's summons lies with the ct. of the district in which debtor happens to be, & in a case where debtor had absconded from his usual place of abode, within a particular district, & gone no one knew whither :—*Held :* the county ct. of that district had jurisdiction to make an order for substituted service against debtor under 1870 Rules, r. 61.—*Re* HOLDSWORTH, *Ex p.* NORTH KENT BANK (1878), 9 Ch. D. 333 ; 39 L. T. 379 , 27 W. R. 158, C. A.

890. Service of second notice — Whether fresh particulars must be filed.]—Where a trader-debtor's summons is dismissed for informality, the summoning creditor cannot make use of the particulars of demand already filed, in order to support another summons ; he must file fresh particulars, & serve a fresh notice requiring payment.—ANON. (1867), 15 W. R. 882.

891. —— —— Effect of omission to serve fresh particulars.]—A trader-debtor's summons was issued & duly served with particulars of demand. This summons was dismissed on the ground that debtor was a non-trader, & as such entitled to three weeks' notice instead of seven days. A second debtor's summons was then issued & served without the particulars of demand. The sum claimed on the second summons was different from that claimed on the first, as one item demanded in the particulars served with the first summons had been paid in the interval :—*Held :* as debtor had been served with the particulars with the first summons, & thus knew the particulars of the claim against him, the omission to serve particulars with the second summons did not render it invalid.—*Re* JAVAL, *Ex p.* JAVAL (1876), 34 L. T. 47, C. A.

892. Waiver.]—*Held :* debtor, by appearing in a bkpcy. petition founded on a debtor's summons & not then objecting to the want of proof of the service of the debtor summons, had waived his right to object.]—*Re* EVANS, *Ex p.* EVANS (1883), 50 L. T. 158 ; 32 W. R. 281, C. A.

D. Amendment of Summons or Notice.

See, now, 1914 Act, s. 147 (1).

893. Limits of jurisdiction to amend — Error in amount.]—The power to amend a bkpcy. notice is limited to the amendment of formal defects, & it is a question of degree in all cases what is a formal defect which can be amended at the hearing, & what is a substantial defect which cannot.

On Mar. 23, a bkpcy. notice was issued for £219 3*s.* 3*d.*, the amount of a judgment debt ; prior to that date the debt had been reduced by payments to £200. On Mar. 27 an order was made on a sheriff's interpleader, the effect of which was to stay execution as to a further sum of £45. The bkpcy. notice was served on Mar. 28. At the hearing the registrar amended the notice by substituting £155 for the £219 3*s.* 3*d.*, the amount mentioned in the notice, & ordered the notice as amended to be re-served, & no petition to be presented for seven days :—*Held :* the mistake in the bkpcy. notice was not merely formal, & the amendment ought not to have been made.—*Re* MILLER, *Ex p.* NUGENT (1893), 69 L. T. 260 ; *sub nom. Re* MILLER, *Ex p.* MILLER, 10 Morr. 183 ; 5 R. 498, D. C.

Annotations :—**Consd.** *Re* A Debtor (478 of 1908), [1908] 2 K. B. 684, C. A. **Refd.** *Re* Follows, *Ex p.* Follows (1895), 65 L. J. Q. B. 15.

See, now, 1914 Act, s. 2 (ii).

894. Judgment wrongly described.]—An action was brought against debtor & five other persons, & judgment recovered against debtor & three co-defts. A bkpcy. notice served on debtor stated that the judgment had been recovered against debtor & all five co-defts., but the other particulars, such as date & amount, were correctly stated :—*Held :* the defect in the notice was not material to its validity, & the notice could be amended.—*Re* LOW, *Ex p.* GIBSON, [1895] 1 Q. B. 734 ; 64 L. J. Q. B. 362 ; 75 L. T. 450 ; 59 J. P. 292 ; 43 W. R. 405 ; 11 T. L. R. 298 ; 39 Sol. Jo. 348 ; 2 Mans. 169 ; 14 R. 371, C. A.

Annotations :—**Refd.** *Re* Murietta, *Ex p.* South American & Mexican Co. (1896), 40 Sol. Jo. 317, C. A. ; *Re* Debtor (478 of 1908), [1908] 2 K. B. 684, C. A.

895. Notice addressed to non-existent firm—Judgment against firm after dissolution.]—Judgment was recovered, in default of appearance, against a late partnership firm of W. Brothers, in an action brought against it after its dissolution for a debt incurred during the partnership. The writ had been served on each of the late partners. A bkpcy. notice in the usual form & following the judgment was then addressed to W. Brothers, & served personally on each of the late partners The judgment creditor presented a petition against one partner alone :—*Held :* even if the bkpcy. notice was technically defective, yet in the circumstances the defect was one that had not caused debtor any " substantial injustice," & was capable of amendment.—*Re* WENHAM, *Ex p.* BATTAMS, [1900] 2 Q. B. 698 ; 69 L. J. Q. B. 803 ; 83 L. T. 94 ; 48 W. R. 627 ; 44 Sol. Jo. 609 ; 7 Mans. 309, C. A.

896. Notice founded on two judgment debts.]—Where a bkpcy. notice was defective by reason of being founded on two judgment debts, the ct. refused to allow the notice to be amended, but, the objection not having been taken in the ct. below, applt. was not allowed his costs in that ct., though he was allowed his costs of the appeal.—*Re* O. C. S., *Ex p.* DEBTOR, [1904] 2 K. B. 161 ; 73 L. J. K. B. 585 ; 91 L. T. 224 ; 52 W. R. 595 ; 48 Sol. Jo. 492 ; 11 Mans. 122, C. A.

Annotation :—**Refd.** *Re* A Debtor (478 of 1908), [1908] 2 K. B. 684, C. A.

897. Failure to give credit for sum paid.]—A bkpcy. notice failed to give credit for a sum of £2 off the judgment debt :—*Held :* this was not a formal defect or irregularity capable of amendment, & the notice must be set aside as bad.—*Re* THREADKELL (1906), cited [1908] 2 K. B. at p. 689, D. C.

Annotation :—**Folld.** *Re* A Debtor (478 of 1908), [1908] 2 K. B. 684, C. A.

See, now, 1914 Act, s. 2 (ii).

898. Error in calculating interest.]—A bkpcy. notice claimed payment of a sum as being the balance of the amount due on a final judgment obtained by the creditors against debtor. Figures were given in the margin of the notice showing how the sum claimed was arrived at. The amount of the debt was stated, as also the amount of the interest thereon, & certain credits were allowed. There was a mistake in the calculation of the interest, & consequently the notice required payment of £1 5*s.* 6*d.* in excess of what was actually due :—*Held :* inasmuch as the bkpcy. notice claimed a sum which never was in fact due, the mis-statement of the amount due was a substantial defect, & was not a mere formal defect or irregularity which could be amended

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& the notice was bad.—*Re* A DEBTOR (No. 478 of 1908), *Ex p.* DEBTOR, [1908] 2 K. B. 684; 77 L. J. K. B. 981; 99 L. T. 458; 24 T. L. R. 778; 52 Sol. Jo. 641, C. A.

Annotation :—**Expld. & Distd.** *Re* A Debtor (No. 2 of 1912), *Ex p.* The Debtor (1912), 106 L. T. 895.
See, now, 1914 Act, s. 2 (ii).

899. Error in amount—Omission to deduct sum paid into court by claimant in interpleader proceedings.]—Judgment having been recovered against debtor for £446, execution was issued under which the sheriff levied, but a third person having claimed the goods, an interpleader order was obtained, whereby upon payment of £20 into ct. by claimant, the sheriff was directed to withdraw. A bkpcy. notice, requiring payment of the debt, having afterwards been served upon debtor :—*Held :* the fact of the notice claiming the whole debt of £446, without considering the £20 which might be stayed, only amounted to a formal error which the ct. would rectify.—*Re* BATES, *Ex p.* LINDSEY (1887), 57 L. T. 417; 35 W. R. 668; 4 Morr. 192, D. C.

Annotations :—**Consd.** *Re* Child, *Ex p.* Child, [1892] 2 Q. B. 77, D. C. **Distd.** *Re* Miller, *Ex p.* Miller (1893), 10 Morr. 183, D. C. **Consd.** *Re* Debtor (478 of 1908), [1908] 2 K. B. 684, C. A. **Mentd.** *Re* Follows, *Ex p.* Follows, [1895] 2 Q. B. 521, D. C.

900. ——.]—A bkpcy. notice required payment of a sum as being the balance claimed to be due on a final judgment. The notice included a sum of £8 1*s.* for costs. The total costs due under the judgment were only £5 6*s.*, but the notice included the costs, amounting to £2 15*s.*, of an unsuccessful attempt by debtor to set aside the judgment :—*Held :* the addition of the £2 15*s.*, although admittedly due, was not a formal defect or irregularity which could be remedied under 1883 Act, s. 143, & the bkpcy. notice was bad.—*Re* BEACH (1905), cited in [1908] 2 K. B. at p. 688, C. A.

Annotation :—**Follds.** *Re* Debtor, [1908] 2 K. B. 684, C. A.
See, now, 1914 Act, s. 2 (ii).

E. Stay and Adjournment of Proceedings on Summons or Notice.

901. On what grounds—Action commenced by debtor.]—The mere fact that a debtor has commenced an action against a creditor, in respect of matters arising out of the same transaction, is no reason why the proceedings of the creditor under a debtor's summons issued against debtor should be stayed.—*Re* KAIN, *Ex p.* ELLIS (1871), 6 Ch. App. 602; 40 L. J. Bcy. 77; 24 L. T. 819; 19 W. R. 913, L. JJ.

Annotation :—**Consd. & Follds.** *Re* Foster, *Ex p.* Foster (1883), 22 Ch. D. 797, C. A.

902. —— **Bonâ fide dispute as to amount of debt.**]—When the person summoned by a debtor's summons merely denies by his affidavit that he is indebted to the summoning creditor in the amount claimed, but it appears that he admits a debt of more than £50, there being a *bonâ fide* dispute as to the amount, the summons ought not to be dismissed, but the proceedings upon it ought to be stayed pending the trial of the validity of the debt claimed.—*Re* KIDDELL, *Ex p.* ROWAN (1874), 9 Ch. App. 617; 43 L. J. Bcy. 96; 30 L. T. 625; 22 W. R. 784, L. J.

Annotation :—**Consd.** Cadiz Waterworks Co. *v.* Barnett (1874), L. R. 19 Eq. 182.

903. —— **Order for sale of mortgaged property not carried out.**]—The fact of a foreclosure decree & an order for sale of the property of debtor not having been carried out, is not sufficient ground for an adjournment by the registrar of further proceedings on a bkpcy. notice served by the mtgee. on the application of debtor under 1886 Rules, r. 139.—*Re* KELDAY, *Ex p.* MESTON (1888), 36 W. R. 585; 4 T. L. R. 478, C. A.

Annotation :—**Consd.** *Re* Cole, *Ex p.* Attenborough, [1898] 1 Q. B. 290.

904. On what conditions—Order for debtor to give security for debt—Discretion of court.]—It is within the discretion of the ct. to issue, or, refuse to issue, an order for a trader to enter into a bond for an alleged debt due from him under 1849 Act, s. 79. *Semble :* the ct. will not direct such bond to be given, where the alleged debt arises out of the result of speculative transactions.—*Re* WOOD, *Ex p.* WOOD (1854), 4 De G. M. & G. 875; 2 Eq. Rep. 300; 23 L. J. Bcy. 3; 22 L. T. O. S. 325; 18 Jur. 229; 43 E. R. 750; *sub nom. Re* WOOD, *Ex p.* SIMONDS, 2 W. R. 286, L. JJ.

Annotation :—**Follds.** *Re* Ward, *Ex p.* Ward (1882), 20 Ch. D. 356, C. A.

905. —— —— ——.]—An action was brought by an indorsee against the acceptor of a bill of exchange, & deft. obtained leave to defend the action, on the ground that he had accepted the bill as agent, & not as principal. The alleged debtor was then served with a trader-debtor's summons, under 1849 Act, s. 78, & desiring to contest the claim, was ordered by the comr. to give security by bond, with two sureties :—*Held :* the comr. had exercised a proper discretion with which the ct. would not interfere.—*Re* RUCK, *Ex p.* RUCK (1863), 8 L. T. 102; 9 Jur. N. S. 683.

906. —— —— ——.]—A trader-debtor's summons is a preliminary matter, & a comr. is not called upon to try a question which requires a great deal of examination, but when he is of opinion that there is something to try, & debtor has made a deposition of good defence, the bond should be ordered.—*Re* ATWOOL, *Ex p.* ATWOOL (1868), 19 L. T. 42, L. JJ.

PART II. SECT. 2, SUB-SECT. 10.—E.
See, also, cases in Sect. 2, sub-sect. 10, F., *post.*

901 i. *On what grounds—Petition of arrangement filed.*]—Filing a petition for arrangement will not stop proceedings under a trader debtor's summons, which was issued before the petition for arrangement was filed. In such cases the trader must, on the return of the summons, say whether he admits or denies the debt.—*Re* A TRADER DEBTOR SUMMONS (1869), 3 I. L. T. Jo. 102.—IR.

901 ii. —— *Suit in Chancery pending.*]—M. filed a bill in the Ct. of Ch. against C. for specific performance of an agreement. Subsequently, & during the pendency of that suit, C. issued a debtor's summons against M. in respect of a sum due :—*Held :* all proceedings on the debtor's summons should be stayed until the determination of the Ch. suit, & alleged debtor should not be required to give security in respect of the alleged debt.—*Re* M. D. (1875), 9 I. L. T. 63.—IR.

901 iii. —— *Protection order.*]—After a debtor, who had presented an arrangement petition in Ireland, had obtained a protection order, a creditor issued against him a debtor's summons in England. The arranging debtor having moved to restrain further proceedings under the debtor's summons :—*Held:* an injunction should not be granted.—*Re* W. A. R. (1875), 9 I. L. T. 149.—IR.

904 i. *On what conditions—Bond with sureties.*]—A trader, appearing to a summons issued under 12 & 13 Vict. c. 107, s. 11, & making a deposition that he has a good defence to the "whole demand," need not enter into a bond with two sureties, etc., under s. 13.—*Re* COMERFORD (1851), 3 Ir. Jur. 309.—IR.

904 ii. —— —— *Affidavits.*]—Under the trader-debtor sect. of Irish Bkpt. Act the ct. may inquire into all the facts of the case, & not permit the trader to make an affidavit of a good defence on the merits. Under the sect. of the English stat. the ct. must receive the affidavit.

When a trader *bonâ fide* believes that he has a good defence on the merits, & there may be a question for a jury, the ct. will permit him to make the affidavit, & will not require him to enter into a bond.—*Re* FIVEY (1860), 13 Ir. Jur. 22.—IR.

a. *Removal of admission of debt from file—Filed under misapprehension.*]—The Ct. of Bkpcy. has not jurisdiction to take an admission of debt off the file, on the ground that it was filed under a misapprehension of its effect, or in circumstances which, if known to the ct., would have entitled debtor to obtain an extension of time from the ct.—*Re* HUTCHINGS (1859), 10 I. Ch. R. 108.—IR.

907. —— —— Effect of failure to execute bond.]—An order was made upon a debtor's summons that debtor should, within seven days from service on him, execute a bond with two sureties to be approved by the ct., to pay what might be recovered against him by the summoning creditor in any proceedings taken for the sum mentioned in the summons, & that all proceedings on the summons should be stayed until the ct. in which the proceedings should be taken should have come to a decision thereon. Debtor proposed sureties who were objected to, but the registrar never gave any notice of a time & place for the execution of the bond. The bond was not executed within the seven days:—*Held:* as the order to give security stayed the proceedings on the summons unconditionally, no act of bkpcy. had been committed by debtor by his not having executed the bond within the seven days. *Semble:* though the registrar committed a serious default in not giving notice of a time & place for the execution of the bond, such irregularity might have been got over.—*Re* JOHNSON, *Ex p.* JOHNSON. (1870), 5 Ch. App. 741; 23 L. T. 291; 18 W. R. 1097, L. J.

Annotation:—**Mentd.** Johnson *v.* Emerson (1871), L. R. 6 Exch. 329.

908. —— Whether security for costs will be required.]—Where a debtor's summons is ordered to stand over for an action to be brought, the ct. will not require alleged debtor to give security, where there is as much probability of deft. as of pltf. succeeding in the action.—*Re* TURNER, *Ex p.* TURNER (1874), 10 Ch. App. 175; 44 L. J. Bcy. 112; 31 L. T. 532, L. JJ.

Annotation:—**Mentd.** *Re* Latham, *Ex p.* Latham (1876), 4 Ch. D. 105.

909. —— ——.]—A debtor's summons was founded upon a bill of exchange. The summoning creditor had, before the hearing of the summons, commenced an action against debtor upon the bill, which debtor had obtained leave to defend without giving any security. He had then pleaded want of consideration. He also alleged that the holder had notice of the want of consideration:—*Held:* having regard to these facts, the proceedings upon the summons ought to be stayed pending the trial of the action, without security being required from debtor.—*Re* LATHAM, *Ex p.* LATHAM (1876), 4 Ch. D. 105; 35 L. T. 674; *sub nom. Re* FORSTER, *Ex p.* LATHAM & FORSTER, 25 W. R. 231.

Annotation:—**Distd.** *Re* Smith, *Ex p.* Hosford (1877), 6 Ch. D. 215, C. A.

910. —— ——.]—The discretion which the ct. has, upon staying proceedings on a debtor's summons, to order security to be given by debtor must not be exercised adversely to a solvent debtor where there is a *bonâ fide* question in course of litigation between him & the creditor, upon the result of which will depend the validity or amount of the debt in question.

A., the vendor of a co. by the articles of agreement guaranteed a dividend of 10 per cent. for five years upon the paid-up capital of the co. for the time being. The business resulted in a loss for the first two years, whereupon A. paid the dividends for that period so guaranteed by him, but refused to pay the guaranteed dividends for the third year, which also resulted in a loss. The co. having gone into liquidation, the liquidator issued a debtor's summons against A. for the unpaid dividend, which A. opposed on the ground that the accounts between him & the co. had not been fully taken, & that it would appear upon taking such accounts that by reason of a set-off & other *bonâ fide* defences, the co. was indebted to him, not he to the co. There was no suggestion of debtor's insolvency:—*Held:* in the circumstances, the proceedings should be stayed without security.—*Re* BROWN, *Ex p.* BROWN (1878), 26 W. R. 518, C. A.

911. —— ——.]—Where debtor, against whom a debtor's summons has been issued, is solvent, & there is a *bonâ fide* dispute as to the debt, the ct. will not necessarily order the proceedings to be stayed without security, pending a trial of the validity of the debt. One of the questions which the ct. will consider is, whether the creditor has a probability of success in an action.—*Re* PINCOFFS, *Ex p.* JACOBSON (1882), 22 Ch. D. 312; 52 L. J. Ch. 561; 48 L. T. 197; 31 W. R. 554, C. A.

912. —— ——.]—Where the proceedings under a debtor's summons are stayed pending an action to try the validity of an alleged debt, & in the opinion of the ct. there is more than a reasonable probability that alleged debtor has a good defence to the action, the ct. will not require debtor to give security.—*Re* SMITH BROTHERS, *Ex p.* SMITH (1883), 48 L. T. 320.

See 1914 Act, s. 5 (5).

913. —— —— Question of debtor's solvency material—Discretion of court.]—A creditor issued a debtor's summons for £442, the alleged balance of an account for goods supplied. The creditor had previously brought an action & had issued another debtor's summons against alleged debtor for the same sum. The action had been by consent dismissed for want of prosecution, & the summons had been also dismissed. Debtor applied to the ct. to dismiss the second summons, & made an affidavit that he was not indebted in the sum claimed. On the hearing of the application, the proceedings in the action & on the first debtor's summons were put in evidence. Debtor was not examined, & no other evidence was adduced on his behalf. The creditor was examined & cross-examined, & stated that he had made many applications during several years to debtor for payment, & had been put off with excuses. The registrar held that debtor must give security for the alleged debt & costs, pending the trial of an action to establish the validity of the claim, & the decision was affirmed by the Chief Judge:—*Held:* the registrar was right in requiring security, there being ground for suspecting the solvency of debtor.

In determining whether security ought to be given upon an application to dismiss a debtor's summons, regard must be had to the question of debtor's solvency, as well as to the possibility of his establishing his defence, but the requiring of security being a matter of judicial discretion, the Ct. of Appeal will not interfere with the exercise of the primary judge's discretion, unless it can see clearly that the discretion has been improperly exercised.—*Re* MARSHALL, *Ex p.* MARSHALL (1877), 5 Ch. D. 873; 37 L. T. 42; 2 W. R. 762, C. A.

914. —— —— No attempt by plaintiff to obtain security for debt.]—When an order is made staying the proceedings on a debtor's summons, the fact that in a pending action by the summoning creditor for the same debt, with a specially indorsed writ, pltf. has not attempted under Rules of Ct., 1875, Ord. 14, rr. 1, 6, to obtain security for the debt is not a conclusive reason for staying the proceedings on the summons without security.—*Re* SMITH, *Ex p.* HOSFORD (1877), 6 Ch. D. 215: 37 L. T. 44; 25 W. R. 799, C. A.

Sect. 2.—What is an act of bankruptcy: Sub-sect. 10, E. F. & G. (a).]

Removal of admission of debt from file.]—*See* No. 796, *ante*.

Stay & adjournment of applications to dismiss & set aside summons or notice.]—*See* Nos. 915, 931–933, *post*.

F. Compliance with Summons or Notice.

915. Whether necessary—Application to dismiss summons—Stay ordered.]—A debtor's summons having been served on pltf., a trader, an application was made by him to dismiss it, & on Apr. 12 an order was made that a bond with sureties should be executed by pltf., within seven days of service of the order, & an action brought to try the debt; the order also contained a stay of proceedings. The order was served on the 13th, & notice of securities was given on the 18th; but no appointment was made by the registrar, & the bond was never executed:—*Held:* (1) (KELLY, C.B., & CLEASBY, B.) an application to dismiss the debtor's summons having been made & a stay of proceedings ordered, no act of bkpcy. was committed by pltf. in not paying, securing or compounding for the alleged debt within seven days from the service of the summons; (2) (MARTIN & BRAMWELL, BB.), under 1869 Act, s. 6 (6) an act of bkpcy. was committed at the expiration of the seven days from the service of the summons, pltf. not having paid, secured, or compounded for the debt.—JOHNSON *v.* EMERSON (1871), L. R. 6 Exch. 329; 40 L. J. Ex. 201; 25 L. T. 337.

Annotation:—**Mentd.** Quartz Hill Consolidated Gold Mining Co. *v.* Eyre (1883), 11 Q. B. D. 674, C. A.

916. —— Debtor disputing validity of notice & claiming set-off.]—On the advance of £400 by a bank to one of their customers a surety executed a charge on certain money & guaranteed repayment of the sum advanced. Other persons also gave separate guarantees to the bank & deposited securities with them in respect of the customer's accounts & overdrafts. The surety having paid to the bank on another transaction the sum of £212 18*s.* 3*d.*, which was admittedly 10*d.* too much, & having paid off the £400 guarantee brought an action, which was dismissed with costs, against the bank to get back the guarantee. The bank issued a bkpcy. notice against him in respect of the costs without giving credit for the overpayment by him to the bank, & after he had given formal notice that he disputed the validity of their notice, an application by him to set it aside was dismissed with costs. A receiving order, from which the surety appealed, having been made against him on a bkpcy. petition founded on the notice:—*Held:* if there was a set-off equal to the amount claimed on the judgment debt, debtor should set it up & claim such a set-off, but if the set-off was less than the amount of the debt, it was an act of bkpcy. not to comply with the notice, though debtor would be entitled on the hearing of the petition to show that the set-off reduced the debt below the amount necessary to support the petition.—*Re* DEBTOR (No. 8 of 1919), *Ex p.* DEBTOR (1919), 88 L. J. K. B. 1248; [1918–9] B. & C. R. 221, D. C.

917. Sufficiency of compliance—Tender of debt without costs.]—A tender of the debt, without costs, before the day on which the summons is returnable, is sufficient.—ANON. (1854), 23 L. T. O. S. 129.

918. —— Payment by bill of exchange.]—A bill was given by a debtor, upon whom a bkpcy. notice had been served, for the amount of the judgment debt, & was taken by the creditor:—*Held:* such bill was sufficient satisfaction of the requirements of the bkpcy. notice under 1883 Act, s. 4 (1) (*g*), so as to prevent such creditor afterwards proceeding to obtain a petition against debtor on the bkpcy. notice.—*Re* MATTHEW, *Ex p.* MATTHEW (1884), 12 Q. B. D. 506; 51 L. T. 179; 32 W. R. 813; 1 Morr. 47, C. A.

919. —— Conduct of creditor rendering actual production of money unnecessary.]—Where a creditor has issued a summons to his debtor, & debtor attends & admits part of the debt & tenders the part he admits, the creditor may by his conduct render it unnecessary for debtor actually to produce & show the money in order to comply with 1849 Act, s. 82.—*Re* FARLEY, *Ex p.* DANKS (1852), 2 De G. M. & G. 936; 22 L. J. Bcy. 73; 1 W. R. 57; 42 E. R. 1138, C. A.

920. Within what time—On expiration of time limited by 1869 Act, s. 6 (6).]—The non-compliance with a debtor's summons is a completed act of bkpcy., available against debtor for adjudication on the expiration of the time limited by the above sub-sect., & if notice of such non-compliance be given to another creditor before any petition for adjudication has been filed, it will prevent such creditor from availing himself of the protection of s. 94.—*Re* BUCHAN, *Ex p.* HANKIN (1875), 10 Ch. App. 267; 44 L. J. Bcy. 74; 32 L. T. 316; 23 W. R. 401, L. JJ.

Annotation:—**Consd.** Hood *v.* Newby (1882), 21 Ch. D. 605, C. A.

921. —— Before expiry of last moment of last day.]—The act of bkpcy., in failing to comply with a bkpcy. notice, is complete at the last moment of the day on which the notice can be complied with.—*Re* MAUD, *Ex p.* TOWNEND (1891), 64 L. T. 743; 40 W. R. 47; 7 T. L. R. 511; 8 Morr. 144, D. C.

922. Effect of compliance—Giving security to satisfaction of creditor.]—A bkpcy. notice was served by a judgment creditor on debtor. An agreement was entered into between the creditor & debtor that the latter should pay £75 in cash to the creditor, & hand over to him a specified bill of exchange. Debtor also undertook to have transferred to the creditor fully paid-up shares in a specified co., with liberty to debtor to re-

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PART II. SECT. 2, SUB-SECT. 10.—F.

921 i. *Within what time—Before expiry of last moment of last day.*]—A debtor summons was served on Jan. 3; the debt was not paid until after noon on Jan. 11. The summoning creditor filed a petition in bkpcy. before noon on Jan. 11, & an adjudication was pronounced, the act of bkpcy. relied on being that the trader had not within seven days from the service of the debtor summons paid, secured, or compounded for the debt:—*Held:* the act of bkpcy. being complete on the last moment of the seventh day, might be treated as having been committed at any time on the eighth day.—*Re* SMITH & Co. (1859), 8 I. Ch. R. 374.—IR.

b. —— *Enlargement of time—When granted.*]—Where a petition for an arrangement had been filed, & protection from process granted, & afterwards a creditor issued a debtor's summons, the ct. enlarged the time for calling on the trader to state whether or not he admitted the demand, until after the time appointed for the first sitting under the arrangement clauses.—ANON. (1858), 7 I. Ch. R. 293.—IR.

c. —— —— ——.]—When a debtor's summons has been served on a debtor, who subsequently files a petition for arrangement, the enlargement of the time given by 20 & 21 Vict. c. 60, s. 11, to answer it, is entirely in the discretion of the ct., which will be influenced by considering whether or not the arrangement is likely to be sanctioned by the ct.—*Re* DOBSON (1859), 8 I. Ch. R. 388.—IR.

d. —— —— *Jurisdiction of court.*]—When a debtor's summons has been served on a debtor who subsequently files his petition for arrangement, the ct. has not jurisdiction under Irish 1872 Act, to enlarge the time, until after the time appointed for the first private sitting in the arrangement matter, for paying, securing, or compounding for the debt.—*Re* W. & N. (1873), 7 I. L. T. 180.—IR.

purchase the shares within a year, at the amount of the judgment debt & taxed costs, with interest thereon. This was "to be security for the debt, but judgment still to be in full force." The £75 was paid & the bill of exchange was handed over to the creditor, & an order setting aside the bkpcy. notice was made by consent. The agreement was carried out:—*Held:* security for the debt to the satisfaction of the creditor having been given within seven days after service of the notice, the requirements of the notice had been complied with, &, debtor not having committed any default, the creditor was not entitled during the pendency of the security to serve debtor with a fresh bkpcy. notice in respect of the same debt.—*Re* SMITH, *Ex p.* DURBAN, [1903] 1 K. B. 33; 72 L. J. K. B. 30; 87 L. T. 586; 51 W. R. 118; 9 Mans. 341; *sub nom. Re* DEBTOR, *Ex p.* DEBTOR, 19 T. L. R. 13; 47 Sol. Jo. 29, C. A.

Annotation:—**Mentd.** *Re* Vogel, *Ex p.* Anglo-Eastern Contract Co. (1913), 109 L. T. 325, D. C.

923. Effect of failure to comply—Qualified act of bankruptcy.]—The act of bkpcy. committed by non-compliance with a debtor's summons:—*Held:* only a qualified act of bkpcy.—*Re* MOOJEN, *Ex p.* BOUCHARD (1879), 12 Ch. D. 26; 48 L. J. Bcy. 105; 41 L. T. 363; 28 W. R. 129, C. A.

Annotations:—**Distd.** Hood *v.* Newby (1882), 21 Ch. D. 605, C. A. **Apld.** Tomlinson *v.* Hampson (1894), 38 Sol. Jo. 401; *Re* Gordon, *Ex p.* Navalchand, [1897] 2 Q. B. 516. **Refd.** Levy *v.* Lovell (1880), 49 L. J. Ch. 305, C. A.; The Cella (1888), 13 P. D. 82, C. A.; *Re* Ford, *Ex p.* Trustee, [1900] 2 Q. B. 211.

See, now, 1914 Act, s. 1 (1) (*g*), which makes an act of bkpcy. available for any creditor.

924. When act of bankruptcy complete.]—A creditor, on July 21, 1870, served on a non-trader a debtor's summons for a sum exceeding £50. Debtor filed an affidavit denying the debt, & on Aug. 5 obtained the common order that he should give security within seven days, & that on his so doing proceedings should be stayed till the ct., in which proceedings should be taken for recovery of the debt, had come to a decision. On Aug. 12 an order was made by consent giving him a week's further time to complete the security. He never gave the security, & on Feb. 16, 1871, the creditor filed a petition for adjudication, on the ground of neglect to pay, secure, or compound for the debt:—*Held:* there was a complete act of bkpcy. at the expiration of three weeks from the service of the summons.—*Re* WIER, *Ex p.* WIER (1871), 6 Ch. App. 875; 41 L. J. Bcy. 14; 25 L. T. 369; 19 W. R. 1042, L. JJ.

Annotations:—**Apld.** *Re* Moojen, *Ex p.* Bouchard (1879), 12 Ch. D. 26, C. A. **N. F.** *Re* Powell, *Ex p.* Powell, [1891] 2 Q. B. 324, D. C. **Mentd.** *Re* Shorey, *Ex p.* Shorey (1872), 21 W. R. 105; *Re* Green (1881), 44 L. T. 619, C. A.

See, also, Nos. 920, 921, *ante.*

G. Dismissal of and Setting aside Summons or Notice.

(*a*) *In General.*

925. Jurisdiction of court—Limitation on.]—The jurisdiction to set aside a bkpcy. notice is limited by stat. to cases where debtor has a counterclaim, set-off, or cross demand, which he could not set up in the action; & the ct. cannot go behind the judgment & inquire into the validity of the judgment debt.—*Re* EASTON, *Ex p.* DIXON (1893), 9 T. L. R. 408; 37 Sol. Jo. 479; 10 Morr. 111, D. C.

Annotations:—**Distd.** *Re* Clark, *Ex p.* Beyer, Peacock, [1896] 2 Q. B. 476, C. A. **Refd.** *Re* Cole, *Ex p.* Attenborough, [1898] 1 Q. B. 290, D. C.

See, further, Part VIII., *post.*

926.—— ——.]—A bkpcy. notice can only be set aside on the grounds mentioned in 1883 Act & Rules.—*Re* COLE, *Ex p.* ATTENBOROUGH, [1898] 1 Q. B. 290; 67 L. J. Q. B. 302; 78 L. T. 23; 46 W. R. 352; 5 Mans. 19, D. C.

927. —— That creditor has not offered to surrender or value security.]—A debtor's summons by a secured creditor cannot be dismissed, on the ground that he does not offer to give up his security or have it valued, though he must do so in order to obtain an adjudication in bkpcy. against debtor.—*Re* GILES, *Ex p.* MAURITZ (1870), 5 Ch. App. 779; 39 L. J. Bcy. 56; 23 L. T. 293; 18 W. R. 1097, L. JJ.

Annotation:—**Folld.** Barnfather *v.* Barrow, Barrow, Page & Draper (1877), 37 L. T. 231.

928. —— Composition deed—Creditor not bound thereby—Secret advantage given to some creditors.]—Debtor, against whom no proceedings in bkpcy. had been taken, entered into an agreement with his creditors, by which he agreed to pay 10*s.* in the pound within six years to any creditors signing the deed of arrangement, & the creditors covenanted by the deed not to sue debtor, or to enforce any judgment already obtained, & to forgo all their claims on him if the provisions of the deed were carried out. The deed was signed by a creditor, who had previously obtained a final judgment against debtor, & after such creditor had signed three other creditors signed the deed, who, it was subsequently discovered, had received from debtor's brother, with the knowledge of debtor, certain other payments over & above the 10*s.* in the pound secured by the deed:—*Held:* the order of the registrar refusing to set aside a bkpcy. notice served upon debtor by the creditor who had obtained a final judgment was a right order, such creditor being no longer bound by the deed.—*Re* MILNER, *Ex p.* MILNER (1885), 15 Q. B. D. 605; 54 L. J. Q. B. 425; 53 L. T. 652; 33 W. R. 867; 1 T. L. R. 553; 2 Morr. 190, C. A.

See, also, cases in Part XXIII., *post.*

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923 i. *Effect of failure to comply—Discretion of court.*]—Under New South Wales Bkpcy. Acts, 1887—8, an act of bkpcy. may be constituted by non-compliance with a bkpcy. notice under s. 4 (2) of the principal Act. Ample discretion is vested in the judge to grant or refuse a sequestration order founded on the notice, & if granted to discharge or annul it. But no jurisdiction is given by the Acts to annul an act of bkpcy. or declare that it never was committed, & jurisdiction cannot be given by a rule of procedure framed under s. 119.—KING *v.* HENDERSON, [1898] A. C. 720; 67 L. J. P. C. 134; 79 L. T. 37; 47 W. R. 157, P. C.—**AUS.**

PART II. SECT. 2, SUB-SECT. 10.—G. (a).

925 i. *Jurisdiction of court—Denial of debt by debtor.*]—If a trader being summoned with a view to admit or deny the demand of the summoning creditor, swears that he does not owe the debt, & that he has a good defence as to the whole, he cannot be called upon to enter into a bond to secure any sum that may be recovered from him in an action, & he is discharged from the summons.—*Re* COMMERFORD (1851), 17 L. T. O. S. 190.—**IR.**

e. *Summons set aside for irregularity after non-compliance—Effect.*]—After the lapse of fourteen days from the date of a debtor's summons, an order *nisi* for sequestration was made on the ground of such summons not having been complied with, but before the order *nisi* came on to be heard, the debtor's summons was set aside for irregularity:—*Held:* there were proper materials for making the order *nisi* at its date, & order made absolute, notwithstanding the subsequent setting aside of the debtor's summons.—*Re* LAWLER (1878), 4 V. L. R. 8.—**AUS.**

f. *Notice to dismiss—Service of.*]—Where the creditor appears by a solr., notice to dismiss a debtor's summons must be served at the address given by such solr., & personal service upon the creditor is not sufficient in such a case.—*Re* CAMERON (1892), 26 I. L. T. 108.—**IR.**

g. *Onus of proof.*]—Upon a motion by a debtor to dismiss a debtor's summons, the onus lies on him in the first instance to open & establish a case sufficient to displace the debtor's summons.—*Re* DRUMGOOLE, *Ex. p.* DRUMGOOLE (1887), 21 I. L. T. 32.—**IR.**

Sect. 2.—What is an act of bankruptcy: Sub-sect. 10, G. (a) & (b); sub-sect. 11, A. & B.]

929. —— Creditor preventing compliance—Obtaining charging order on shares.]—A judgment creditor, who had served a bkpcy. notice on debtor under 1883 Act, s. 4 (1) (*g*), within the seven days allowed for complying with the notice obtained a charging order on certain shares belonging to debtor:—*Held:* by so attaching the shares the creditor had not prevented debtor from paying the judgment debt, & debtor was not entitled to have the bkpcy. notice set aside.

In such case the question must be whether the creditor by what he has done has in fact prevented debtor from complying with the notice, & if all that the creditor has done is to make it more difficult, but not to prevent the payment, it is not sufficient.—*Re* SEDGWICK, *Ex p.* McMURDO (1888), 60 L. T. 9; 37 W. R. 72; 5 T. L. R. 4; *sub nom. Re* SEDGWICK, *Ex p.* SEDGWICK, 5 Morr. 262, C. A.

Annotations:—**Consd.** *Re* Renison, *Ex p.* Greaves, [1913] 2 K. B. 300. **Apld.** *Re* Wilson, *Ex p.* Jones (1916), 85 L. J. K. B. 1408, C. A. **Refd.** *Re* Lupton, *Ex p.* Lupton (1911), 55 Sol. Jo. 717. **Mentd.** *Re* Dennis, *Ex p.* Dennis (1888), 60 L. T. 348, C. A.

See, also, cases in Part III., Sect. 1, sub-sect. 3, B, *post.*

930. —— That debtor should have time to make arrangement.]—The fact that the granting of time to debtor would be fair & right is not a ground for setting aside a bkpcy. notice.—*Re* COLE, *Ex p.* ATTENBOROUGH, [1898] 1 Q. B. 290; 67 L. J. Q. B. 302; 78 L. T. 23; 46 W. R. 352; 5 Mans. 19, D. C.

931. —— To adjourn application to dismiss or set aside—Dispute as to indebtedness—Failure of debtor to give security.]—A creditor took bkpcy. proceedings by way of debtor's summons against A., who filed an affidavit denying the debt & applied to dismiss the summons. The county ct. judge refused such application, & as debtor was not able to give the required security, refused to send the question of indebtedness to be tried by a jury:—*Held:* the county ct. judge had arrived at a right decision.—*Re* ROWBOTHAM, *Ex p.* ROWBOTHAM (1871), 25 L. T. 921.

932. —— —— Action by debtor to set aside judgment—Evidence of reasonable ground for action.]—Debtor, after the service of a bkpcy. notice upon him, commenced an action against his creditor to set aside the judgment on which such notice was founded, & prayed that an account might be taken, & made other claims in the nature of a counterclaim. Debtor delivered the statement of claim in the action, & applied to the ct. to dismiss the bkpcy. notice. The registrar, after reading the statement of claim, adjourned the application *sine die*, with liberty to apply:—*Held:* the statement of claim was not evidence, & the registrar, before interfering with the operation of the bkpcy. notice, ought to have been satisfied by evidence that debtor had at any rate some reasonable ground for bringing the action.—*Re* FOSTER, *Ex p.* BASAN (1885), 2 Morr. 29, C. A.

933. —— —— That debtor should have time to make arrangement.]—An application to set aside a bkpcy. notice can only be adjourned on the grounds mentioned in 1883 Act & Rules; & the fact that the granting of time to debtor to allow him to make a proposed arrangement would be fair & right, is insufficient to justify the adjournment of an application to set aside a bkpcy. notice.—*Re* COLE, *Ex p.* ATTENBOROUGH, [1898] 1 Q. B. 290; 67 L. J. Q. B. 302; 78 L. T. 23; 46 W. R. 352; 5 Mans. 19, D. C.

See, also, Nos. 901 *et seq.*, *ante.*

934. Locus standi of debtor — What debtor must deny in affidavit.]—Form of affidavit (*see* No. 902, *ante*) sufficient to give the person summoned by a debtor's summons a *locus standi* upon an application to dismiss the summons.—*Re* KIDDELL, *Ex p.* ROWAN (1874), 9 Ch. App. 617; 43 L. J. Bcy. 96; 30 L. T. 625; 22 W. R. 784, L. J.

Annotation:—**Mentd.** Cadiz Waterworks Co. *v.* Barnett (1874), L. R. 19 Eq. 182.

935. —— ——.]—Debtor may have a debtor's summons dismissed for irregularity, although he has not distinctly denied the debt in his affidavit.—*Re* TORKINGTON, *Ex p.* TORKINGTON (1874), 9 Ch. App. 298; 22 W. R. 602, L. C. & L. JJ.

Annotations:—**Consd.** Blaiberg *v.* Parke (1882), 10 Q. B. D. 90. **Refd.** *Re* Lowenthal, *Ex p.* Lowenthal (1874), 9 Ch. App. 324, L. C. & L. J.

936. Appeal from refusal to set aside—What notice required.]—The notice of appeal from a refusal to set aside a bkpcy. notice is a fourteen days' notice. Where such notice was not given, the ct. directed the case to stand over to a certain day until the required time had elapsed, & notice to be given to the creditor that the ct. had appointed such day for the hearing of the appeal.—*Re* PHILLIPS, *Ex p.* PHILLIPS (1888), 5 Morr. 187, D. C.

(b) Counterclaim, Set-off, or Cross-demand.

937. Which could have been set up in action—Leave to defend given on conditions.]—A creditor obtained judgment against debtor by default. Debtor obtained leave to defend on payment into ct., which he failed to do. A bkpcy. notice having been issued, & debtor having refused to give security:—*Held:* he had not an effective set-off against the judgment debt, which he could not have set up in the action, as the fact that unconditional leave to defend the action had not been given was no ground for saying that debtor could not have set up in the action an effective set-off which he alleged appeared in evidence.—*Re* ISAAC, *Ex p.* ISAAC (1885), 2 Morr. 258, D. C.

938. No mutuality — Claim able to be set up after receiving order granted.]—Where the liquidator of a co. has obtained judgment against a shareholder for unpaid calls a bkpcy. notice issued by the liquidator in respect of that judgment debt will not be set aside, although the shareholder has a claim against the co. for a larger amount than the amount of the judgment debt, which for want of mutuality he could not set up in the action for the calls, but which he will be able to set off against the judgment debt when a receiving order is made.

A bkpcy. notice is not of necessity bad because, if bkpcy. ensues, the debt will be discharged by a

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PART II. SECT. 2, SUB-SECT. 10.—G. (b).

937 i. *Which could have been set up in action.*]—Debtor, in an action against him by D. & Co., pleaded a contract by way of cross-action, but the plea was disallowed on the grounds (1) the contract was not proved, & (2) if it had been proved, it did not arise out of the same subject-matters as that upon which D. & Co. sued. D. & Co., having obtained judgment issued a bkpcy. notice thereon. Upon an application to set aside the notice on the ground that debtor had a cross demand under the above contract which he could not set up in the action:—*Held:* (1) the ct. had only to be satisfied as to the *bonâ fides* of the cross demand & was not called upon to decide its validity; (2) debtor was not precluded from claiming under the contract alleged by him in his plea in the action, the question whether the contract was proved having only become collaterally a question in the action.—*Re* M. (1909), 10 S. R. N. S. W. 175.—AUS.

set-off (ROMER, L.J.).—*Re* G. E. B. (A DEBTOR), [1903] 2 K. B. 340; 72 L. J. K. B. 712; 89 L. T. 245; 10 Mans. 243; *sub nom. Re* A DEBTOR, 51 W. R. 675; 47 Sol. Jo. 618, C. A.

Annotations:—**Mentd.** Lister *v.* Hooson (1907), 77 L. J. K. B. 161, C. A.; *Re* A Debtor, *Ex p.* Peak Hill Goldfield, [1909] 1 K. B. 430, C. A.

939. Must be mutual & in same right.]—When debtor applies to set aside a bkpcy. notice, on the ground that he has a counterclaim which equals or exceeds the amount of the judgment on which the bkpcy. notice is founded, such counterclaim must be mutual & due in the same right, *e.g.* in answer to a judgment obtained against him by exors. in their personal capacity debtor cannot set up a claim against their testator's estate.—*Re* MOLESWORTH (1907), 51 Sol. Jo. 653, C. A.

940. Claim assigned to debtor after service of notice.]—A judgment creditor served a bkpcy. notice upon debtor in respect of the judgment debt. Debtor after the service of the bkpcy. notice obtained an assignment to himself of a debt due from the judgment creditor to a firm of which debtor was a member, which was alleged by debtor to exceed the amount of the judgment debt, & applied to set aside the bkpcy. notice on the ground that he had a counterclaim which exceeded the amount of the judgment debt, & which he could not set up in the action in which the judgment was obtained:—*Held*: even assuming debtor could, had he so chosen, have obtained the assignment in time to set up the counterclaim in the action, the bkpcy. notice must be set aside, inasmuch as debtor could not as matters stood at the time the action was proceeding have set up the counterclaim.—*Re* A DEBTOR (No. 37 of 1914), [1914] 3 K. B. 726; 84 L. J. K. B. 133; 111 L. T. 412; 58 Sol. Jo. 784; [1915] H. B. R. 16.

SUB-SECT. 11.—GIVING NOTICE OF SUSPENSION OR INTENDED SUSPENSION OF PAYMENT.

A. In General.

941. Need not be in writing.]—A notice by debtor that he has suspended, or that he is about to suspend payment of his debts, need not, in order that it may constitute an act of bkpcy., be in writing. It is sufficient if a verbal statement to that effect be made by debtor to one of his creditors.—*Re* WALKER, *Ex p.* NICKOLL (1884), 13 Q. B. D. 469; 1 Morr. 188, D. C; *subsequent proceedings* on appeal, 1 Morr. 249, C. A.

942. —— Must be formal—With deliberate intention.]—A notice by debtor that he has suspended, or is about to suspend, payment of his debts may be given orally, but it must be given formally & deliberately, & with the intention of giving notice.—*Re* FRIEDLANDER, *Ex p.* OASTLER (1884), 13 Q. B. D. 471; 54 L. J. Q. B. 23; 51 L. T. 309; 33 W. R. 126; 1 Morr. 207, C. A.

Annotations:—**Consd.** *Re* Wolstenholme, *Ex p.* Wolstenholme (1885), 2 Morr. 213, D. C.; *Re* Walsh, *Ex p.* Trustee (1885), 52 L. T. 694, D. C.; *Re* Lamb, *Ex p.* Gibson & Bolland (1886), 55 L. T. 817, D. C. **Refd.** Crook *v.* Morley, [1891] A. C. 316, H. L.; *Re* Entwistle, *Ex p.* Turner (1891), 65 L. T. 349, D. C. **Mentd.** Hill *v.* Rowlands, [1896] 2 Q. B. 124.

943. Must be intention to suspend payment in ordinary course—Whether debtor is trader material.]—To constitute a notice by debtor that he has suspended or is about to suspend payment of his debts, the statement must be a statement of intention to suspend payment in ordinary course. In deciding whether such a statement amounts to a notice, it is material whether debtor is a trader or non-trader.—*Re* SCOTT, *Ex p.* SCOTT, [1896] 1 Q. B. 619; 65 L. J. Q. B. 465; 44 W. R. 587; 40 Sol. Jo. 731; 3 Mans. 102, D. C.

Annotations:—**Distd.** *Re* A Debtor (1912), 28 T. L. R. 386, D. C. **Refd.** *Re* Reis, *Ex p.* Clough, [1904] 2 K. B. 769, C. A.

944. Effect of words used on mind of creditor immaterial.]—Words, which in themselves do not amount to a notice of intention of suspension of payment of debts, cannot, by reason of their effect on the mind of the person to whom they are addressed, constitute such a notice so as to create an act of bkpcy.—*Re* PHILLIPS, *Ex p.* THOMAS (W.) & Co. (1897), 76 L. T. 531; 41 Sol. Jo. 470, D. C.

945. Rule for construing circular calling meeting of creditors.]—Circulars issued by non-traders calling meetings of their creditors should not be construed as notices of intention to suspend payment, unless the terms plainly indicate such an intention.—*Re* A DEBTOR, *Ex p.* PETITIONING CREDITORS *v.* DEBTOR (1912), 106 L. T. 812; 28 T. L. R. 386; *sub nom. Re* A DEBTOR (No. 4 of 1912, SALFORD), 56 Sol. Jo. 482, D. C.

946. Admissibility in evidence—Of written notice given "without prejudice."]—A written notice by a debtor to a creditor that he is about to suspend payment of his debts is admissible in evidence to prove an act of bkpcy., notwithstanding that the notice is expressed to be "without prejudice."—*Re* DAINTREY, *Ex p.* HOLT, [1893] 2 Q. B. 116; 62 L. J. Q. B. 511; 69 L. T. 257; 41 W. R. 590; 9 T. L. R. 452; 37 Sol. Jo. 480; 10 Morr. 158; 5 R. 414, D. C.

947. Statement by third party—Must be authorised.]—M. wrote to the manager of his bank to instruct P., his solr., to call a meeting of his creditors. Subsequently P. told T., a creditor, that M. had given him instructions to call his creditors together, because he could not pay his debts:—*Held*: the conversation was not notice by M., through his agent, that he had suspended, or was about to suspend, payment, as P. was not authorised by the debtor to give any such oral notice, but only to issue a circular on a future date.—*Re* MORGAN, *Ex p.* TURNER (1895), 73 L. T. 448; 44 W. R. 96; 40 Sol. Jo. 36; 2 Mans. 508, D. C.

Annotation:—**Mentd.** *Re* Boocock, *Ex p.* Walker (1916), 114 L. T. 903, D. C.

948. Effect of moratorium.]—Debtor gave notice of suspension of payment, at a time when a moratorium proclamation was in force, extending the time for payment of debts:—*Held*: there was nothing in the proclamation to prevent debtor from committing an act of bkpcy. by giving notice of suspension of payment.—*Re* SAHLER (1914), 84 L. J. K. B. 1275; 112 L. T. 133; 59 Sol. Jo. 106; [1915] H. B. R. 119, D. C.

B. Sufficiency of Statements, etc.

949. Offer of composition.]—Debtor having called his creditors together, made to them an offer of a certain amount in the pound:—*Held*: this did not amount to a declaration of intention to suspend payment, & did not constitute an act of bkpcy.—*Re* WALSH, *Ex p.* THE TRUSTEE (1885), 52 L. T. 694; 2 Morr. 112, D. C.

PART II. SECT. 2, SUB-SECT. 11.—A.

942 i. *Need not be in writing—Must be formal—With deliberate intention.*]—*Re* MISSEN, *Ex p.* OFFICIAL ASSIGNEE, BANK OF NEW SOUTH WALES (1893), 14 N. S. W. B. 24.—**AUS.**

942 ii. —— —— ——.]—The statement must not be mere casual conversation, but must be of a formal nature & voluntary to the extent, at all events, of deliberately expressing a then existing intention of debtor that he will not or cannot meet his liabilities as they become due. Such statement may be made in a conversation with a single creditor, or in answer to a question put to elicit the expression of the intention of debtor.—*Re* PIKE, *Ex p.* OFFICIAL ASSIGNEE, JOHNSON (1896), 17 N. S. W. B. 34.—**AUS.**

Sect. 2.—What is an act of bankruptcy: Subsect. 11, B.]

Annotations :—**Consd.** *Re* Lamb, *Ex p.* Gibson & Bolland (1886), 55 L. T. 817, D. C. **Refd.** *Re* Wolstenholme, *Ex p.* Wolstenholme (1885), 2 Morr. 213, D. C.; *Re* Entwistle, *Ex p.* Turner (1891), 65 L. T. 349, D. C.; Crook *v.* Morley, [1891] A. C. 316, H. L.

950. —— Statement that debtor going out of business.]—Debtor through his agents issued a circular to his creditors setting out a statement of his affairs & offering them a certain amount in the pound, adding that he had no other property & that he was going out of business & into some situation :—*Held :* this circular amounted to a declaration by debtor that he was about to suspend payment & was an act of bkpcy.—*Re* LAMB, *Ex p.* GIBSON & BOLLAND (1887), 3 T. L. R. 303; 4 Morr. 25, C. A.

Annotations :—**Consd.** *Re* Entwistle, *Ex p.* Turner (1891), 65 L. T. 349, D. C. **Apld.** Crook *v.* Morley, [1891] A. C. 316, H. L.; *Re* Selwood, *Ex p.* Dash (1894), 1 Mans. 66, D. C.; *Re* Waite, *Ex p.* Bentley's Yorkshire Breweries (1894), 71 L. T. 778, D. C.; *Re* Phillips, *Ex p.* Thomas (W.) (1897), 76 L. T. 531, D. C. **Consd.** Clough *v.* Samuel, [1905] A. C. 442, H. L. **Distd.** *Re* Midgley (1913), 108 L. T. 45, D. C.

951. —— No statement as to intentions if offer refused.]—Debtor wrote letters to petitioning creditor in which he made an offer of a dividend, but abstained from saying what the consequences would be, or, rather, what he would do, if his offer were not accepted :—*Held :* the letters did not amount to a notice of suspension.—*Re* POPE, *Ex p.* M'LAURIN & Co. (1891), 7 T. L. R. 231, D. C.

952. —— Accompanied by statement of affairs —Debtor's stock-in-trade sold off.]—A circular addressed by debtor's solr. to all the creditors, after explaining the state of debtor's affairs, which showed unsecured creditors to the amount of £640, with assets £60, & that the stock-in-trade of debtor had been sold off, continued :—" Debtor's friends are willing to come forward to help him to arrange his affairs, if it can be done without resort to bkpcy., & I am instructed by them to offer for your acceptance a composition of 3*s.* in the pound payable at three & six months. This composition, if accepted, will be fully secured, & I shall be obliged by your at once informing me what you will do in the matter." A creditor's petition alleging the circular as an act of bkpcy. having been dismissed by the county ct. registrar, on the ground that no act of bkpcy. had been proved :—*Held :* the order dismissing the petition of the creditor must be set aside.—*Re* JOHNS, *Ex p.* SPEARS (1893), 10 Morr. 190, D. C.

953. Statement that debtor unable to pay debts —In full.]—An oral statement made by debtor, that he is unable to pay his debts in full, is not a notice that he has suspended, or is about to suspend, payment of his debts, so as to constitute an act of bkpcy.—*Re* FRIEDLANDER, *Ex p.* OASTLER (1884), 13 Q. B. D. 471; 54 L. J. Q. B. 23; 51 L. T. 309; 33 W. R. 126; 1 Morr. 207, C. A.

Annotations :—**Apld.** *Re* Walsh, *Ex p.* The Trustee (1885), 52 L. T. 694, D. C. **Consd** *Re* Wolstenholme, *Ex p.* Wolstenholme (1885), 2 Morr. 213, D. C.; *Re* Lamb, *Ex p.* Gibson & Bolland (1886), 55 L. T. 817, D. C.; *Re* Entwistle, *Ex p.* Turner (1891), 65 L. T. 349, D. C.; Hill *v.* Rowlands, [1896] 2 Q. B. 124. **Refd.** Crook *v.* Morley, [1891] A. C. 316, H. L. **Mentd.** *Re* Crook, *Ex p.* Crook (1890), 7 Morr. 11, C. A.

954. —— That bankruptcy inevitable failing acceptance of composition.]—A circular was issued by debtor to his creditors calling them together, & stating that he might raise enough to pay 10*s.* in the pound, if all the creditors agreed to accept that composition to avoid bkpcy. proceedings, which otherwise were inevitable :—*Held :* an act of bkpcy.—*Re* WOLSTENHOLME, *Ex p.* WOLSTENHOLME (1885), 2 Morr. 213, D. C.

Annotations :—**Distd.** *Re* Lamb, *Ex p.* Gibson & Bolland (1886), 55 L. T. 817, D. C. **Consd.** *Re* Entwistle, *Ex p.* Turner (1891), 65 L. T. 349, D. C.; Crook *v.* Morley, [1891] A. C. 316, H. L. **Refd.** Clough *v.* Samuel, [1905] A. C. 442, H. L.

955. —— Words amounting to.]— A creditor called upon his debtor, a lady & a non-trader, to obtain payment of his debt, when debtor in conversation with him said, " I won't pay anybody now; it is too late. I am acting under advice, & I refuse to see anybody at all " :—*Held :* these words amounted to a statement that debtor was unable to pay her debts, & proposed to deal with her creditors collectively, & constituted an act of bkpcy.—*Re* SCOTT, *Ex p.* SCOTT, [1896] 1 Q. B. 619; 65 L. J. Q. B. 465; 74 L. T. 555; 44 W. R. 587; 40 Sol. Jo. 731; 3 Mans. 102, D. C.

Annotations :—**Distd.** *Re* Debtor, *Ex p.* Petitioning Creditors *v.* Debtor (1912), 106 L. T. 812, D. C. **Refd.** *Re* Reis, *Ex p.* Clough, [1904] 2 K. B. 769, C. A.

956. —— That debtor utterly penniless & had lost everything.]—A verbal statement by debtor to a creditor that debtor was " utterly penniless," that he " could not pay anything," & that he had " lost everything," is a good notice of suspension of payment of his debts by debtor so as to constitute an act of bkpcy.—*Re* MILLER, [1901] 1 K. B. 51; 70 L. J. Q. B. 1; 83 L. T. 545; 49 W. R. 65; 17 T. L. R. 9; 45 Sol. Jo. 44; 8 Mans. 1, C. A.

957. ——.]—A declaration of inability to pay debts may be a notice of suspension.—CROOK *v.* MORLEY, [1891] A. C. 316; 61 L. J. Q. B. 97; 65 L. T. 389; 8 Morr. 227; *sub nom. Re* CROOK, CROOK *v.* MORLEY, 7 T. L. R. 650, H. L.; *affg.* S. C. *sub nom. Re* CROOK, *Ex p.* CROOK (1890), 24 Q. B. D. 320, C. A.

Annotations :—**Consd.** *Re* Entwistle, *Ex p.* Turner (1891), 65 L. T. 349; *Re* Simonson, *Ex p.* Ball, [1894] 1 Q. B. 433. **Refd.** *Re* Selwood, *Ex p.* Dash (1894), 1 Mans. 66, D. C.; *Re* Waite, *Ex p.* Bentley's Yorkshire Breweries (1894), 71 L. T. 778; *Re* Scott, *Ex p.* Scott, [1896] 1 Q. B. 619; *Re* Phillips, *Ex p.* Thomas (1897), 76 L. T. 531; *Re* Reis, *Ex p.* Clough, [1904] 2 K. B. 769, C. A.; Clough *v.* Samuel, [1905] A. C. 442; *Re* Debtor, *Ex p.* Petitioning Creditors *v.* Debtor (1912), 106 L. T. 812, D. C.

PART II. SECT. 2, SUB-SECT. 11.—B.

h. *Mere intimation of insolvency.*]—*Semble :* a mere intimation to a creditor by debtor or his agent that debtor is insolvent does not amount to an act of insolvency.—MERCANTILE BANK OF INDIA, LTD. *v.* MADRAS OFFICIAL ASSIGNEE (1916), I. L. R. 39 Mad. 250. —IND.

953 i. *Statement that debtor unable to pay secured debt.*]—A mere statement by a debtor, on demand being made, that he is not able to pay a secured debt is not a declaration that he is about to suspend payment.—*Re* ISRAEL, *Ex p.* OFFICIAL ASSIGNEE, ISRAEL (1895), 16 N. S. W. B. 93.—AUS.

k. *Statement that affairs in accountant's hands & refusal to pay accounts in meantime.*]—A statement by a debtor to the agent of a creditor, in answer to a demand for payment of a debt, that he has placed his affairs in the hands of accountants to prepare a statement of his accounts for him, & that in the meantime he has been advised not to pay any accounts, amounts to a notice that debtor has suspended or is about to suspend payment of his debts, within Bkpcy. Act, 1898, s. 2.—MOY *v.* BRISCOE & Co. (1907), 5 C. L. R. 56.—AUS.

l. *Statement of intention to file.*]—A debtor in the course of conversation with one of his creditors said, " I shall have to file " —*Held :* notice that debtor was about to suspend payment of his debts.—DENHAM *v.* FOLEY (1898), 19 N. S. W. L. R. 414.—AUS.

m. *Statement of affairs put before creditors—On debtor asking for further advance.*]— Bkpt., in asking for a further advance from certain creditors, laid a statement of his affairs before them, & it was arranged that he should call a meeting of his creditors, as on the statement he could not pay all his creditors in full :—*Held :* this constituted notice to the creditors of an available act of bkpcy.—*Re* LEMON, *Ex p.* OFFICIAL ASSIGNEE, COLONIAL, FINANCE MORTGAGE, INVESTMENT, & GUARANTEE CORPN., LTD., RESPONDENTS (1894), 15 N. S. W. B. 90.—AUS.

958. Calling creditors together—To submit statement of affairs—Embarrassment admitted.]—Solrs., issued the following circular: "We have been consulted by F. & Co., whose affairs have become embarrassed, & we have advised them before taking further action to confer with the creditors as to their position. We have, therefore, to request your attendance at a meeting to be held at our offices when a statement of affairs will be submitted":—*Held:* there was no sufficient notice of suspension of payment.—*Re* FLEMING, FRASER & CO., *Ex p.* TRUSTEE (1888), 60 L. T. 154, D. C.

Annotations:—**Consd.** *Re* Crook, *Ex p.* Crook (1890), 24 Q. B. D. 320, C. A.; *Re* Entwistle, *Ex p.* Turner (1891), 65 L. T. 349, D. C.; Crook *v.* Morley, [1891] A. C. 316, H. L.

959. —— Statement that debtor unable to meet obligations falling due.]—Debtor sent to his creditors a circular letter in these terms: "Being unable to meet my engagements as they fall due, I invite your attendance (at a specified time & place) when I will submit a statement of my position for your consideration & decision":—*Held:* this letter would naturally induce the creditors to believe that debtor intended to suspend payment of his debts, & amounted to a notice that he was "about to suspend payment of his debts."—CROOK *v.* MORLEY, [1891] A. C. 316; 61 L. J. Q. B. 97; 65 L. T. 389; 7 T. L. R. 650; 8 Morr. 227, H. L.

Annotations:—**Consd.** *Re* Entwistle, *Ex p.* Turner (1891), 65 L. T. 349, D. C. **Folld.** *Re* Waite, *Ex p.* Bentley's Yorkshire Breweries (1894), 71 L. T. 778. **Distd.** *Re* Phillips, *Ex p.* Thomas (W.) (1897), 76 L. T. 531, D. C. **Consd.** *Re* Reis, *Ex p.* Clough, [1904] 2 K. B. 769, C. A.; Clough *v.* Samuel, [1905] A. C. 442, H. L. **Expld.** *Re* Debtor (No. 4 of 1912, Salford) (1912), 56 Sol. Jo. 482, D. C. **Refd.** *Re* Simonson, *Ex p.* Ball (1893), 1 Mans. 30; *Re* Selwood, *Ex p.* Dash (1894), 1 Mans. 66, D. C. **Mentd.** *Re* Scott, *Ex p.* Scott, [1896] 1 Q. B. 619.

960. —— Admission of financial difficulties.]—Debtors, having consulted their solrs., posted a circular to their creditors, stating that certain matters had placed them in "financial difficulties which makes it desirable for us to consult with our creditors as to our position. We are having our books examined & a statement prepared by" a firm of chartered accountants, "&, as soon as this is complete, we propose inviting you to a meeting of our creditors." Subsequently a meeting of the creditors was held, at which the statement of affairs prepared by the accountants was submitted:—*Held:* the circular was an act of bkpcy.—*Re* SIMONSON, *Ex p.* BALL, [1894] 1 Q. B. 433; 63 L. J. Q. B. 242; 70 L. T. 32; 1 Mans. 30; 10 R. 107.

Annotations:—**Consd.** *Re* Midgley (1913), 108 L. T. 45, D. C. **Mentd.** *Re* Charlwood, *Ex p.* Trustee (1894), 63 L. J. Q. B. 344, D. C.; Davies *v.* Petrie (1905), 93 L. T. 511, D. C.; *Re* Geen, *Ex p.* Parker, [1917] 1 K. B. 183.

961. —— ——.]—Debtor issued a circular to his creditors stating: "I am very sorry to inform you that from my losses by bad debts & dear flour, having unfortunately been over-persuaded to buy forward, I find myself in difficulties. I therefore consider it my best plan to call a meeting of my creditors to be held here on Monday next at 10.45 a.m. Hoping for your forbearance," etc.:—*Held:* an act of bkpcy.—*Re* SELWOOD, *Ex p.* DASH (1894), 10 T. L. R. 418; 1 Mans. 66, D. C.

962. —— To consider avoidance of loss which bankruptcy would cause.]—Debtor's solr. wrote to the creditors, "I have been consulted by Mr. W., & I find that his affairs are in so complicated a state that it is only right his creditors should be called together to decide whether the serious loss to them in bkpcy. can be avoided. I, therefore, respectfully request your attendance at a meeting of creditors to be held at . . . when & where a statement of affairs will be submitted":—*Held:* this letter was an act of bkpcy.—*Re* WAITE, *Ex p.* BENTLEY'S YORKSHIRE BREWERIES (1894), 71 L. T. 778; 43 W. R. 208; 39 Sol. Jo. 136; 1 Mans. 512; 15 R. 157, D. C.

963. —— Request for statement of account.]—Debtor's solrs. issued the following circular: "Mrs. D. has placed her affairs in our hands, & we have received instructions to call a meeting of her creditors & lay her circumstances before them. We beg therefore to inform you that such meeting will be held [etc.]. Please send us at once a statement of your account":—*Held:* this was such a statement that it would have been dishonest in debtor if before the date of the meeting she had attempted to settle with any of her

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958 i. *Calling creditors together—To ask for time.*]—A statement by a debtor to a creditor, in conversation, that he wishes, or intends, to call a meeting of his creditors & ask for time to meet his liabilities, is not a notice that he has suspended or is about to suspend payment of his debts, where it does not convey to the creditor that debtor is not paying or will not pay debts out of such means as he has or may get.—*Re* REIMER 1896), 15 N. Z. L. R. 198.—N.Z.

958 ii. —— ——.]—Bkpt., who had mtged. some sheep, saw the mtgee., who was aware of bkpt.'s insolvent condition, & told him he was going to ask for time from all his creditors, but that he would not take time from any creditor unless all agreed to give him time. After having seen his creditors, & having been refused time by one, he again saw the mtgee. & told him that, if he did not get time allowed at a meeting of his creditors which had been called, he would have to sacrifice certain sheep at a loss, & would not be able to pay all his creditors, but if he got time he would be able to "pull through":—*Held:* a notice that bkpt. was about to suspend payment of his debts.—*Re* MISSEN, *Ex p.* OFFICIAL ASSIGNEE, BANK OF NEW SOUTH WALES (1893), 14 N. S. W. B. 24.—AUS.

n. *Request to grantee of bill of sale to take over business.*]—T. said to R., his creditor, whose debt was secured under a bill of sale, "I cannot meet my bills coming due." R. said, "What do you intend to do?" T. said, "I think you had better take over the business yourself, as you hold the bill of sale." R. said, "There is no necessity for that; how do you stand?" T. said, "Here is my position," & handed him a statement of his affairs. R., after looking at the statement said, "You are not in any difficulties; you only want time to get in a lot of those book-debts." T. said, "They won't pay me, I've tried; I am sick of it; I would rather give up":—*Held:* this conversation amounted to a notice of suspension, or intention to suspend, payment within Bkpcy. Act, 1887 (53 Vict. No. 19), s. 4 (1) (h).—*Re* THOROLD (1890), 11 N. S. W. L. R. 331.—AUS.

o. *Letter authorising agent to convene meeting—Handed to creditor to give to agent.*]—A debtor at the instigation of a creditor signed a document addressed to a firm of agents, authorising them to call a meeting of his creditors under 1898 Act, & intimating that he was unable to pay his liabilities on demand. The document was handed to the creditor for perusal & transmission to the agents, but the creditor immediately presented a bkpcy. petition against debtor, the act of bkpcy. alleged being that debtor had given notice to a creditor that he had suspended or was about to suspend payment of his debts:—*Held:* the acts of debtor, being incidental to the summoning of the meeting were protected, & did not constitute an act of bkpcy. except in the event specially provided by the Act.—*Re* FORD, *Ex p.* FELTON, GRIMWADE & DICKFORD, LTD. (1909), 12 W. A. R. 15.—AUS.

p. *Letter in reply to creditor threatening proceedings—Stating futility of continuing proceedings.*]—A creditor wrote to his debtor, threatening legal proceedings. In reply debtor wrote that he could not pay, & nothing would be gained by summoning him, that if the creditor went on with the summons, etc., he would not realise 10*s.*, but if he let the thing stand over he would get £10, that the creditor had no idea of the state of the retail trade with regard to money coming in, & that if debtor had not intended to pay, he would not have paid what he did:—*Held:* the letter did not constitute an act of bkpcy.—*Re* KIDD, *Ex p.* OFFICIAL ASSIGNEE (1903), 3 S. R. N. S. W. 363.—AUS.

q. *Notice of intention to surrender.*]—The notice required by Act 38 of 1884, s. 1, of intention to apply for leave to surrender is not an act of insolvency within Ord. 6 of 1843, s. 28.—BRITISH SOUTH AFRICA CO. *v.* LYLE BROTHERS & WRIGHT'S TRUSTEES (190 0), 17 S. C. 328.—S. AF.

r. ——.]—A notice of intention to apply for the voluntary surrender of debtor's estate constitutes a notice of intention on the part of debtor to suspend payment of his debts, & is an act of insolvency under Law 47 of 1887, s. 4 (*g*).—PAVIA *v.* GIBB (1915), 36 N. L. R. 259.—S. AF.

Sect. 2.—*What is an act of bankruptcy: Sub-sects.* 11, *B. & 12. Sects.* 3 & 4.]

creditors separately, & amounted to a notice that she was about to suspend payment of her debts.—*Re* DAGNALL, *Ex p.* SOAN & MORLEY, [1896] 2 Q. B. 407; 65 L. J. Q. B. 666; 75 L. T. 142; 45 W. R. 79; 40 Sol. Jo. 731; 3 Mans. 218, D. C.

Annotations :—**Expld. & Distd.** *Re* A Debtor (1912), 28 T. L. R. 386, D. C. **Consd.** *Re* Midgeley (1913), 57 Sol. Jo. 247. **Distd.** *Re* A Debtor (1915), 31 T. L. R. 150, D. C. **Mentd.** *Re* Worsley, [1901] 1 K. B. 309, C. A.; *Re* Clark, *Ex p.* Pope & Owles, [1914] 3 K. B. 1095, C. A.; *Re* Reynolds, *Ex p.* White, [1915] 2 K. B. 186, C. A.

964. —— With reference to financial position.]—A circular letter was sent by a doctor, through his solr., to all his creditors, in the following terms: "Dr. B., physician & surgeon, has consulted me with reference to his financial position, & I shall be glad if you will attend a meeting of his creditors to be held here" :—*Held :* the circular did not constitute a notice of suspension, or intended suspension, of payment of his debts, its terms not plainly indicating such an intention.—*Re* A DEBTOR, *Ex p.* PETITIONING CREDITORS *v.* DEBTOR (1912), 106 L. T. 812; 28 T. L. R. 386; 56 Sol. Jo. 482, D. C.

Annotation : **Distd.** *Re* Midgley (1913), 108 L. T. 45, D. C.

965. —— —— To consider methods of continuing business.]—A circular issued by a trader to his creditors, in which they are invited to attend a meeting for the purpose of discussing his affairs & of deciding upon the methods for continuing the business, may be a sufficient notice of suspension of payment of debts to be an act of bkpcy.—*Re* MIDGLEY (1913), 108 L. T. 45; 57 Sol. Jo. 247, D. C.

Annotation :—**Mentd.** *Re* A Debtor, *Ex p.* Cardiff & Channel Mills (1917), 117 L. T. 574, D. C.

966. Statement at meeting of creditors.]—A proposal laid before a meeting of creditors, by which they are to be paid in full by instalments partly in cash & partly in shares, may be an act of bkpcy.—*Re* MIDGLEY (1913), 108 L. T. 45; 57 Sol. Jo. 247, D. C.

Annotation :—**Mentd.** *Re* A Debtor, *Ex p.* Cardiff & Channel Mills (1917), 117 L. T. 574, D. C.

967. ——.]—Debtor, who had carried on business, sent to the creditors of the business a circular giving them notice of a meeting of creditors to be held. She was not present at the meeting, but her solr. made a statement on her behalf that she was unable to pay her debts :—*Held :* an act of bkpcy. was committed at the meeting of creditors. *Re* REYNOLDS, *Ex p.* WHITE BROTHERS, LTD., [1915] 2 K. B. 186; 84 L. J. K. B. 1346; 112 L. T. 1049; 59 Sol. Jo. 270; [1915] H. B. R. 174; *sub nom. Re* A DEBTOR, 31 T. L. R. 216, C. A.

968. Letter asking for time & declaring debtor solvent—Subsequent letter announcing acceptance of composition.]—Debtor's solr. wrote to a creditor, "I have been consulted by E. as to the position of his affairs. A meeting of the creditors will be held [etc.]. From a rough statement of affairs it appears that my client is solvent, but unable immediately to realise his assets. If time be granted he will be able to pay all his creditors the full amount of their claims, & I trust you will attend the meeting in order that a satisfactory arrangement may be come to." Subsequently the creditor received another letter, "At the meeting of creditors it was unanimously resolved to accept a composition of 7*s.* 6*d.* in the pound, payable as follows :" Then followed the terms of the composition, & a statement of debtor's affairs, showing liabilities £1680 & assets £685 :—*Held :* these letters amounted to notice by debtor that he was about to suspend payment.—*Re* ENTWISTLE, *Ex p.* TURNER (1891), 65 L. T. 349; 7 T. L. R. 625, D. C.

969. Offer to secure debt—Threat to apply for receiving order if refused.]—Debtor, who was in embarrassed circumstances, offered to secure the debt of judgment creditors, who threatened execution, by a second mtge. on his estate. This the creditors were unwilling to accept. In these circumstances debtor's solrs. wrote to the judgment creditors, "As promised, we send you herewith statement shewing the income & expenditure & the amount of the mtges. on the estates. We think it well to repeat what we stated to you at our interview, that a receiving order will be applied for immediately execution is issued" :—*Held :* the letter did not amount to a notice that debtor had suspended, or that he was about to suspend, payment of his debts.—HILL'S (LORD) TRUSTEE *v.* ROWLANDS, [1896] 2 Q. B. 124; 65 L. J. Q. B. 542; 74 L. T. 556; 3 Mans. 136.

Annotation :—**Refd.** *Re* Reis, *Ex p.* Clough, [1904] 2 K. B. 769, C. A.

970. Statement that if creditor did not supply goods—Debtor would have to stop payment.]—Debtor said to petitioning creditor: "If you do not supply me with bricks, I shall not be able to carry out my contracts, & shall have to stop payment" :—*Held :* no act of bkpcy.—*Re* PHILLIPS, *Ex p.* THOMAS & CO. (1897), 76 L. T. 531; 41 Sol. Jo. 470, D. C.

971. Statement of apprehended difficulty in settling—Recommending creditors to close accounts.]—A stockbroker, being hopelessly insolvent, told his Stock Exchange creditors that he would have a difficulty in paying them at the approaching settlement & suggested that they should close their accounts with him, which they did :—*Held :* as the stockbroker had no intention in fact to give his creditors notice that he was about to suspend payment of his debts, there was in fact no such notice given.—CLOUGH *v.* SAMUEL, [1905] A. C. 442; 74 L. J. K. B. 918; 93 L. T. 491; 54 W. R. 114; 21 T. L. R. 702; 12 Mans. 347, H. L.; *affg.* S. C. *sub nom. Re* REIS, *Ex p.* CLOUGH, [1904] 2 K. B. 769, C. A.

Annotations :—**Expld.** *Re* Midgley (1913), 108 L. T. 45, D. C. **Mentd.** *Re* Hart, *Ex p.* Green, [1912] 3 K. B. 6, C. A.; *Re* Lind, Industrials Finance Syndicate *v.* Lind, [1915] 1 Ch. 744.

972. Notice of temporary suspension.]—*Semble :* a notice of temporary suspension is an act of bkpcy.—CROOK *v.* MORLEY, [1891] A. C. 316; 61 L. J. Q. B. 97; 65 L. T. 389; 8 MORR. 227; *sub nom. Re* CROOK, CROOK *v.* MORLEY, 7 T. L. R. 650, H. L.; *affg.* S. C. *sub nom. Re* CROOK, *Ex p.* CROOK (1890), 24 Q. B. D. 320, C. A.

Annotations :—**Mentd.** *Re* Entwistle, *Ex p.* Turner (1891), 65 L. T. 349; *Re* Selwood, *Ex p.* Dash (1894), 1 Mans. 66, D. C.; *Re* Simonson, *Ex p.* Ball, [1894] 1 Q. B. 433; *Re* Waite, *Ex p.* Bentley's Yorkshire Breweries (1894), 71 L. T. 778; *Re* Scott, *Ex p.* Scott, [1896] 1 Q. B. 619; *Re* Phillips, *Ex p.* Thomas (1897), 76 L. T. 531; *Re* Reis, *Ex p.* Clough, [1904] 2 K. B. 769, C. A.; Clough *v.* Samuel, [1905] A. C. 442, H. L.; *Re* Debtor, *Ex p.* Petitioning Creditors *v.* Debtor (1912), 106 L. T. 812, D. C.

SUB-SECT. 12.—OTHER CASES.

See cases *infra.*

SECT. 3.—WHO CAN AVAIL HIMSELF OF AN ACT OF BANKRUPTCY.

See Part III., Sect. 1, sub-sect. 3, *post.*

SECT. 4.—EVIDENCE IN REGARD TO ACTS OF BANKRUPTCY.

973. What must be proved—Generally—That intention to defeat or delay creditors was disclosed.]—Whether a man left his house, or kept it, or assigned his goods with intent to delay his creditors, or intended to commit a fraud, are matters of ordinary occurrence; & in such

inquiries, if you can be satisfied by the concomitant facts that such an intention existed, the want of a disclosure of that intention to any other person is wholly immaterial.—JAMES *v.* GRIFFIN (1837), 2 M. & W. 623; 6 L. J. Ex. 241; 150 E. R. 906, Ex. Ch.

Annotations :—**Mentd.** Dodson *v.* Wentworth (1842), 4 Man. & G. 1080; Bushel *v.* Wheeler (1844), 15 Q. B. 442; Heinecke *v.* Earle (1858), 31 L. T. O. S. 357, Ex. Ch.; Bolton *v.* L. & Y. Ry. Co. (1866), L. R. 1 C. P. 431; Fraser *v.* Witt (1868), L. R. 7 Eq. 64; *Re* Worsdell, *Ex p.* Barrow (1877), 46 L. J. Bcy. 71; *Re* Cook, *Ex p.* Rosevear China Clay Co. (1879), 11 Ch. D. 560, C. A.

—— **In regard to particular acts of bankruptcy.**]—*See* Sect. 2, *ante*.

974. Who may be examined—To prove act of bankruptcy—Bankrupt.]—*Semble :* it has never been the practice to examine bkpt. to prove his own act of bkpcy.—*Re* HOLLOWAY (1854), 1 Bank. & Ins. R. 244.

Annotation:—**N.F.** *Re* X. Y., *Ex p.* Haes, [1902] 1 K. B. 98, C. A.

975. —— —— ——.]—The ct. has no power to make a party give evidence against himself in support of an adverse petition for adjudication against him.—*Re* PETITION FOR ADJUDICATION *Ex p.* CASTRIQUE (1864), 10 L. T. 757.

Annotation :—**N.F.** *Re* X. Y., *Ex p.* Haes, [1902] 1 K. B. 98, C. A.

976. —— —— ——.]—Although debtor can be called to give evidence for the purpose of proving an act of bkpcy. against himself, bkpcy. proceedings being no longer considered as of a *quasi*-criminal nature, he cannot be compelled to answer questions which tend to criminate him.—*Re* X Y., *Ex p.* HAES [1902] 1 K. B. 98; *sub nom. Re* A DEBTOR, *Ex p.* PETITIONING CREDITORS, 50 W. R. 182; 18 T. L. R. 66; 46 Sol. Jo. 68, C. A.

977. —— **To explain equivocal act of bankruptcy—Bankrupt.**]—Bkpt. cannot be called to explain an equivocal act of bkpcy.—HOFFMAN *v.* PITT (1803), 5 Esp. 22.

Annotation:—**Folld.** Binns *v.* Tetley (1825), M'Cle. & Yo. 397.

978. Admissibility of evidence—To prove act of bankruptcy—Generally—Declarations of bankrupt made after deed done.]—The declarations of bkpt. as to any particular matter or deed which may constitute an act of bkpcy., if made after the deed done, are not evidence.—ROBSON *v.* KEMP (1802), 4 Esp. 233.

Annotation :—**Folld.** Smallcombe *v.* Bruges (1824), M'Cle. 45.

—— —— **In regard to particular acts of bankruptcy.**]—*See* Sect. 2, *ante*.

979. —— **To explain intent of act—Act doubtful.**]—If a person commits a doubtful act of bkpcy., going abroad & dealing, etc., will be evidence to explain the intent of the first act; for if it was not done to defraud creditors, & keep out of the way, it will not be an act of bkpcy.—HOPKINS *v.* ELLIS (1704), 1 Salk. 110; Holt, K. B. 95; 91 E. R. 101.

980. —— —— ——.]—Where an act is a clear unequivocal act of bkpcy., it cannot be explained by any subsequent circumstances: but where the act is in itself doubtful, it may be explained.—COLKETT *v.* FREEMAN (1787), 2 Term Rep. 59; 100 E. R. 33.

Annotations :—**Apld.** Gillingham *v.* Laing (1816), 6 Taunt. 532; Richardson *v.* Pratt (1885), 52 L. T. 614.

PART II. SECT. 2, SUB-SECT. 12.

s. *Failure to satisfy judgment.*]—Merely failing to satisfy a judgment debt is not an act of insolvency under "Insolvency Stat., 1871" (No. 379), ss. 37, 41.—*Re* MARTIN (G.) & CO. (1879), 5 V. L. R. 13.—**AUS.**

t. —— *Sheriff's demand for fees & expenses.*]—If a sheriff's officer makes a demand of the amount of a judgment debt from a debtor, & also demands sheriff's fees & expenses, as indorsed on his warrant, & the judgment debt is not paid, the judgment creditor can rely on such non-payment as an act of insolvency if it is clear that a separate demand was made for the judgment debt, & debtor was not in any way embarrassed by the further demand.—*Re* SLOSS, *Ex p.* ROBISON BROTHERS, CAMPBELL & SLOSS, LTD. (1893), 19 V. L. R. 710.—**AUS.**

a. —— *Failure to point out property.*]—A judgment debtor, when called upon to satisfy the debt or point out property to satisfy it, must, in order to avoid the commission of an act of insolvency within 5 Vict. No. 17, s. 5, either satisfy or point out property within the circuit district of the sheriff to whom the writ of execution is addressed.—*Re* HEWITT, *Ex p.* STAUGHTON & DARBYSHIRE (TWO OF EXORS. OF SIMON STAUGHTON) (1864), 1 W. W. & A'B. 15.—**AUS.**

b. —— ——.]—Where it appeared from the sheriff's return that debtor's goods only produced £5 3*s.*, & that he had found no other goods whereof he could cause to be made good the deficiency of petitioner's writ of execution or any part thereof:—*Held :* the return was sufficient to prove that debtor had committed the act of insolvency created by the words in Ord. 6 of 1843, s. 4, "or shall not point out to the officer charged with the execution thereof sufficient disposable property to satisfy same, or if it shall appear from the return made by such officer, or his affidavit, that he has not found sufficient disposable property of such person to satisfy such sentence."—*Re* WEBSTER, ANDERSON *v.* WEBSTER (1835), 3 Men. 220.—**S. AF.**

c. —— ——.]—Where the sheriff attached under a writ of execution certain mining shares, but did not sell such shares & stated in his return that, owing to the depression of the market, it was unadvisable to sell, & that the marketable value of some of the shares was far less than the judgment debt & the remainder had no marketable value whatever, & that no other goods had been pointed out by debtor or found to satisfy the urgency of the writ:—*Held :* an act of insolvency had been committed.—ALDERSON *v.* KERR (1884), 1 Buch. A. C. 355.—**S. AF.**

d. —— ——.]—To constitute a due pointing out of disposable property under Law 13 of 1895, s. 8 (*b*), debtor must indicate the nature & exact situation of the property with sufficient particularity to enable the messenger to attach & sell it. Merely stating that one has property in this or that district is insufficient.—DE WAARD *v.* ANDREW & THIENHAUS, LTD. (1907), T. S. 727.—**S. AF.**

e. —— —— *"Disposable property."*]—Under Law 13 of 1895, s. 8 (*b*), "disposable property" includes land freely disposable & not mortgaged to a third person.—DE WAARD *v.* ANDREW & THIENHAUS, LTD. (1907), T. S. 727.—**S. AF.**

f. —— —— *Pointing out for execution land in another's name.*]—Resp., upon beng called to satisfy a judgment debt, told the sheriff's officer that he had land which he could levy upon. This land was not in resp.'s name, & the sheriff's officer made a return that resp. had no real or personal estate of which he could cause to be made the money required by the writ or any part thereof:—*Held :* the return was false & the act of insolvency had not been established.—*Re* RYLAH, *Ex p.* COLONIAL BANK OF AUSTRALASIA, LTD. (1899), 24 V. L. R. 844.—**AUS.**

g. *Failure to satisfy execution in Supreme Court on county court judgment.*]—Is an act of insolvency within Insolvency Stat. 1871 (No. 379), s. 37 (viii.).—*Re* M'NAMARA (1884), 10 V. L. R. 184.—**AUS.**

See, also, cases in Sect. 2, sub-sect. 8, *ante*.

h. *Imprisonment for not giving security.*]—Deft. was arrested & imprisoned under Debtors Act, 1872, s. 7, for two months, until he should deposit in ct. a specified sum by way of security, or give a bond that he would not leave Ireland without leave of the ct.:—*Held :* not an act of bkpcy.—*Re* B., *Ex p.* HESTER (1874), 8 I. L. T. Jo. 109.—**IR.**

k. *Failure to petition against demand by creditor or debtor to make assignment for creditors.*]—M., a creditor of deft., made a demand upon him to assign his estate, for the benefit of his creditors, under Insolvent Act, 1869, s. 14. No petition against the demand was presented within five days, as required by the Act, but after that time deft. settled his debt with M., who took no further proceedings:—*Held :* the estate of deft. was subject to compulsory liquidation.—DEVER *v.* MORRIS (1873), 14 N. B. R. (Pug.) 270.—**CAN.**

PART II. SECT. 4.

l. *Issue directed to try whether act of bankruptcy committed.*]—A. married B., a watchmaker, who died in 1823, leaving A. all his property to the amount of £7,000. She continued to carry on the trade till 1826, when C. purchased the stock for £4,000, & passed his bond with warrant to a trustee for the separate use of petitioner, & in the same month C. married A. In 1830 C. died indebted to petitioning creditor in £100 & upwards, for goods sold. The bill of parcels was directed to C. & the account settled by his acceptances. Another person claimed to be C.'s wife. The question being whether A. was a trader in copartnership with C. & liable to a commission of bkpcy., for petitioning creditor's demand, as a joint debt:—*Held :* an issue should be directed to inquire whether A. committed an act of bkpcy.—*Ex p.* JOHNSON (1830), 3 Ir. L. Rec. 1st ser. 309.—**IR.**

m. *Sufficiency of evidence.*]—The nonservice of a notice of disputing an act of bkpcy., is not a conclusive admission that an act of bkpcy. has been committed.—HUDSON *v.* M'ALLEN (1841), Ir. Cir. Rep. 64.—**IR.**

Part III.—Petition.

SECT. 1.—CREDITOR'S PETITION.

SUB-SECT. 1.—WHO MAY PETITION.

A. In General.

981. Assessor—Church and highway rates.]—LLOYD *v.* HEATHCOTE, No. 1029, *post.*

982. Assignee—In bankruptcy—One of several.]—The established practice allowed a commission to issue on the petition of one of several assignees, & the fact that the petitioning assignee is also the solvent partner of bkpt. does not affect the practice.—*Re* BLAKEY, *Ex p.* BLAKEY (1822), 1 Gl. & J. 197.

See, now, 1914 Act, s. 56 (2).

983. —— Equitable — Whether assignor must join.]—The equitable assignee of a debt can present a bkpcy. petition against debtor without joining the assignor as a co-petitioner.—*Re* BAILLIE, *Ex p.* COOPER (1875), L. R. 20 Eq. 762; 44 L. J. Bcy. 125; 32 L. T. 780; 23 W. R. 950.

Annotations :—**Distd.** *Re* Adams, *Ex p.* Culley (1878), 38 L. T. 858, C. A. **Apld.** *Re* Montgomery Moore Ship Collision Doors Syndicate (1903), 72 L. J. Ch. 624.

984. —— Of bond.]—An assignee of a bond cannot petition for a commission of bkpcy.—*Ex p.* LEE (1721), 1 P. Wms. 782; 2 Eq. Cas Abr. 97, Pl. 3; 24 E. R. 614, L. C.

985. —— ——.]—An assignee of a bond cannot petition for a commission of bkpcy.—MEDLICOT'S CASE (1731), 2 Stra. 899; 93 E. R. 926.

—— Of judgment creditor.]—*See* Nos. 1012, 1013, *post.*

986. Bankrupt—Assignees making no claim.]—*Semble :* an uncertificated bkpt. can petition for a commission, if his assignees make no claim to the debt.—*Re* WHITEHOUSE, *Ex p.* CARTWRIGHT (1815), 2 Rose, 230.

Annotation :—**Refd.** Herbert *v.* Sayer (1844), 5 Q. B. 965, Ex. Ch.

987. —— Future estate vesting in assignees under 6 Geo. 4, c. 16.]—Where under a second commission bkpt. did not pay 15*s.* in the pound, although he obtained his certificate, & his future estate vested in his assignees under the above Act :—*Held :* bkpt. could not present a bkpcy. petition, as his interest could not vest both in him & in his assignees.—*Re* FREER, *Ex p.* ROBINSON (1828), Mont. & M. 44; 7 L. J. O. S. Ch. 75.

Annotation :—**Refd.** Fyson *v.* Chambers (1842), 9 M. & W. 460.

988. —— Discharged under Insolvent Act — Fifteen shillings in the pound not paid.]—A party who has been discharged twice under Insolvent Act, & is afterwards bkpt., & has not paid 15*s.* in the pound, cannot have property, & cannot be a petitioning creditor.—*Re* DAWSON, *Ex p.* MASCARENAS (1832), 1 Deac. & Ch. 507, Ct. of R.

See, now, 1914 Act, ss. 16, 21, 26, & 28.

989. —— Executors of.] — Exors. of a bkpt., unless the commission against his testator be superseded, cannot take out one for a debt due to testator.—*Ex p.* GOODWIN (1740), 1 Atk. 100; 26 E. R. 66.

990. British subject resident in enemy country.]—Residence of a British subject in an enemy's country for the purpose of a trade, licensed by the Govt. of this country, is not a disability to take out a commission of bkpcy.—*Ex p.* BAGLEHOLE (1812), 18 Ves. 525; 1 Rose, 271; 34 E. R. 417.

Annotation :—**Mentd.** Ertel Bieber *v.* Rio Tinto Co., [1918] A. C. 260, H. L.

991. Company.]—*Held :* a limited co. could maintain a petition for adjudication under 1861 Act, s. 87.—*Re* CALTHROP (1868), 3 Ch. App. 252; 37 L. J. Bcy. 17; 18 L. T. 166; 16 W. R. 446, L. J.

Annotations :—**Mentd.** *Re* Bristow, *Ex p.* Emanuel (1868), 18 L. T. 222 L. J.; *Re* Bowes, *Ex p.* Jackson (1880), 14 Ch. D. 725, C. A.

992. —— Official manager of—11 & 12 Vict. c. 45 & 12 & 13 Vict. c. 108.]—Under the above Acts the official manager of a co. to whom calls are ordered to be paid, does not, in virtue of such order, become a creditor of the person who has to pay the calls, so as to be entitled to be a petitioning creditor, & to ask for an adjudication in bkpcy. against him.—WILLIAMS *v.* HARDING (1866), L. R. 1 H. L. 9; 35 L. J. Bcy. 25; 14 L. T. 139; 12 Jur. N. S. 457; 14 W. R. 503, H. L.

Annotations :—**Consd.** *Re* Dalzell, *Ex p.* Rashleigh (1875), 2 Ch. D. 9, C. A. **Refd.** City Discount Co. *v.* Lloyd (1871), 24 L. T. 512; *Re* Winterbottom, *Ex p.* Winterbottom (1886), 18 Q. B. D. 446. **Mentd.** *Re* A Deed of Composition, *Ex p.* Anon. (1868), 19 L. T. 73; Martin's Anchor Co. *v.* Morton, Martin's Anchor Co. *v.* Hewett (1868), L. R. 3 Q. B. 306; *Re* Pickering, *Ex p.* Pickering (1868), 19 L. T. 369;

PART III. SECT. 1, SUB-SECT. 1.—A.

a. *Agent—Under power of attorney.*]—A power of attorney (*inter alia*) authorised the attorney "to bring any action, suit or other proceeding for recovering or compelling payment" of any sum of money due to the donor :—*Held :* the attorney was authorised to present & prosecute a petition for the sequestration of the estate of a debtor of his principal.—*Re* ANDERSON, [1909] V. L. R. 465.—**AUS.**

b. —— ——.]—A power of attorney authorised the attorney to issue execution on a judgment & "to proceed to the final end & determination thereof." On a return of *nulla bona* the principal requested the attorney to proceed to sequestration :—*Held :* the attorney had authority so to do.—MEIRING *v.* HANSON (1885), 3 S. C. 336.—**S. AF.**

c. —— *Under warrant of attorney.*]—A warrant of attorney "to sue & to prosecute proceedings to their final end & determination," is authority to the attorney to take out a summons for compulsory sequestration upon an unsatisfied judgment.—STANDARD BANK *v.* KRUGER & CO. (1884), 4 E. D. C. 179.—**S. AF.**

d. *Bank of Ireland.*]—*Semble :* a commission of bkpcy. may be issued by the above bank.—*Re* BEALE (1842), 2 Dr. & War. 375.—**IR.**

e. *Bank manager—Authorised to sue on behalf of bank.*]—A bank manager, with power, under power of attorney, to institute "actions, suits, or other legal proceedings" on behalf of his bank, has power to petition in bkpcy. for it.—*Re* MACKAY, 2 J. R. N. S. 150.—**N.Z.**

f. *Commissioners of Taxation.*]—The power given to the above comrs. by Land & Income Tax Assessment Act 1895 (59 Vict. No. 15) s. 51, to sue for & recover land & income tax by action in any ct. of competent jurisdiction includes the power to present a petition in bkpcy, without the A.-G. joining therein on behalf of the Crown.—*Re* CARTER SMITH, *Ex p.* TAXATION COMRS. (1908), 8 S. R. N. S. W. 246.—**AUS.**

g. *Committee of lunatic.*]—The ct. has power to sanction the presentation of a petition in insolvency or for the liquidation of the affairs of an insane person by his committee.—*Re* NEWMAN-WILSON, (1895) 6 Q. L. J. 229.—**AUS.**

991 i. *Company—Limited company—"Petition sealed with corporate seal"—Signed by two directors & secretary.*]—A limited co. can maintain a petition for adjudication under 1857 Act, s. 116. In such cases it will be sufficient for the petition to be sealed with the corporate seal, & signed by two directors & the secretary.—NORTHERN BANKING CO. *v.* PORTER (1873), 7 I. L. T. 18.—**IR.**

h. *Corporation.*]—A corpn. aggregate may be a petitioning creditor, & sue out a commission of bkpcy.—*Re* SNEYDS, *Ex p.* BANK OF IRELAND (1829), 1 Mol. 261.—**IR.**

k. ——.]—A corpn. aggregate may be a petitioning creditor in bkpcy.—*Re* BEALE (1842), 2 Dr. & War. 375.—**IR.**

l. —— *Petition sealed with corporate seal—Signed by mayor & two councillors.*]—A petition was signed by the mayor & two other councillors, in the presence of the town clerk, & the affixing of the corpn. seal to it was duly witnessed, & by a resolution, duly passed & authenticated under the corpn. seal, the town clerk & city solr. were authorised to take all necessary steps in the matter :—*Held :* it was sufficiently shown that the petition was authorised by the corpn.—*Re* SLATER, *Ex p.* AUCKLAND CORPN. (1890), 8 N. Z. L. R. 641.—**N.Z.**

Financial Corpn. *v.* Lawrence (1869), 38 L. J. C. P. 305; *Re* General Estates Co., Hastie's Case (1869), 4 Ch. App. 274, L. JJ.; *Re* Blakeley Ordnance Co., Brett's Case, *Re* Oriental Commercial Bank, Morris' Case (1873), 8 Ch. App. 800, L. C. & L. JJ.; *Re* Athlumney, *Ex p.* Wilson, [1898] 2 Q. B. 547.

See, now, Cos. (Consolidation) Act, 1908 (c. 69), s. 125.

993. —— Secretary duly authorised.]—A petition by a co. incorporated under Cos. Acts may be presented by the secretary if duly authorised.—*Re* WHITLEY, *Ex p.* MIRFIELD COMMERCIAL CO., LTD. (1891), 65 L. T. 351; 7 T. L. R. 508; 8 Morr. 149, D. C.

Annotation:—**Mentd.** *Re* Midgley (1913), 108 L. T. 45, D. C.

994. —— —— Affidavit of authority unnecessary.]—A petition by a co. incorporated under Cos. Acts was presented by the secretary duly authorised, but was dismissed by the county ct. judge, on the ground that no affidavit had been filed in accordance with 1886 Rules, r. 258:—*Held:* the rule did not apply to cos. incorporated under Cos. Acts, but only to unincorporated cos. authorised to sue & be sued in the name of a public officer or agent, & the judge's decision was wrong.—*Re* COLLIER, *Ex p.* DAN RYLANDS, LTD. (1891), 64 L. T. 742; 8 Morr. 80, D. C.

Annotations:—**Folld.** *Re* Whitley, *Ex p.* Mirfield Commercial Co. (1891), 65 L. T. 351, D. C. **Mentd.** *Re* O. C. S., *Ex p.* The Debtor, [1904] 2 K. B. 161, C. A.; *Re* Debtor (478 of 1908), [1908] 2 K. B. 684, C. A.

995. —— —— Court may inquire into authority.]—Where a creditor co. presents a bkpcy. petition by its secretary, the ct. may require the secretary's authority to be proved, even though debtor has not expressly taken objection to the want of such evidence by notice under 1886 Rules, r. 160, but in the absence of such objection it is a matter of discretion for the ct. whether it will or will not require such proof.—*Re* SANDERS, *Ex p.* SANDERS (1894), 63 L. J. Q. B. 734; 71 L. T. 236; 42 W. R. 650; 38 Sol. Jo. 632; 1 Mans. 382; 10 R. 443, D. C.

996. —— —— How authorised.]—A resolution of directors of a co., that their secretary be authorised to present a petition, is sufficient authority for affixing the co.'s seal to the instrument authorising the secretary to present the petition.—*Re* MIDGLEY (1913), 108 L. T. 45; 57 Sol. Jo. 247, D. C.

Annotation:—**Mentd.** *Re* A Debtor, *Ex p.* Cardiff & Channel Mills (1917), 117 L. T. 574.

Authority of secretary. *See, generally,* COMPANIES.

See, also, Nos. 1149, 1150, *post.*

997. —— —— Authority enabling company to sue & be sued in secretary's name insufficient.]—A private Act of Parliament, "to enable a certain insurance society to sue & be sued in the name of their secretary," enacted that they might commence all actions & suits in his name as nominal pltf.:—*Held:* this did not enable the secretary to petition on behalf of the society for a commission of bkpcy. against their debtor.—GUTHRIE *v.* FISK (1824), 3 B. & C. 178; 5 Dow. & Ry. K. B. 24; 107 E. R. 700.

Annotations:—**Consd.** *Re* Hall, *Ex p.* Hall (1838), 8 L. J. Bcy. 5. **Distd.** Hope *v.* Meek (1855), 10 Exch. 829. **Consd.** Williams *v.* Harding (1866), L. R. 1 H. L. 9, H. L.; *Re* Winterbottom, *Ex p.* Winterbottom (1886), 18 Q. B. D. 446. **Apld.** *Re* Nance, *Ex p.* Ashmead, [1893] 1 Q. B. 590, C. A. **Refd.** *Re* Muirhead, *Ex p.* Muirhead (1876), 24 W. R. 351, C. A. **Mentd.** Williams *v.* Beaumont (1833), 10 Bing. 260.

See, now, 1914 Act, s. 149, & 1915 Rules, r. 277.

See, also, Nos. 1149, 1150, 1228-1230, 1252, 1253, *post.*

998. Creditor—Notwithstanding petition by bankrupt for liquidation by arrangement.]—A creditor is entitled to file a petition for an adjudication, although a petition by bkpt. for arrangement be pending, if the creditor has not acquiesced in or sanctioned the arrangement.—*Re* SAUNDERS, *Ex p.* TREHERNE (1860), 2 De G. F. & J. 656; 30 L. J. Bcy. 6; 3 L. T. 458; 6 Jur. N. S. 1317; 9 W. R. 133; 45 E. R. 775, L. JJ.

999. —— Whether necessarily creditor serving bankruptcy notice.]—Where a debtor has committed an act of bkpcy, by non-compliance with a bkpcy. notice, under 1883 Act, s. 4 (1) (*g*), a bkpcy. petition may be presented by any creditor in respect of such act of bkpcy., although the creditor who served the notice has, subsequently to the act of bkpcy., received payment of his debt.—*Re* POWELL, *Ex p.* POWELL, [1891] 2 Q. B. 324; 64 L. T. 800; 39 W. R. 656; 7 T. L. R. 556; 8 Morr. 178, D. C.

Annotation:—**Refd.** *Re* Whitley, *Ex p.* Mirfield Commercial Co., (1891) 8 Morr. 149, D. C.

1000. —— —— Application against non-trader.]—When petitioning creditor fails to proceed & obtain adjudication on a petition against a non-trader, it is not competent to another creditor to apply for adjudication upon that petition, 1849 Act, s. 101, not applying to proceedings against non-traders under 1861 Act.—*Re* BRISTOW, *Ex p.* EMMANUEL (1868), 3 Ch. App. 247; 37 L. J. Bcy. 9; 18 L. T. 222; 16 W. R. 385, L. J.

Annotation:—**Refd.** Newcastle *v.* Morris (1870), L. R. 4 H. L. 661, H. L.

1001. Executor—One of two.]—One of two exors. may petition against a debtor of testator.—TREASURE *v.* JONES (1785), cited Selwyn's Nisi Prius, 12th ed., Vol. I., p. 253.

1002. —— Probate obtained between petition & adjudication.]—An exor. sued out a commission & afterwards, but before the comrs. had made their adjudication, obtained probate of the will:—*Held:* a good petitioning creditor.—*Re* DRAKELEY, *Ex p.* PADDY (1818), 3 Madd. 241; Buck, 235; 56 E. R. 498.

1003. —— Valid probate obtained after commission.]—A commission of bkpcy. may be supported on a debt due to petitioning creditor in the character of exor., although he have not obtained a probate on a sufficient stamp at the time when the commission issued, if he afterwards obtains a valid probate, for that has relation back to testator's death.—ROGERS *v.* JAMES (1816), 7 Taunt. 147; 2 Marsh. 425; 129 E. R. 59.

Annotations:—**Apld.** *Re* Drakeley, *Ex p.* Paddy (1818), 3 Madd. 241. **Consd.** Rose *v.* Tomblinson (1834), 3 Dowl. 49. **Refd.** Burton *v.* Kirkby (1816), 7 Taunt. 174.

1004. Factor—Selling in own name without del credere commission—Before principal agrees to take purchaser as debtor.]—A factor who sells goods in his own name without a *del credere* commission, & is alone known to the purchaser, is a good petitioning creditor against the purchaser, although he has merely communicated the name of the purchaser to his principal. But he ceases to be so, when the principal has agreed with him to consider the purchaser as his debtor, & has taken steps for recovering the debt directly from the purchaser.—SADLER *v.* LEIGH (1815), 4 Camp. 195; 2 Rose, 286.

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998 i. *Creditor—With first regular docket.*]—A. having committed an act of bkpcy., B. lodged the affidavit of debt required by stat. C. subsequently upon the same day deposited with the officer the affidavit of his debt, & the bond required by 6 Will. 4, c. 14, s. 30: *—Held:* notwithstanding B.'s priority in lodging the affidavit, C. had the first regular docket, & was entitled to have the commission.—*Re* BEALE (1842), 2 Dr. & War. 375.—IR.

1001 i. *Executor—Where several executors.*]—All exors. must join in a petition for the compulsory sequestration of the estate of a debtor to their testator's estate.—*Re* HEWITT, *Ex p.* STAUGHTON & DARBYSHIRE (1864), 1 W. W. & A'B. 15.—AUS.

Sect. 1.—Creditor's petition : Sub-sect. 1, A. & B.; sub-sect. 2, A.]

Annotation :—**Refd.** *Re* Gray, *Ex p.* Gray (1835), 4 Deac. & Ch. 778, Ct. of R.

Husband.]—*See* Nos. 1017, 1030 *et seq.*, 1121, 1127, *post.*

1005. Indorsee—Of bankrupt's bill—Indorsement after bankruptcy.]—The indorsee of bkpt.'s bill cannot petition for a commission of bkpcy., where the indorsement is subsequent to the bkpcy.—*Ex p.* LEE (1721), 1 P. Wms. 782 ; 2 Eq. Cas. Abr. 97, pl. 3 ; 24 E. R. 614, L. C.

1006. Infant.]—The bond upon suing out a commission of bkpcy. must be by petitioning creditor, & where petitioning creditor was an infant the commission was superseded on account of his infancy.—*Ex p.* BARROW (1797), 3 Ves. 554 ; 30 E. R. 1153.

Annotations :—**Apld.** *Re* Mogg, *Ex p.* Mogg (1828), 6 L. J. O. S. Ch. 162. **Refd.** *Re* Ayre, *Ex p.* Patts (1840), 10 L. J. Bcy. 26.

1007. —— One of several creditors.]—A commission cannot be supported upon a petitioning creditor's debt, made up of debts due to several persons, if one of them is an infant & a separate creditor of the trader.—*Re* MORTON, *Ex p.* MORTON (1817), Buck, 42.

Annotations :—**Distd.** *Re* Ayre, *Ex p.* Potts (1840), 10 L. J. Bcy. 26, Ct. of R. **Mentd.** *Re* Mogg, *Ex p.* Mogg (1828), 6 L. J. O. S. Ch. 162.

1008. Joint creditor—Separate commission.]—A separate commission of bkpcy. may be taken out against one of several partners on the petition of a joint creditor.—CRISPE *v.* PERRIT (1744), Willes, 467 ; *sub nom. Ex p.* CRISP, 1 Atk. 133 ; 125 E. R. 1272.

Annotations :—**Consd.** *Re* Brown, *Ex p.* Murton (1812), 1 Ves. & B. 60. **Refd.** *Ex p.* Layton (1801), 6 Ves. 434 ; *Re* Corson, *Ex p.* De Tastet (1810), 1 Rose, 10 ; *Re* Chambers, *Ex p.* Chambers (1835), 1 Deac. 197.

1009. —— One of two.]—One of two joint obligees is not by himself a good petitioning creditor against the obligor.—BRICKLAND *v.* NEWSOME (1808), 1 Camp. 474.

Annotation :—**Refd.** *Re* Tucker, *Ex p.* Tucker (1895), 73 L. T. 170, C. A.

1010. —— One residing in enemy country but not adhering to enemy.]—A debt due to two partners is good to support a commission of bkpcy., notwithstanding one of the partners is resident in an enemy's country, such residence not being shown to be adhering to the enemy.—ROBERTS *v.* HARDY (1815), 3 M. & S. 533 ; 2 Rose, 457 ; 105 E. R. 710.

Annotations :—**Refd.** Rodriguez *v.* Speyer, [1919] A. C. 59, H. L. **Mentd.** Willison *v.* Patteson (1817), 7 Taunt. 439.

See, also, Nos. 1129 *et seq.*, *post.*

1011. —— Two of three trading in enemy country.]—A commission of bkpcy. founded on the petition of A., a British subject resident in England, for a debt due to himself & his partners, B. & C., also British subjects, but resident & carrying on trade in an enemy's country, cannot be supported.—M'CONNELL *v.* HECTOR (1802), 3 Bos. & P. 113 ; 127 E. R. 61.

Annotations :—**Expld. & Distd.** Roberts *v.* Hardy (1815), 3 M. & S. 533. **Refd.** William *v.* Patteson (1817), 7 Taunt. 439 ; Porter *v.* Freudenberg, Kreglinger *v.* Samuel & Rosenfeld, *Re* Merten's Patents, [1915] 1 K. B. 857, C. A. ; Daimler Co. *v.* Continental Tyre & Rubber Co. (Great Britain), [1916] 2 A. C. 307, H. L. ; Speyer *v.* Rodriguez (1917), 87 L. J. K. B. 171, C. A. ; Dynamit Act. *v.* Rio Tinto Co., [1918] A. C. 292, H. L. ; Rodriguez *v.* Speyer (1918), 119 L. T. 409, H. L. **Mentd.** The Matchless (1822), 1 Hag. Adm. 97 ; Janson *v.* Driefontein Consolidated Mines, [1902] A. C. 484, H. L. ; Mitsui *v.* Mumford, [1915] 2 K. B. 27 ; Jager *v.* Tolme & Runge (1915), 31 T. L. R. 381.

1012. Judgment creditor—Assignee of.]—An assignee of a judgment creditor cannot present a petition in bkpcy. against the judgment debtor.—ANON. (1731), Kel. W. 6 ; 25 E. R. 466.

See, now, Jud. Act, 1873 (c. 66), s. 25 (6).

What constitutes an assignment, *see* CHOSES IN ACTION.

1013. —— ——.]—On the dissolution of a firm of stockbrokers by the death of one of the partners, the partnership assets, including a debt to the late firm in respect of certain Stock Exchange transactions, were assigned by the surviving partners to L. for the purpose of winding up the partnership, & notice of the assignment was served on debtor. L. then recovered judgment for the amount of the debt. Subsequently an action was commenced in the Ch. Div. for the winding up of the partnership, & in that action a receiver was appointed of the partnership assets. The receiver took an assignment of the judgment debt from L., & obtained leave to issue execution. He then served a bkpcy. notice on debtor, & on the failure of debtor to comply with the notice a bkpcy. petition was presented against him by the receiver, the surviving partners, & the personal representatives of the deceased partner :—*Held :* inasmuch as the receiver had obtained an assignment of the judgment debt, he was a creditor entitled to present a bkpcy. petition.—*Re* MACOUN, [1904] 2 K. B. 700 ; 73 L. J. K. B. 892 ; 91 L. T. 276 ; 53 W. R. 197 ; 48 Sol. Jo. 672 ; 11 Mans. 264, C. A.

1014. —— Survivor of — Joinder of personal representative of deceased judgment creditor.]—Co-pltfs. obtained judgment against deft. with costs. The costs were taxed. One of co-pltfs. having died, the survivors presented a petition in bkpcy., the petitioning creditors' debt being stated to be the amount of the costs due under the judgment :—*Held :* the survivors might petition in respect of the judgment debt, without joining the personal representative of the deceased judgment creditor.—*Re* TUCKER, *Ex p.* TUCKER (1895), 73 L. T. 170 ; 59 J. P. 757 ; 11 T. L. R. 504 ; 39 Sol. Jo. 640 ; 2 Mans. 358 ; 14 R. 564, C. A.

1015. —— Leave of court—Inability of debtor to pay due to war—Courts (Emergency Powers) Act, 1914 (c. 78).]—*Held :* s. 1, (3) of the above Act was exhaustive & not limited to petitions presented before the passing of the Act, & it was not necessary

1008 i. *Joint creditor—Separate commissions.*]—Q. & F. carried on business as contractors in copartnership, & incurred a partnership debt. Certain creditors obtained separate judgments against Q. & F. for the debt, & neither of the judgments was satisfied. The creditors then presented a petition, asking for the adjudication as bkpts. of Q. & F. separately, & not as partners :—*Held :* the ct. had no power on the petition to adjudicate the partnership bkpt.—*Re* QUINLAN & FOSTER (1907), 26 N. Z. L. R. 513.—**N.Z.**

1012 i. *Judgment creditor—While action pending.*]—A judgment creditor cannot make his debtor a bkpt. while a suit is pending against him by the latter even when the debt on which he petitions is the costs of another unsuccessful action which debtor has brought against him.—*Re* BURKE (1886), 4 N. Z. L. R. 303.—**N.Z.**

1012 ii. —— ——.]—A judgment creditor cannot make his debtor a bkpt. while an action is pending against him by the latter, even when the writ in the action was taken out immediately before the adjourned application for adjudication was made.—*Re* SLATER (1889), 8 N. Z. L. R. 404.—**N. Z.**

1012 iii. —— *Debtor alleged to be solvent.*]—A judgment creditor is not bound to wait until a fair value can be obtained for debtor's assets by careful administration ; & it is no answer to an application for sequestration of debtor's estate to allege that he is solvent.—SCHARFF *v.* GROBLER (1908), 18 C. T. R. 485.—**S. AF.**

1012 iv. —— *Not person beneficially interested in judgment.*]—Under Insolvency Stat. 1871, No. 379, s. 37 (8), petitioning creditor, where the act of insolvency is failure to satisfy a judgment, must be the person who instituted the suit, & in whose favour the judgment was given, in other words, one person should not institute the suit & another person beneficially interested in the money recovered petition for sequestration as a creditor.—*Re* ALLEN (1879), 5 V. L. R. 25.—**AUS.**

therefore under s. 1 (1), for an unsatisfied judgment creditor, before he could present a bkpcy. petition against debtor, to obtain the leave of the ct. by which the judgment was entered.—*Re* SILBER, [1915] 2 K. B. 317; 84 L. J. K. B. 971; 113 L. T. 763; 59 Sol. Jo. 271; [1915] H. B. R. 95, C. A.

Annotation :—**Consd.** *Re* A Company, [1915] 1 Ch. 520, C. A.

1016. Landlord—Pending replevin on distress.]—*Semble :* pending a replevin on a distress for rent the landlord cannot sue out a commission against the tenant founded on his demand for rent.—MIDDLETON *v.* MUCKLOW (1834), 10 Bing. 401; 131 E. R. 959; *sub nom.* EMERY & MIDDLETON *v.* MUCKLOW, 4 Moo. & S. 263.

1017. Married woman—As executrix—Husband must join.]—A petitioning creditor's debt must be a debt upon which an action can be brought by petitioning creditor, & a husband must join in a bkpcy. petition by his wife founded on a debt due to her as extrix.—*Re* MOGG, *Ex p.* MOGG (1828), 2 Gl. & J. 397; 6 L. J. O. S. Ch. 162.

See, further, Nos. 1001 *et seq.*, *ante*, Nos. 1030 *et seq.*, *post.*

1018. Partner—Also instituting proceedings for account.]—If a partner institutes proceedings for the taking of the partnership accounts, he renders himself incompetent to take bkpcy. proceedings in respect of the same debt.—*Re* GRAY, *Ex p.* GRAY (1835), 4 Deac. & Ch. 778; 2 Mont. & A. 283; 4 L. J. Bcy. 70, Ct. of R.

Annotation :—**Refd.** Hope *v.* Meek (1855), 10 Exch. 829.

1019. Receiver in Chancery—Whether a "creditor".]—In an action in the Ch. Div., a receiver was appointed to collect & receive goods comprised in a charge given to pltfs. by one of defts., including therein any balance of the proceeds of the goods so charged in the hands of other deft. An order was subsequently made for the payment by last-mentioned deft. to the receiver of a specific sum, being money received by him in respect of the proceeds of the goods, & comprised in the charge :—*Held :* the receiver was not a "creditor" entitled to present a bkpcy. petition against such deft. within 1883 Act, s. 6.—*Re* SACKER, *Ex p.* SACKER (1888), 22 Q. B. D. 179; 58 L. J. Q. B. 4; 60 L. T. 344; 37 W. R. 204; 5 T. L. R. 112, C. A.

Annotations :—**Expld.** *Re* Macoun, [1904] 2 K. B. 700, C. A. **Refd.** *Re* O'Gorman, *Ex p.* Bale, [1899] 2 Q. B. 62; Rodriguez *v.* Speyer, [1919] A. C. 59, H. L.

Surety.]—*See* Nos. 1045, 1046, 1048, *post.*

1020. Trustee—For absolute beneficial owner—Joinder of cestui que trust.]—Under 1883 Act, a mere trustee of a debt for an absolute beneficial owner is not entitled to present a bkpcy. petition against debtor unless the *cestui que trust*, if capable of dealing with the debt, joins as a co-petitioner.—*Re* HASTINGS, *Ex p.* DEARLE (1884), 14 Q. B. D. 184; 54 L. J. Q. B. 74; 33 W. R. 440; 1 Morr. 281, C. A.

Annotations :—**Expld.** *Re* Arkell, *Ex p.* Arkell (1889), 6 Morr. 182, D. C.; *Re* Gamgee, *Ex p.* Ward (1891), 60 L. J. Q. B. 574; *Re* Maund, *Ex p.* Maund, [1895] 1 Q. B. 194. **Distd.** *Re* Tucker, *Ex p.* Tucker (1895), 73 L. T. 170. **Mentd.** *Re* Palmer, *Ex p.* Brims, [1898] 1 Q. B. 419, C. A.

1021. —— —— —— Trustee for persons under disability.]—Where a debt is vested in a mere trustee for an absolute beneficial owner, who is capable of dealing with the debt as he pleases, the trustee cannot alone sustain a bkpcy. petition against debtor, but the beneficial owner must join in the petition. The rule, however, does not apply to a trustee for persons under disability.—*Re* ADAMS, *Ex p.* CULLEY (1878), 9 Ch. D. 307; 47 L. J. Bcy. 97; 38 L. T. 858; 27 W. R. 28, C. A.

Annotations :—**Consd.** *Re* Hastings, *Ex p.* Dearle (1884), 14 Q. B. D. 184, C. A. **Distd.** *Re* Tucker, *Ex p.* Tucker (1895), 73 L. T. 170, C. A. **Refd.** *Re* Maund, *Ex p.* Maund, [1895] 1 Q. B. 194. **Mentd.** *Re* Macoun, [1904] 2 K. B. 700, C. A.

1022. —— —— —— Amendment.]—Where petitioning creditor is a mere trustee, the petition ought to be amended by joining the *cestui que trust*, on payment of all the costs, including the costs of an appeal.—*Re* ELLIS, *Ex p.* HINSHELWOOD (1887), 4 Morr. 283, C. A.

Annotation :—**Refd.** *Re* Maund, *Ex p.* Maund, [1895] 1 Q. B. 194.

See, also, Nos. 1371, 1372, *post.*

1023. —— As regards part of debt.]—An objection was taken to a bkpcy. petition on the ground that, as to part of the debt in respect of which the petition was presented, petitioning creditor was trustee for another person, who was not joined as a co-petitioner & had not given his consent to the petition :—*Held :* the objection could not be sustained, & the registrar was right in making a receiving order against debtor.—*Re* GAMGEE, *Ex p.* GAMGEE (1891), 8 Morr. 182; *sub nom. Re* GAMGEE, *Ex p.* WARD, 60 L. J. Q. B. 574; 64 L. T. 730; 39 W. R. 579, C. A.

1024. —— Under deed of assignment.]—A commission of bkpcy. cannot be taken out by a person who is appointed, & acts as trustee under a deed of assignment for the benefit of creditors, although he does not actually execute the deed.—*Re* WHALLEY, *Ex p.* WHALLEY (1803), 1 Smith, K. B. 118.

B. Creditors holding Security.

See Part IX., *post.*

SUB-SECT. 2.—IN RESPECT OF WHAT DEBTS.

A In General.

1025. Debt must be legal not equitable.]—*Held :* a petitioning creditor's debt must be a legal one, not a mere equitable demand.—*Re* HAWTHORNE, *Ex p.* HAWTHORNE (1831), Mont. 132.

1026. Debt should not be doubtful.]—The practice of petitioning upon a debt which is doubtful, or which is uncertain as to the amount under dispute, ought always to be discouraged. Bkpcy. is not the proper method of settling disputed accounts.—*Re* POTTS (1862), 31 L. J. Bcy. 34; 6 L. T. 137, L. JJ.

Annotation :—**Mentd.** *Re* Scott Russell (1862), 31 L. J. Bcy. 37, L. JJ.

1027. —— Disputed balance on complicated accounts.]—It is an objectionable proceeding, not deserving of encouragement, to found a petition upon a disputed balance of complicated cross-demands & unsettled accounts.—*Re* SCOTT RUSSELL (1862), 31 L. J. Bcy. 37; 6 L. T. 138, L. JJ.

See, also, No. 1038, *post.*

1017 i. *Married woman—Trading separately — Husband abroad.*]—A married woman, although treated as a separate trader, & her husband be gone out of the realm :—*Held :* not competent to be petitioning creditor to sue out a commission of bkpcy.—*Re* ATKINSON (1825), 2 Mol. 451.—**IR.**

1018 i. *Partner—Petition by one of two partners—In absence of other.*]—One of two partners may, during the absence of the other partner, present a petition for the adjudication of the partnership firm.—*Re* SMART, DONKIN & CO. (1870), 2 Q. S. C. R. 66.—**AUS.**

1021 i. *Trustee—For absolute beneficial owner—Joinder of cestui que trust.*]—The principle of law stated in *Re Adams, Ex p. Culley*, No. 1021 *supra*, does not hold in the colony of Victoria.—*Re* DWYER (1879), 5 V. L. R. 198.—**AUS.**

PART III. SECT. 1, SUB-SECT. 2.—A.

1026 i. *Debt should not be doubtful.*]—No commission ought to be sued out upon a disputed account to be settled in either a ct. of law or of equity, & no man should be petitioning creditor to whose debt there attaches that degree of doubt that it is depending on the balance of an account unliquidated, whether any debt is *de facto*.—*Re* FRENCH, *Ex p.* SOMERS (1828), 1 Mol. 431, n.—**IR.**

Sect. 1.—*Creditor's petition: Sub-sect.* 2, *A.*]

1028. Debt must not be statute-barred.]—A judgment creditor is not entitled, after the expiration of twelve years without payment of interest or acknowledgment of his right, to obtain an adjudication in bkpcy. against debtor.—*Re* TYNTE, *Ex p.* TYNTE (1880), 15 Ch. D. 125; 42 L. T. 598; 28 W. R. 767.

Annotations:—**Distd.** *Re* Whitley, *Ex p.* Mirfield Commercial Co. (1891), 65 L. T. 351, D. C. **Dbtd.** *Re* Mendelssohn, *Ex p.* Mendelssohn, [1903] 1 K. B. 216, C. A. **Refd.** *Re* Outram, *Ex p.* Ashworth & Outram (1893), 63 L. J. Q. B. 308. **Mentd.** Jay *v.* Johnstone (1892), 67 L. T. 655, D. C.

1029. Assessment for church & highway rates.]—An assessment for church & highway rates is a debt, & the assessor a creditor, under bkpcy. laws.—LLOYD *v.* HEATHCOTE (1820), 2 Brod. & Bing. 388; 5 Moore, C. P. 129; 129 E. R. 1017.

Annotations:—**Mentd.** Harvey *v.* Ramsbottom (1822), 1 B. & C. 55; Fisher *v.* Boucher (1830), 10 B. & C. 705; Belcher *v.* Gummow (1847), 9 Q. B. 873; Phillips *v.* Naylor (1858), 3 H. & N. 14.

See, also, 1914 Act, s. 33.

1030. Petition by husband —Debt due to wife as executrix or administratrix.]—Where a debt is due to a wife as administratrix, the husband alone cannot take oath of it as a debt due to himself, in order for a commission of bkpcy.—*Ex p.* STAPLES (1734), 7 Vin. Abr. 67.

Annotations:—**Apld.** *Re* Mogg, *Ex p.* Mogg (1828), 2 Gl. & J. 397; **Refd.** Rumsey *v.* George (1813), 1 M. & S. 176.

1031. —— ——.]—Bkpt. was bound to N. in a bond of £100. N. died & made B. her extrix., who married H. On bkpt.'s failing, H. alone petitioned & sued out a commission of bkpcy.:—*Held:* as the debt was due to H.'s wife as extrix., the petition ought to have been by the husband & wife for the debt due to her *in auter droit*.—MASTER *v.* WINTER (1735), 2 Gl. & J., at p. 398; cited Davies, B. L. at p. 464; Montague B. L., 1st ed., vol. 2, p. 129.

Annotation:—**Refd.** Rumsey *v.* George (1813), 1 M. & S. 176.

1032. —— **Debt partly due to wife.**]—A husband alone cannot be petitioning creditor in respect of a debt composed partly of a sum of money due to him in his own right, & partly of a sum due to his wife *dum sola*.—RUMSEY *v.* GEORGE (1813), 1 M. & S. 176; 105 E. R. 66.

See, now, Married Women's Property Act, 1882 (c. 75); *see, also*, Nos. 1001 *et seq.*, 1017, *ante*.

1033. Petition by creditor in partnership with bankrupt in certain transactions—Debt not arising out of such transactions.]—It is no objection to petitioning creditors' debt, that petitioning creditors were in partnership with bkpt. in a particular transaction, providing the debt does not arise out of that particular transaction.—WINDHAM *v.* PATERSON (1815), 1 Stark. 144; 2 Rose, 466.

Annotation:—**Distd.** *Re* Notley, *Ex p.* Notley (1833), 3 L. J. Bcy. 1.

1034. Profit sharing arrangement between creditor & bankrupt — Money received by bankrupt for goods deposited with him for sale.]—Where A. deposits with B. goods to be sold, &, on a sale being effected, the profits, after deducting the cost price, etc., are to be equally divided between them, but the loss, if any, is to be borne exclusively by A., if B. effect a sale & receive the money, the debt due from him to A. is sufficient to support a commission of bkpcy. against B.—MARSON *v.* BARBER (1818), Gow, 17, N. P.

1035. —— **Money advanced for employment in business.**]—Money was advanced to debtor for employment in his business, the agreement providing for a share of profits in addition to the agreed interest:—*Held:* a good petitioning creditor's debt.

It is only when it is necessary to take the partnership accounts to ascertain the amount of the debt, that it can be said to arise out of the partnership, so as to deprive the creditor of his legal rights. In the case of a partnership, if there has been an account rendered & balance struck, the same can be proved & it will support a commission (*per* CUR.).—*Re* NOTLEY, *Ex p.* NOTLEY (1833), 1 Mont. & A. 46; 3 L. J. Bcy. 1; *sub nom. Re* NOTLEY, *Ex p.* BRIGGS, 3 Deac. & Ch. 367.

Annotation:—**Refd.** *Re* Gray, *Ex p.* Gray (1835), 4 Deac. & Ch. 778.

See, further, PARTNERSHIP.

1036. Debt for which action pending.]—In June, 1812, A. sued H. & G. for a debt of £1000, & G. being abroad, writs of *alias capias* & *pluries capias*, returnable in Michaelmas term, 1812, & Hilary term, 1813, were issued against him with a view to outlawry, but a commission of bkpcy. having been taken out against H., the proceedings in outlawry against G. were suspended. Except touching at Deal in Apr., 1814, on a voyage, G. never returned to Great Britain till July, 1819. In Feb., 1821, A. commenced a new action against G. for the same debt, as was the subject of the former action, but having failed in his attempts to arrest G., issued, upon such debt, a commission of bkpcy. against him in Mar., 1821, & in July, 1821, after G. had commenced an action to try the validity of the commission, but before trial, entered up continuances in the action commenced June, 1812:—*Held:* at the time of issuing the commission of bkpcy., the debt in question was a good petitioning creditor's debt.—GREGORY *v.* HURRILL (1823), 1 Bing. 324; 8 Moore, C. P. 189; 1 L. J. O. S. C. P. 115; 130 E. R. 131.

1037. —— **Arrears of rent.**]—*Semble:* if an action be pending for rent, a landlord cannot make the debt for arrears of rent the subject of a bkpcy. petition (TINDAL, C.J.).—MIDDLETON *v.* MUCKLOW (1834), 10 Bing. 401; 131 E. R. 959.

1038. Debt on balance of account.]—A commission of bkpcy. may be supported on a petitioning creditor's debt on a balance of accounts, which continue running up to the commission & always against bkpt. to the extent of £100, though payments have been made sufficient, if applied in the order of time, to discharge the particular balance actually due at the time of the act of bkpcy.—SHAW *v.* HARVEY (1830), Mood. & M. 526.

See, also, No. 1027, *ante*.

1039. Debt due by partner for loan from partner—Debt wrongly described as due to partnership.]—Bkpt., who was in partnership with W. P., borrowed various sums of him by way of personal loan, & upon dissolution of the partnership purchased the

1028 i. *Debt must not be statute-barred.*]—A creditor whose claim is not enforceable against debtor may not apply for sequestration of debtor's estate.—NICHOLL *v.* NICHOLL (1916), W. L. D. 10.—**S. AF.**

m. *Secured debt.*]—*Held:* Debtors & Creditors Act, 1876, being silent upon the subject, it was not necessary, to support a petition for adjudication, that petitioning creditor's debt should be unsecured, or that the value of the security should be deducted from the amount claimed.—*Re* MACKAY, 2 J. R. N. S. 150.—**N.Z.**

n. *Arrears of rates.*]—Rates in arrear constitute a debt capable, if sufficient in amount, of supporting an adjudication in bkpcy., obtained against the defaulting ratepayer on the petition of the Collector-General of Rates in the City of Dublin.—*Re* CONATY (1879), 3 L. R. Ir. 463.—**IR.**

o. *S. P. Re* HUNTER (1879), 3 L. R. Ir. 465.—**IR.**

p. *Debt discharged in former proceedings.*]—A debt from which the trader has been released by the ct. in insolvency may nevertheless be a good debt on which to petition in bkpcy.—*Re* HODGENS (1868), 2 I. L. T. Jo. 689.—**IR.**

stock-in-trade for a stipulated sum. W. P. made out an account entitled "H. P. (bkpt.) in account with H. & W. P." :—*Held:* W. P. had a good petitioning creditor's debt notwithstanding this mode of entitling the account.—*Re* PALMER, *Ex p.* RICHARDSON & SON (1833), 3 Deac. & Ch. 244.

1040. Debt due by trader discharged out of custody—Judgments Act, 1838 (c. 110).]—The debt of a trader discharged out of custody under the above Act, is a good & sufficient petitioning creditor's debt, to support a fiat in bkpcy. against him under s. 39 of that Act.—WATSON *v.* HUMPHREY (1855), 10 Exch. 781; 24 L. J. Ex. 190; 24 L. T. O. S. 291; 3 W. R. 254; 3 C. L. R. 1048; 156 E. R. 656.

1041. Petition by several creditors—Debts together amounting to £50—Each less than £50.]—Two creditors, whose debts together amount to more than £50, though each debt is less, can issue a debtor's summons on which debtor can be adjudicated bkpt.—*Re* ANDREW, *Ex p.* ANDREW (1875), 1 Ch. D. 358; 45 L. J. Bcy. 57; 33 L. T. 556; 24 W. R. 197, C. A.

See, now, 1914 Act, s. 4 (1) (*a*).

1042. —— One of whom an infant.]—*Re* MORTON, *Ex p.* MORTON, No. 1007, *ante.*

1043. —— On one debtor's summons—Must not be separate petitions.]—If several creditors join in one debtor's summons, they must go on together in the subsequent proceedings & cannot severally present petitions in bkpcy. founded on debtor's failure to comply with the summons.

If they do unite in this way they must all stand or fall together (JAMES, L.J.)—*Re* ONSLOW, *Ex p.* KIBBLE (1875), 10 Ch. App. 373; 44 L. J. Bcy. 63; 32 L. T. 138; 23 W. R. 433, L. JJ.

Annotations:—**Refd.** *Re* Andrew (1875), 1 Ch. D. 358, C. A. **Mentd.** *Re* Lynch, *Ex p.* Lynch (1876), 2 Ch. D. 227; *Re* Blythe, *Ex p.* Banner (1881), 44 L. T. 908, C. A.; *Re* Jones, *Ex p.* Jones (1881), 18 Ch. D. 109, C. A.; *Re* Tollemache, *Ex p.* Revell (1884), 13 Q. B. D. 720, C. A.; *Re* Lennox, *Ex p.* Lennox (1885), 16 Q. B. D. 315, C. A.; Duncan *v.* Dixon (1890), 44 Ch. D. 211; *Re* Leavesley, [1891] 2 Ch. 1, C. A.; Smith *v.* King, [1892] 2 Q. B. 543; *Re* Manchester, Middleton & District Tram. Co., [1893] 2 Ch. 638; *Re* Hawkins, *Ex p.* Troup, [1895] 1 Q. B. 404, C. A.; *Re* G. E. B., [1903] 2 K. B. 340, C. A.; *Re* Debtor (1915), 113 L. T. 704.

1044. Money paid by brokers to jobbers—At client's request—To meet differences.]—Money paid by a broker on the Stock Exchange to jobbers, at request of a client to meet liabilities due in respect of speculative dealings for differences on behalf of the client, is a good debt whereon to found an adjudication of bkpcy. against the client.—*Re* ROGERS, *Ex p.* ROGERS (1880), 15 Ch. D. 207; 43 L. T. 163; 29 W. R. 29, C. A.

Annotations:—**Mentd.** *Re* Evans, *Ex p.* Evans (1883), 50 L. T. 158, C. A.; *Re* Johnson, *Ex p.* Johnson (1883), 25 Ch. D. 112, C. A.

1045. Surety — Against co-surety — In respect of sums paid—Not until excess of proportion paid.]—Until a surety has paid more than his proportion he has, if the co-surety has not been released, no claim against him, & he cannot present a bkpcy. petition against him.—*Re* SNOWDON, *Ex p.* SNOWDON (1881), 17 Ch. D. 44; 50 L. J. Ch. 540; 44 L. T. 830; 29 W. R. 654, C. A.

Annotations:—**Consd.** Stirling *v.* Burdett, [1911] 2 Ch. 418. **Refd.** Beckett *v.* Addyman (1882), 9 Q. B. D. 783, C. A.; Wolmershausen *v.* Gullick, [1893] 2 Ch. 514.

1046. —— —— —— Debt payable by instalments.]—Where a debt is payable by instalments, & one surety is compelled to pay an instalment, he has a good petitioning creditor's debt against his co-surety.—*Re* MACDONALD, *Ex p.* GRANT, [1888] W. N. 130, C. A.

Annotation:—**Consd.** Stirling *v.* Burdett (1911), 81 L. J. Ch. 49.

1047. Money-lender—Debt due to—Registered name & address not used.]—A registered money-lender, who carries on a money-lending business otherwise than in his registered name or at his registered address, or enters into any agreement, or takes any security for money in the course of his business as a money-lender otherwise than in his registered name, cannot present a bkpcy. petition in respect of money so lent.—*Re* DEBTOR, *Ex p.* CARDEN (1908), 52 Sol. Jo. 209, C. A.

Annotations:—**Mentd.** Blair *v.* Buckworth (1908), 24 T. L. R. 474, C. A.; King *v.* Turnbull (1908), 24 T. L. R. 434; Gadd *v.* Provincial Union Bank, [1909] 2 K. B. 353, C. A.

1048. Debt contracted to pay bet—Loan by way of guarantee for gambling purposes.]—In 1903, L. lent debtor £1,000 for the purpose of betting on horse races, any profits resulting from the betting to be equally divided. In the same year L. guaranteed an overdraft to the extent of £1,000 at debtor's bank. There were no profits on the betting, & all the money having been lost, L. in 1903, guaranteed a further overdraft of £500 in order to enable debtor to pay bets to that amount which he had lost. In 1906, L. paid £1,633 to the bank under his guarantees & recovered judgment in default of defence against debtor for £3,000. Debtor having failed to comply with a bkpcy. notice L. presented a bkpcy. petition against him:—*Held:* (1) as to the guarantee for £500, the debt arising out of the loan for the purpose of enabling debtor to pay a bet which he had lost, not being for an illegal consideration, could be proved for in bkpcy., & the money was not paid by L. "in respect of" a gaming contract within Gaming Act, 1892 (c. 9), s. 1; (2) as the guarantee was given in 1903, & the payment to the bank was not made till 1906, the banking account having been running in the interval, the original

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1041 i. *Two creditors—Each debt less than £50—Debts combined before petition.*]—S., a creditor, presented a petition for adjudication of insolvency against I., alleging a debt of £59 12*s.* 7*d.* Of that amount part was owing to S., on a judgment recovered by him, & the remainder, a sum of £36 17*s.* 0*d.* was owing to him as the assignee of debt contracted by I. with another person by whom it was assigned to S. before presentation of the petition. I. did not receive notice of the assignment until after the petition was presented. The assignor was not joined as co-petitioner. The act of insolvency was not disputed:—*Held:* S. was a competent petitioning creditor.—*Re* IZATT, *Ex p.* SMITH, [1903] S. R. Q. 135.—**AUS.**

1041 ii. —— —— *Debts combined after act of bankruptcy.*]—*Re* BOWLER, *Ex p.* CALDWELL (1895), 6 Q. L. J. 242.—**AUS.**

1045 i. *Surety — Against debtor — Payment by one of several sureties.*]—A payment by one of several sureties on behalf of debtor may constitute a good petitioning creditor's debt.—*Re* INGLIS (1877), 3 V. L. R. 100.—**AUS.**

q. *Claim for money embezzled.*]—Bkpcy. proceedings allowed on the part of a creditor, whose claim was for money embezzled from him, debtor having absconded.—*Re* HERDSON, 2 J. R. N. S. 221.—**N.Z.**

r. *Debt contracted after 1872 Act—Rent accruing due after Act under lease executed before—Not such a debt.—Held:* rent accruing due & payable after the passing of the above Act, by a lessee or assignee of a lease executed or assigned before the passing of the Act, was a debt contracted by the lessee or assignee before the passing of the Act, & did not constitute a good petitioning creditor's debt.—*Re* M. (1874), 8 I. L. T. 34, 77.—**IR.**

s. —— *Creation of new tenancy.*]—The tenant of a farm under a contract of tenancy created before the passing of the above Act, was evicted, in 1880, for non-payment of rent, & the day after the period for redemption had expired A. paid a sum of money to the landlord, part of which was applied in payment of the arrears of rent, & the residue paid to the evicted tenant, & A. was thereupon put into possession of the holding at the same rent as the former tenant, & continued in possession, paying this rent. A year's rent being due by A. in 1885, the landlord obtained a debtor's summons against him in respect of such rent:—*Held:* a new tenancy was created in 1880 between A. & the landlord, & the rent, in respect of which the summons was obtained, was a debt contracted after the passing of the Act.—*Re* M'CARTHY (1887), 19 L. R. Ir. 375.—**IR.**

Sect. 1.—*Creditor's petition: Sub-sect.* 2, *A., B. & C.* (*a*) & (*b*).]

transaction, even if tainted with vice under Gaming Acts, must be taken to have been wiped out, so that no question arose with regard to it; (3) there was a good debt to support the petition.—*Re* O'SHEA, *Ex p.* LANCASTER, [1911] 2 K. B. 981; 81 L. J. K. B. 70; 105 L. T. 486; 18 Mans. 349, C. A.

1049. Postponement of Payments Act, 1914 (c. 11) —Debt within moratorium proclamations.]—*Held:* a debt within the proclamations issued under the above Act, 1914, formed a good petitioning creditor's debt.—*Re* SAHLER (1914), 84 L. J. K. B. 1275; 112 L. T. 133; 59 Sol. Jo. 106; [1915] H. B. R. 119, D. C.

B. Amount of Debt.

See Nos. 1041, 1043, *ante*, Nos. 1071, 1072, 1091, 1124, 1135, 1136, 1138 *et seq.*, *post.*

C. *Must be Due at date of Act of Bankruptcy.*

(*a*) *In General.*

1050. General rule.]—To support a commission of bkpcy., it is necessary that there should have been a good petitioning creditor's debt subsisting when the act of bkpcy. was committed, & it is not sufficient that petitioning creditor's debt accrued before the suing out of the commission.—Moss *v.* SMITH (1808), 1 Camp. 489.

1051. ——.]—It has always been the settled rule that the debt of petitioning creditor must be a debt which existed at the time of the act of bkpcy. The law was so settled, not on the ground of any express words in any of Bkpcy. Acts, but because it would be manifestly unjust, that a person who commits an act of bkpcy., & who happens to have no creditors, or pays his creditors in full, should be liable to be made a bkpt. on account of that act by some person to whom he afterwards became indebted (MELLISH, L.J.).—*Re* HAYWARD, *Ex p.* HAYWARD (1871), 6 Ch. App. 546; 40 L. J. Bcy. 49; 24 L. T. 782; 19 W. R. 833, L. JJ.

Annotations:—**Expld.** Faulks *v.* Atkins (1893), 10 T. L. R. 178. **Mentd.** *Re* Foulds, *Ex p.* Learoyd (1878), 10 Ch. D. 3, C. A.; *Re* Moore, *Re* Bartholomew's Case (1899), 68 L. J. Ch. 302, C. A.

1052. —— **"Due"—Presently payable.**]—The petitioning creditor's debt must be a debt on which an action can be brought, & the word "due" in 1869 Act, s. 6, means "presently payable."—*Re* PEARCY, *Ex p.* STURT & Co. (1871), L. R. 13 Eq. 309; 41 L. J. Bcy. 12; 20 W. R. 200.

Annotation:—**Consd.** *Re* Fastnedge, *Ex p.* Kemp (1874), 9 Ch. App. 383, L. J.

1053. Bond executed after act of bankruptcy—Given for pre-existing debt.]—A commission of bkpcy. is well founded upon a bond given for a pre-existing debt, although it appear that the bond was executed subsequently to the act of bkpcy.—AMBROSE *v.* CLENDON (1736), Lee *temp.* Hard. 267; 2 Stra. 1042; 95 E. R. 172, N. P.

Annotations:—**Consd.** Bryant *v.* Withers (1813), 2 M. & S. 123. **Distd.** *Re* Barrow & Gedder, *Ex p.* Christy (1832), 2 Deac. & Ch. 155. **Apld.** *Re* Mostyn, *Ex p.* Griffiths (1853), 3 De G. M. & G. 174, L. JJ. **Distd.** *Re* Tyler, *Ex p.* Higgins (1858), 3 De G. & J. 33, L. JJ. **Consd.** *Re* King & Beesley, *Ex p.* Horner (1894), 64 L. J. Q. B. 126. **Refd.** *Re* Prescott, *Ex p.* Prescott (1840), 4 Jur. 852.

1054. Goods delivered to have work done thereon —No demand until after bankruptcy.]—An action of *assumpsit*, which is a demand founded on implied contract, is sufficient to make a man a debtor within the bkpcy. laws.

A. delivered to B., who afterwards became a bkpt., a quantity of saltpetre to be refined. No demand was made till after the bkpcy.:—*Held:* this was not a debt within bkpcy. laws, because no debt accrued before the bkpcy.—ANON. (1773), Lofft. 341; 98 E. R. 683.

1055. Money payable on notice—No notice before act of bankruptcy.]—A debt for money lent on mtge., conditioned for payment after six months' notice, such notice not to expire before a certain day, is a good petitioning creditor's debt to support a commission sued out before that day.—HILL *v.* HARRIS (1830), Mood. & M. 448, N. P.

Annotation:—**Refd.** *Re* Barr, *Ex p.* Wolfe, [1896] 1 Q. B. 616.

1056. ——.]—Under an agreement made in Jan., 1900, between M., a stockbroker, & T., with a view to T.'s ultimately becoming a member of the Stock Exchange & entering into partnership with M., T. paid £2000 into M.'s banking account, subject to a condition that if T. should not, on or before Sept. 29, 1900, become a member of the Stock Exchange, or if, having become a member, he should not be at liberty to enter a partnership within that period by reason of his recommenders withholding their consent, then & in either of those cases T. should have the option of determining the agreement by notice, whereupon the £2,000 should be repaid by M. On June 28, M. was hammered on the Stock Exchange, & thereupon T., without having given any notice purporting to determine the agreement, presented a bkpcy. petition against M., alleging that M. was indebted to him "in the sum of £2,000 lent by him to M. pursuant to the agreement":—*Held:* the alleged debt of £2,000 was not "a liquidated sum, payable either immediately or at some certain future time," within 1883 Act, s. 6 (1) (*b*), & was not sufficient to support the petition, & T.'s only remedy was in damages for breach of the agreement.—*Re* MILLER, [1901] 1 K. B. 51; 70 L. J. Q. B. 1; 83 L. T. 545; 49 W. R. 65; 17 T. L. R. 9; 45 Sol. Jo. 44; 8 Mans. 1, C. A.

Annotation:—**Mentd.** *Re* Reis, *Ex p.* Clough (1904), 91 L. T. 592, C. A.

See, now, 1914 Act, s. 4 (1) (*b*).

1057. Sum due for goods purchased — Credit unexpired at act of bankruptcy.]—*Semble:* if a trader bought goods on credit & committed an act of bkpcy. the creditor might take out a commission before the day of payment under 5 Geo. 2, although no written security was given for the debt.—HENBEST *v.* BROWN (1791), Peake, 75, N. P.

Annotations:—**Refd.** Parsloe *v.* Dearlove (1804), 1 Smith, K. B. 281, N. P.; Hoskins *v.* Duperoy (1808), 9 East, 498.

1058. —— ——.]—Assignees nonsuited, on the ground that the debt of petitioning creditor, or at least a part of it necessary to make up £100, arose from goods sold & delivered upon a credit

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PART III. SECT. 1, SUB-SECT. 2. —C. (a).

1050 i. *General rule.*]—It is sufficient if the debt was due at date of the petition whether or not it existed before the act of insolvency relied upon.—SIMPSON & Co. *v.* FLECK (1833), 3 Men. 213.—**S. AF.**

1050 ii. ——.]—A creditor, whose debt has not matured, may take proceedings to subject the estate of his debtor to compulsory liquidation.—*Re* PERKS (1870), 2 Han. 121.—**CAN.**

1050 iii. ——.]—A petitioning creditor's debt must be a sum due at law or in equity, & presently payable. — *Re* TAYLOR, *Ex p.* YOUNG BROTHERS (1891), 17 V. L. R. 121.—**AUS.**

t. —— *Further time for debtor to rebut insolvency.*]—A creditor, whose debt is not yet due, may proceed against his debtor who is insolvent, as he might have done if his debt had been overdue.

Debtor did not owe more than $100 beyond such debt, none of which was at the time due, & a portion of which was not payable for several years:—*Held:* he should be allowed further time to show, if he could, that he was not in fact insolvent, & so not liable to have his estate placed in compulsory liquidation.—*Re* MOORE *v.* LUCE (1868), 18 C. P. 446.—**CAN.**

which was not expired at the time of the commission.—COX *v.* CRIPPS (circa. 1795–1808), cited 9 East, at p. 504; 103 E. R. 665.

Annotation :—**Refd.** Hoskins *v.* Duperoy (1808), 9 East, 498.

1059. ——— ———.]—A debt for goods sold on an unexpired credit will not support a commission of bkpcy. (LORD ELLENBOROUGH, C.J.).—HOSKINS *v.* DUPEROY (1806), 6 Esp. 55.

1060. ——— ———.]—Petitioning creditors supplied goods to P. on a two-months' credit to the amount of £117, of which amount, at the date of the presentation of the petition, only £49 odd was actually payable by P. to petitioning creditors :—*Held :* the debt was not sufficient to support the petition for adjudication.—*Re* PEARCY, *Ex p.* STURT & Co. (1871), L. R. 13 Eq. 309; 41 L. J. Bcy. 12; 20 W. R. 200.

Annotation :—**Refd.** *Re* Fastnedge, *Ex p.* Kemp (1874), 9 Ch. App. 383, L. J.

1061. ——— ——— **Credit by custom of trade.**]—Sugar sold, payable for, by the custom of the trade, two months after the sale, does not create a debt to support a commission, until the time of credit has elapsed.—*Ex p.* ROBERTS, *Ex p.* WELLS (1815), 1 Madd. 72; 56 E. R. 28.

1062. ——— ——— **Credit of alternative periods.**]—Upon a sale of goods, at six or nine months' credit, the purchaser, by not paying at the end of six months, makes his election to take credit for the nine months, & there is no debt to support a commission of bkpcy, till the nine months are expired.—PRICE *v.* NIXON (1813), 5 Taunt. 338; 128 E. R. 720.

Annotation :—**Refd.** Reed *v.* Kilburn Co-operative Soc. (1875), L. R. 10 Q. B. 264.

1063. ——— **Payable by present bill payable at future date—Bill not given at act of bankruptcy.**]—*Held :* (1) goods sold & delivered upon an agreement to be paid for by a present bill payable at a future day did not create a present debt, on which to found a commission of bkpcy.; (2) neither could such executory contract, if no such bill payable at a future day were actually given to secure it, found a good petitioning creditor's debt within 7 Geo. 1, c. 31, s. 1, & 5 Geo. 2, c. 30. s, 22, which were confined to debts due on bills, bonds, promissory notes, & other personal written securities of the like sort, payable at a future day, which alone by the latter stat. were made available to found a good petitioning creditor's debt.—HOSKINS *v.* DUPEROY (1808), 9 East, 498; 103 E. R. 663.

See, now, 1914 Act, s. 4 (1) (*b*).

1064. ——— ——— ———.]—If goods are sold to be paid by a bill at four months, & no bill is given, there is not a good petitioning creditor's debt arising from such sale, to support a commission of bkpcy. against the purchaser, till the four months have expired.—COTHAY *v.* MURRAY (1808), 1 Camp. 335.

1065. Judgment—Act of bankruptcy between verdict & judgment.]—Pltf. in an action for a breach of promise of marriage recovered damages against debtor, who between verdict & judgment committed an act of bkpcy. :—*Held :* the judgment being after the act of bkpcy. was a fatal objection & the debt was not a good petitioning creditor's debt.—*Re* CHARLES, *Ex p.* CHARLES (1811), 14 East, 197; 1 Rose, 372; 16 Ves. 256; 104 E. R. 576.

Annotations :—**Apld.** Buss *v.* Gilbert (1813), 2 M. & S. 70. **Consd.** Scott *v.* Ambrose (1814), 3 M. & S. 326; Walker *v.* Barnes (1814), 1 Marsh. 346. **Distd.** Dinsdale *v.* Eames (1820), 2 Brod. & Bing. 8; Greenway *v.* Fisher (1827), 1 Man. & Ry. K. B. 330. **Consd.** R. *v.* Soulby (1827), 1 Y. & J. 249. **Distd.** *Re* King & Beesley, *Ex p.* King & Beesley [1895] 1 Q. B. 189, D. C. **Refd.** *Ex p.* Douthat (1820), 4 B. & Ald. 67; Haswell *v.* Thorogood (1828), 7 B. & C. 705; Jones *v.* Thompson (1858), E. B. & E. 63; Dresser *v.* Johns (1859), 6 C. B. N. S. 429; *Re* Tripp (1861), 3 L. T. 599; *Re* Enefer, *Ex p.* Browning (1867), 16 W. R. 248. **Mentd.** Young *v.* Taylor (1818), 8 Taunt. 315.

1066. ——— **Obtained after act of bankruptcy.**]—A. issued a writ against B. claiming £49 11*s.* 7*d.* debt & £3 costs. On the same day B. executed a deed assigning all his property to trustees for the benefit of his creditors. A. afterwards signed judgment for the debt & costs, which were taxed at £8 9*s.* 6*d.*, making £58 1*s.* 1*d.* in all, & then presented a bkpcy. petition against B. alleging as the act of bkpcy. the execution of the creditors' deed. The county ct. judge having adjudicated B. bkpt. :—*Held :* there was no good petitioner's debt at the date of the act of bkpcy.—*Re* WHELAN, *Ex p.* SADLER (1878), 48 L. J. Bcy. 43; 39 L. T. 361; 27 W. R. 156.

1067. ——— ———.]—In an action upon a bill of exchange for £40 an order was made staying the proceedings on deft.'s undertaking to pay to pltfs., in addition to £20 which had been paid into ct., £20 10*s.* & the costs of the action. In default of payment pltfs. were to be at liberty to sign judgment & issue execution. The costs having been taxed at £9 2*s.*, deft. tendered £29 14*s.* 6*d.* to pltfs., but they refused to accept it, unless deft. would also pay another overdue acceptance of his for £30 which pltfs. held. He refused to pay the £30, alleging that that acceptance had been obtained from him by fraud, with notice of which pltfs. had taken it. Pltfs. then issued a debtor's summons against deft. for £59 14*s.* 6*d.* Deft. applied to dismiss it, & he was ordered to give security for the amount claimed. The security not having been given, pltfs. presented a bkpcy. petition against him :—*Held :* until judgment had been signed in the action, the £29 14*s.* 6*d.* could not be used to support a debtor's summons, & there was not a debt sufficient to support a bkpcy. petition.—*Re* LE FEVRE, *Ex p.* ASTRUP (1879), 11 Ch. D. 303; 40 L. T. 403; 27 W. R. 518, C. A.

See, now, 1914 Act, s. 4 (1) (*b*).

1068. Mortgage debt—Further advances—Debt contracted at date of mortgage.]—By a mtge. deed the mtgor. covenanted to pay the original mtge. debt & any further advances which might be advanced to him by the mtgee. Further advances having been made :—*Held :* for the purpose of the presentation of a bkpcy. petition against the mtgor., the obligation to pay the further advances constituted a debt contracted at the date of the mtge. deed.—*Re* DALZELL, *Ex p.* RASHLEIGH (1875), L. R. 20 Eq. 782; *varied,* on appeal, 2 Ch. D. 9, C. A.

Annotation :—**Mentd.** R. *v.* Smith, R. *v.* Weston, [1910] 1 K. B. 17, C. C. A.

(*b*) *Effect of Payment or Tender.*

1069. Payment made after act of bankruptcy — With knowledge of act of bankruptcy.]—A creditor of a bkpt. to the amount of £112, previous to the bkpcy. receiving £50 after notice

PART III. SECT. 1, SUB-SECT. 2.—C. (*b*).

1069 i. *Payment made after act of bankruptcy—Payment into court of part—Tender of balance.*]—A. was indebted to H. in the sum of £34, the balance of a judgment debt, & also in the sum of £39, judgment & costs recovered in a district ct. action. H. presented a petition for adjudication of insolvency against debtor. After the presentation of the petition, but before adjudication, debtor paid into ct. the amount under the judgment of the district ct., & tendered payment of the other debt to the creditor, by whom it was refused. On the hearing of the petition the creditor expressed his willingness to accept payment, if in doing so he could avoid the effect of

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of an act of bkpcy., is not thereby precluded from suing out a commission of bkpcy., for by that act he waives his claim to the payment, & he may still retain the money in his hands for the credit of bkpt.'s estate.—MANN *v.* SHEPHERD (1794), 6 Term Rep. 79; 101 E. R. 446.

Annotation:—**Refd.** *Re* Barrow & Geddes, *Ex p.* Christy (1832), 2 Deac. & Ch. 155.

1070. —— **Creditor not bound to accept.**]—After a bkpcy. petition has been presented, petitioning creditor is not bound to accept payment, but is entitled to insist upon proving his debt & the commission of an act of bkpcy.; & this as well in the case of an act of bkpcy. under a debtor's summons as in any other.—*Re* WHALLEY, *Ex p.* BOSS (1874), L. R. 18 Eq. 375; 43 L. J. Bcy. 110; 30 L. T. 474; 22 W. R. 702.

Annotation:—**Refd.** *Re* Gentry, [1910] 1 K. B. 825, C. A.

1071. —— **Payment into court on stay of proceedings.**]—Pltf., who had obtained two judgments against deft. for £32 & £41, respectively, served on deft. a bkpcy. notice in respect of the judgment for £41. Deft. tendered to pltf. the amount due on the judgment for £32, which pltf. refused to accept. Upon the application of deft., the judge at chambers made an order staying all proceedings on the judgment for £32, upon payment of that amount. When that order was made deft. had committed an available act of bkpcy., which was known to pltf. & brought to the notice of the judge:—*Held:* if the judge had power to make such an order, he had not properly exercised his discretion, & the order ought not to have been made.—BROOK *v.* EMERSON (1906), 95 L. T. 821, C. A.

Annotation:—**Apld.** *Re* Gentry, [1910] 1 K. B. 825, C. A.

1072. —— ——.]— Proceedings on a bkpcy. petition were stayed pending the trial of the validity of the debts of two of petitioning creditors. Debtor paid into the county ct. in these actions sums sufficient to reduce the debts of petitioning creditors below £50:—*Held:* the payments were not payments to the creditors, & a receiving order could be made on the petition.—*Re* GENTRY, [1910] 1 K. B. 825; 79 L. J. K. B. 585; 102 L. T. 553; 54 Sol. Jo. 377; 17 Mans. 104; *sub nom. Re* DEBTOR, *Ex p.* PETITIONING CREDITORS & OFFICIAL RECEIVER, 26 T. L. R. 374, C. A.

Annotation:—**Mentd.** *Re* A Debtor, *Ex p.* Petitioning Creditor, [1917] 2 K. B. 60, C. A.

1073. —— **By third party—Purchase of petitioner's debt by bill of sale holder.**]—In order to secure an advance by F. to P., the liquidating debtor, a bill of sale of part of P.'s property was on Mar. 30, 1876, executed by P. to F. on the agreement that the deed should not be registered for six (& afterwards for nine) months, if P. would execute a new bill of sale when called upon to do so. Accordingly, at intervals of about twenty-one days, the bill of sale was renewed fourteen times, the fifteenth & last deed being executed on Jan. 11, 1877. The first & last only of the series were stamped, & the last only was registered. Each deed recited a loan at the date of the deed of the amount purported to be thereby secured, but in fact there was only one loan, increased on two occasions by further advances. On Sept. 26, 1876, debtor had committed an act of bkpcy. by neglecting to satisfy a summons served by B., a creditor, & on Dec. 6 B. served on debtor a petition for adjudication in bkpcy., under which a receiver was appointed on Dec. 9. The petition for liquidation was filed on Jan. 18, 1877, & on Feb. 5, F., the bill of sale holder, purchased & took an assignment of the debt of B.:—*Held:* the purchase by the bill of sale holder of the summoning creditor's debt, though it might purge the act of bkpcy. as between debtor & creditor, could not abrogate the proceedings in bkpcy., so as to defeat the rights of the other creditors.—*Re* PELLEW, *Ex p.* FURBER (1877), 6 Ch. D. 181; 36 L. T. 668; 42 J. P. 150.

Annotation:—**Consd.** *Re* Moojen, *Ex p.* Bouchard (1879), 12 Ch. D. 26, C. A.

1074. Tender after act of bankruptcy—Creditor refusing to accept.]—Bkpt. was jointly liable with W. on a note for £100. After the docket but before the fiat issued W. tendered payment of the note, which petitioning creditor refused:—*Held:* (1) a tender after docket struck was too late; (2) the tender by W. was not pleadable by bkpt.—*Re* LAMPLOUGH, *Ex p.* JONES (1834), 3 Deac. & Ch. 697; 1 Mont. & A. 442; 3 L. J. Bcy. 97, Ct. of R.

1075. —— ——.]—After an act of bkpcy. had been committed debtor tendered payment of his debt to one creditor who refused to receive it, & such creditor subsequently joined in a bkpcy. petition presented against debtor, upon which a receiving order was made. Debtor appealed against the receiving order, on the ground that by reason of the tender there was no good petitioning creditor's debt by which it could be supported:—*Held:* at the time when the tender was made an act of bkpcy. having been committed by debtor, of which the creditor had knowledge, he was fully justified in refusing to accept payment, & the receiving order was rightly made.—*Re* LOWE, *Ex p.* LOWE (1890), 62 L. T. 263; 38 W. R. 560; 6 T. L. R. 201; 7 Morr. 25, D. C.

1076. —— ——.]—On the hearing of a petition for adjudication of bkpcy., founded on default in appearance to a debtor's summons, after the debt & act of bkpcy. had been proved, the hearing was adjourned till the next day with the consent of the solr. of petitioning creditor, in order that debtor might make arrangements to pay not only petitioning creditor's debt, but also the debts of other creditors who were represented by the same solr. At the adjourned hearing debtor tendered the amount of petitioner's debt only & costs, which were refused by petitioning creditor. The registrar accordingly made the order for adjudication:—*Held:* the registrar was right in making the

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Insolvency Act, 1874 (38 Vict. No. 5), s. 66, & the judge, with the consent of both parties, directed that, upon payment of petitioner's costs to date, the petition should be adjourned generally, with liberty to set it down for hearing for any day within six months from the date of presentation, & if not so set down, it should stand dismissed at the expiration of that time.—*Re* A. B., *Ex p.* HETHERINGTON, [1903] S. R. Q. 138.—**AUS.**

1069 ii. —— —— *Not taken out by creditor.*] — Where two creditors having judgments in the resident magistrate's ct. against same debtor petition for the adjudication of the judgment debtor, & before the hearing of the petition debtor pays into ct. the amount of one of the judgments, which is not taken out by the creditor, the bkpcy. ct. cannot refuse to adjudicate debtor a bkpt.—*Re* ELL, *Ex p.* AUSTIN & HASKINS (1886), 4 N. Z. L. R. 114.—**N.Z.**

1069 iii. —— *Satisfaction of judgment.*]—Where the act of insolvency was failure to satisfy a writ of execution, but deft. satisfied the judgment after the return of *nulla bona*, & this payment was not disclosed in the petition:—*Held:* the act of insolvency had been wiped out by subsequent payment.—SEDGWICK & CO., LTD. *v.* NATHAN (1914), C. P. D. 292.—**S. AF.**

1074 i. *Tender after petition filed—Creditor refusing to accept.*] — A petitioning creditor has a right, after filing the petition, to refuse to accept payment of the debt, on which the petition is founded.—*Re* ELL, *Ex p.* AUSTIN & HASKINS (1886), 4 N. Z. L. R. 114.—**N.Z.**

order. *Semble:* there may be cases in which the ct. may refuse to make an order for adjudication, after a tender of the debt & costs, although petitioning creditor refuses to accept them, & insists on his right to adjudication.—*Re* BRIGSTOCKE, *Ex p.* BRIGSTOCKE (1877), 4 Ch. D. 348; 46 L. J. Bcy. 50; 35 L. T. 831; 25 W. R. 262, C. A.

Annotations:—**Distd.** *Re* Flatau, *Ex p.* Official Receiver, [1893] 2 Q. B. 219, C. A. **Mentd.** *Re* Pinfold, *Ex p.* Pinfold (1891), 61 L. J. Q. B. 161.

1077. —— To one of several creditors.]—Where two creditors, each of whose debts is less than £50, petition, a tender of the amount of the debt of one of them does not prevent adjudication.—*Re* ANDREW, *Ex p.* ANDREW (1875), 1 Ch. D. 358; 45 L. J. Bcy. 57; 33 L. T. 556; 24 W. R. 197, C. A.

1078. Set-off of debt acquired after act of bankruptcy.]—A bkpcy. notice was served on a debtor with which he failed to comply, & a petition was filed. Before the hearing of the petition he acquired debenture stock of petitioning co. which exceeded the amount of his debt on which the petition was founded, & which he claimed to set off against the debt. A judgment creditor of debtor then obtained an order appointing a receiver of the debenture stock:—*Held:* debtor could not avail himself of the debt due from petitioning creditors in respect of the debenture stock as a set-off against petitioning creditors' claim, so as to avoid his being adjudicated a bkpt., even although after adjudication the title of the receiver would, as against the trustee in bkpcy., be defeated.—*Re* DEBTOR, *Ex p.* PEAK HILL GOLDFIELD, LTD., [1909] 1 K. B. 430; 78 L. J. K. B. 354; 100 L. T. 213; 16 Mans. 11, C. A.

As to payment by third party, *See* Part XX., Sect. 13, *post.*

Set-off of costs.]—*See* Part XVI., *post.*

D. Must be liquidated.

1079. Obligation to pay excess over given amount.]—The father of a continuing partner covenanted with an incoming partner that the debts of the old firm did not exceed a certain sum, & that if they did, he would on demand pay the new firm or the creditors of the old firm the amount of the excess. The debts exceeded the stipulated amount:—*Held:* the excess did not constitute a good petitioning creditor's debt against the father, or more than a claim for unliquidated damages.—*Re* BROADHURST, *Ex p.* BROADHURST (1852), 2 De G. M. & G. 953; 22 L. J. Bcy. 21; 20 L. T. O. S. 254; 17 Jur. 964; 1 W. R. 94, C. A.

Annotation:—**Consd.** Johnson *v.* Diamond (1855), 11 Exch. 73.

1080. 1869 Act, s. 6—Stock exchange differences fixed by official assignee.]—The amount of the difference due by a defaulter on the London Stock Exchange, as fixed by the official assignee of that body under its rules, to a Stock Exchange creditor, is a "liquidated sum" within 1869 Act, s. 6, & will support a bkpcy. petition by the creditor against the defaulter.—*Re* WARD, *Ex p.* WARD (1882), 22 Ch. D. 132; 52 L. J. Ch. 73; 48 L. T. 332; 31 W. R. 112, C. A.

Annotations:—**Folld.** Ratcliff & Dealtry *v.* Mendelssohn, [1902] 2 K. B. 653, C. A.; *Re* Mendelssohn, *Ex p.* Mendelssohn, [1903] 1 K. B. 216, C. A. **Apprvd.** Mendelssohn *v.* Ratcliff, [1904] A. C. 456, H. L.

1081. —— Trust property or its value as ascertained by inquiry.]—The debt of petitioning creditor was based upon an order directing the alleged debtor, as one of the trustees of a post-nuptial settlement, to deliver up certain property comprised therein to petitioning creditor, or to pay the value thereof, & an inquiry was directed as to the amount which had come into the hands of debtor. In his examination debtor admitted having received £2,350:—*Held:* until the inquiry had been made & an ascertained sum ordered to be paid upon a fixed day, there was no liquidated sum due upon which an adjudication could be founded.—*Re* REYNOLDS, *Ex p.* REYNOLDS (1882), 52 L. J. Ch. 431; 47 L. T. 448; 31 W. R. 323.

1082. Interest until repayment of principal—Bankruptcy before repayment.]—Debtor deposited title deeds with the creditor to secure principal & interest up to a fixed date, & at the same time agreed to execute, when called upon, a legal mtge. to secure the principal & interest "at the rate aforesaid." Neither principal nor interest were paid:—*Held:* the contract was to pay interest at the same rate till repayment of the principal, & such interest was a liquidated sum & constituted a good petitioning creditor's debt.—*Re* KING, *Ex p.* FURBER (1881), 17 Ch. D. 191; 44 L. T. 319; 29 W. R. 524.

E. Debts for which Bills of Exchange or Bonds have been given or Judgments obtained.

1083. Bill not matured—Bill in hands of third party.]—A creditor for the value of goods sold & delivered took a bill of exchange from his debtor for the amount, & negotiated it. Debtor committed an act of bkpcy. while the bill was in the hands of a third party:—*Held:* it was very doubtful whether the debt & act of bkpcy. would support a fiat, & the petition ordered to stand over, to give an opportunity of applying to substitute a new petitioning creditor's debt.—*Re* MAGNUS, *Ex p.* MAGNUS (1842), 2 Mont. D. & De G. 604; 11 L. J. Bcy. 32; 6 Jur. 808, Ct. of R.

Annotation:—**Refd.** *Re* Broadridge, *Ex p.* Cyrus (1869), 5 Ch. App. 176, L. J.

1084. —— ——.]—A fiat was issued upon an affidavit, stating that debtor was indebted to petitioning creditor for goods sold & delivered. He had given his acceptance for the amount of the goods, which the creditor had indorsed & negotiated & which was, at the time of the fiat issued, in the hands of the indorsee & not due:—*Held:* the debt was bad, for at the time the fiat issued it had been transferred to the indorsee of the bill.—*Re* HARDCASTLE, *Ex p.* BOTTEN (1833), Mont. & B. 412, Ct. of R.

Annotations:—**Consd.** *Re* Magnus, *Ex p.* Magnus (1842), 2 Mont. D. & De G. 604. **Distd.** *Re* Broadridge, *Ex p.* Cyrus (1869), 5 Ch. App. 176, L. J.

1085. —— —— Bill only evidence of debt.]—Where petitioning creditor had negotiated a bill of exchange, which had been indorsed to him by bkpt., & had not got it back in his possession when he made the affidavit for the docket, stating that bkpt. was indebted to him in £100 & upwards for money lent, & the bill was the only evidence of the debt, the fiat was annulled at the cost of petitioning creditor.—*Re* PATZEKER, *Ex p.* PATZEKER (1837), 2 Deac. 469; 3 Mont. & A. 329, Ct. of R.

1086. —— Bill in hands of petitioning creditor.]—A petition in bkpcy. alleged as petitioning creditor's debt a sum due for goods sold & delivered. Previously to the commission of the alleged act of bkpcy., debtor had given to petitioning creditor bills of exchange for the price of the goods, which bills had not matured at the date of the presentation of the petition:—*Held:* the only effect of

PART III. SECT. 1, SUB-SECT. 2.—E. *a. Promissory note taken in respect of statute-barred debt.*]—A petitioning creditor, whose claim is on a prescribed debt, cannot improve his position by taking judgment on a promissory note given him in respect of such debt.—NICHOLL *v.* NICHOLL (1916), W. L. D. 22.—**S. AF.**

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taking the bills was to give debtor a period of credit, which was determined by the act of bkpcy., & petitioning creditor's debt was correctly stated in the petition.—*Re* RAATZ, *Ex p.* RAATZ, [1897] 2 Q. B. 80; 66 L. J. Q. B. 501; 76 L. T. 503, D. C.

1087. —— —— 1883 Act s. 6 (1) (b)—Sum due on bill subject to agreement for renewal.]—A debtor, who owed £100 for money lent, accepted a bill of exchange at three months for that amount & interest, & the creditor signed a letter agreeing that the bill should be renewed, provided the interest was paid from time to time. The interest on the first bill was paid, & the bill was renewed. Before the second bill became payable debtor committed an act of bkpcy., & the creditor presented a bkpcy. petition against him:—*Held:* the debt of £100 was "a liquidated sum, payable either immediately or at some certain future time," & the creditor was entitled to present the petition.—*Re* BARR, *Ex p.* WOLFE, [1896] 1 Q. B. 616; 65 L. J. Q. B. 504; 74 L. T. 555; 44 W. R. 586; 40 Sol. Jo. 518; 3 Mans. 97, D. C.

1088. Bill dishonoured—Bill in hands of petitioning creditor—Bill given for composition.]—A composition deed was made between L., a trader, of the first part, B., his surety, of the second, & his creditors of the third, reciting that the creditors had agreed to accept a composition of 12*s.* in the pound, to be paid by four instalments at the end of four, six, nine, & twelve months, "in full satisfaction & payment of their several debts," the first three of such instalments to be secured by bills drawn by L. on B. & accepted by him, the last by L.'s promissory note. The deed contained a covenant by the creditors not to sue L. until default should be made in payment of the bills & notes, or some of them, & upon payment of the bills & notes at maturity to grant a release. W., one of L.'s creditors, executed the deed, & received the bills & notes. On its maturity the first was dishonoured. W. immediately commenced an action against L. for his whole debt, in which he ultimately obtained judgment. L. was declared a bkpt. on W.'s petition:—*Held:* the bills were only conditional payment, & W. had, on the dishonour of the bill, a right to elect to recover his old debt, & had a sufficient petitioning creditor's debt.—LEAKE *v.* YOUNG (1856), 5 E. & B. 955; 25 L. J. Q. B. 266; 27 L. T. O. S. 151; 2 Jur. N. S. 516; 4 W. R. 282; 119 E. R. 736.

Annotation:—**Refd.** Bittleston *v.* Cooke (1856), 25 L. J. Q. B. 281.

1089. —— Bill in hands of third party—Judgment debt.]—The acceptance by a judgment creditor of a bill, or promissory note, for the amount of his debt operates as an agreement not to enforce that debt during the currency of the bill, & afterwards, notwithstanding dishonour, so long as the bill is outstanding in the hands of a third person to whom it has been indorsed for value by the creditor.

A creditor, who had accepted a bill of exchange for the amount of his judgment debt, which was dishonoured but was outstanding in the hands of a third party, issued a bkpcy. notice upon the judgment under 1883 Act, s. 4 (1) (*g*):—*Held:* this was not a debt on which a bkpcy. notice could be served, & the notice & a receiving order made upon it must be set aside.—*Re* A DEBTOR, *Ex p.* THE DEBTOR, [1908] 1 K. B. 344; 77 L. J. K. B. 409; 98 L. T. 652; 52 Sol. Jo. 174; 15 Mans. 1, C. A.

See, now, 1914 Act, s. 1 (1)(*g*).

1090. Bill not filled up until after act of bankruptcy—Accepted in blank before—Held by drawer & petitioning creditor.]—A. purchased goods of B. & agreed to give him a bill at two months for part of the price. Afterwards A. sent B. a paper purporting to be a bill accepted by him with a blank left for the name of B. as drawer. B. kept the paper, but did not fill up the blank until after he had sued out a commission against A.:—*Held:* B. having elected to keep the bill, could not prove his debt as petitioning creditor for goods sold & delivered.—*Re* FARENDEN, *Ex p.* FARENDEN (1817), Buck, 34, L. C.

1091. Bill drawn by bankrupt & taken in part payment of debt—Balance insufficient to support petition—Bill dishonoured.]—A., a creditor of B. to the amount of £115 3*s.* 8*d.*, took his bill for £20 on C., who had not then, nor afterwards, any effects of B. in his hands. The bill when due was dishonoured, & no notice thereof was given by A. to B.:—*Held:* A. might sue out a commission of bkpcy. against B. & his debt would support it.—BICKERDIKE *v.* BOLLMAN (1786), 1 Term Rep. 405; 99 E. R. 1164.

Annotations:—**Mentd.** Goodall *v.* Dolly (1757), 1 Term Rep. 712; Rogers *v.* Stephens (1788), 2 Term Rep. 713; Clegg *v.* Cotton (1802), 3 Bos. & P. 239; Orr *v.* Maginnis (1806), 7 East, 359; Legge *v.* Thorpe (1810), 12 East, 171; Rucker *v.* Hiller (1812), 16 East, 43; Thackray *v.* Blackett (1812), 3 Camp. 164; Brown *v.* Maffey (1812), 15 East, 216; Claridge *v.* Dalton (1815), 4 M. & S. 226; Cory *v.* Scott (1820), 3 B. & Ald. 619; Hill *v.* Heap (1823), Dow. & Ry. N. P. 57; Lafitte *v.* Slatter (1830), 6 Bing. 623; Kemble *v.* Mills (1840), 1 Man. & G. 757; Carter *v.* Flower (1847), 16 M. & W. 743; Cave *v.* Mills (1861), 8 Jur. N. S. 363; *Re* Overend, Gurney, *Ex p.* Swan (1868), L. R. 6 Eq. 344; Turner *v.* Samson (1876), 2 Q. B. D. 23, C. A.; Foster *v.* Parker (1876), 2 C. P. D. 18.

1092. Promissory note improperly stamped.]—Where a debt is due for money had & received & the same is secured by a promissory note on an improper stamp, & it is unnecessary to have recourse to the note to establish the previous existence of the debt, the debt will support a sequestration in Scotland, the law of Scotland being the same as in England.—*Re* MOWAT & SPENCER, *Ex p.* GEDDES (1824), 1 Gl. & J. 414.

Annotation:—**Mentd.** *Re* Artola Hermanos, *Ex p.* Châle (1890), 59 L. J. Q. B. 254.

1093. Bond taken after act of bankruptcy for simple contract debt.]—Though a bond is taken for a simple contract debt, yet if it is after an act of bkpcy., the simple contract is not extinguished.—AMBROSE *v.* CLENDON (1736), Lee *temp.* Hard. 267; 2 Stra. 1042; 95 E. R. 172, N. P.

Annotations:—**Expld.** Bryant *v.* Withers (1813), 2 M. & S. 123. **Consd.** *Re* Barrow & Geddes, *Ex p.* Christy (1832), 2 Deac. & Ch. 155, Ct. of R. **Folld.** *Ex p.* Griffiths (1853), 3 De G. M. & G. 174, L. JJ. **Distd.** *Ex p.* Higgins (1858), 3 De G. & J. 33, L. JJ. **Refd.** *Re* King *v.* Beesley, *Ex p.* Horner (1894), 64 L. J. Q. B. 126, D. C. **Mentd.** *Re* Prescott, *Ex p.* Prescott (1840), 4 Jur. 852, Ct. of R.

1094. Judgment for sum including debt—Whether debt extinguished.]—A debt for money lent due to a creditor at the time when an act of bkpcy. is committed by debtor is sufficient to support a commission against him, though afterwards, & before petitioning for such commission, the creditor obtains judgment against him for a sum of money including such debt, & the affidavit made in order to obtain the commission may be an affidavit of debt for money lent.—BRYANT *v.* WITHERS (1813), 2 M. & S. 123; 2 Rose, 8; 105 E. R. 328.

Annotations:—**Apld.** *Re* Keasley, *Ex p.* Pennell (1841), 2 Mont. D. & De G. 273. **Folld.** *Re* King & Beesley, *Ex p.* King & Beesley, [1895] 1 Q. B. 189. **Mentd.** Rumsey *v.* Tuffnell (1824), 9 Moore, C. P. 425; *Re* Barrow & Geddes, *Ex p.* Christy (1832), 2 Deac. & Ch. 155, Ct. of R.; R. *v.* Biers (1834), 1 Ad. & El. 327.

See, also, Nos. 1122 *et seq., post.*

1095. Judgment on simple contract debt—Whether debt extinguished.]—A judgment on a simple contract debt, though for most purposes merging the debt in the judgment, does not extinguish the debt for the purpose of bkpcy. proceedings, & such debt is still available to support a petition.—*Re* KING & BEESLEY, *Ex p.* KING & BEESLEY, [1895] 1 Q. B. 189; 64 L. J. Q. B. 126; 71 L. T. 580; 43 W. R. 78; 11 T. L. R. 3; 39 Sol. Jo. 12; 1 Mans. 505; 15 R. 22, D. C.

Annotation:—**Distd.** *Re* Raatz, *Ex p.* Raatz, [1897] 2 Q. B. 80, D. C.

1096. Judgment on bond debt — Whether debt extinguished.]—The obligee in a bond given by a trader recovered judgment upon it after the obligor had ceased trading:—*Held:* (1) the bond debt was not so merged in the judgment as to preclude the obligee from petitioning for adjudication against the obligor; (2) such judgment was a good foundation for an act of bkpcy. under 1849 Act, s. 72, having for this purpose relation to the trading, & the notice under that sect. was correct, although it required payment of the judgment, & not of the bond.—*Re* MOSTYN, *Ex p.* GRIFFITHS (1853), 3 De G. M. & G. 174; 22 L. J. Bcy. 50; 21 L. T. O. S. 82; 1 W. R. 236; 43 E. R. 69, L. JJ.

Annotations:—**Distd.** *Ex p.* Higgins (1858), 3 De G. & J. 33, L. JJ. **Folld.** *Re* King & Beesley, *Ex p.* King & Beesley, [1895] 1 Q. B. 189, D. C. **Distd.** *Re* Raatz, *Ex p.* Raatz, [1897] 2 Q. B. 80, D. C.

1097. Debt included in composition deed—Executed by creditor in ignorance of act of bankruptcy.]—A creditor, being ignorant that an act of bkpcy. had been committed by his debtor, executed a composition deed for the amount of his debt, & received a dividend under it:—*Held:* he might, notwithstanding, become a petitioning creditor, in respect of the original debt.—DOE d. PITCHER *v.* ANDERSON (1816), 5 M. & S. 161; 1 Stark. 262; 105 E. R. 1010.

Annotation:—**Refd.** Small *v.* Marwood (1829), 7 L. J. O. S. K. B. 197.

1098. —— Creditor taking secret advantage.]—A creditor, in consideration of bills for 10*s.* in the pound on his debt, executed a composition deed, whereby it was expressed that the creditors who executed it released debtor from all demands. At the same time he secretly obtained security for the balance:—*Held:* he ceased to be a creditor, & could not sue out a fiat against debtor, the original debt being released, & the claim under the composition bills being invalidated by the fraud.—*Re* CROSS (1848), 4 De G. & Sm. 364; 11 L. T. O. S. 534; 64 E. R. 870.

Annotations:—**Refd.** *Re* Harvey, *Ex p.* Phillips (1888), 36 W. R. 567; *Re* Myers, *Ex p.* Myers, [1908] 1 K. B. 941.

1099. —— ——.]—By a composition deed creditors, in consideration of the payment of the composition, agreed to release all debts, on condition that, if default was made in payment of the composition, the deed should be void. One creditor made a secret bargain, by which he received a larger proportion of his debt than any of the other creditors. Default having been made, that creditor presented a petition:—*Held:* the effect of the secret bargain was that the release of petitioning creditor's debt was absolute, & the condition void, & the refusal to make a receiving order was right.—*Re* HARVEY, *Ex p.* PHILLIPS (1888), 36 W. R. 567, C. A.

Annotations:—**Apld.** *Re* Myers, *Ex p.* Myers, [1908] 1 K. B. 941; Mayhew *v.* Boyes (1910), 103 L. T. 1, C. A.

See, also, Nos. 1157 *et seq., post.*

F. Sums due on Bills of Exchange and Promissory Notes.

1100. By holder—Against drawer—Bill drawn before bankruptcy—Indorsed after.]—A bill of exchange drawn by a bkpt. before his bkpcy., but not indorsed to petitioning creditor until after the act of bkpcy., is a good petitioning creditor's debt.—BINGLEY *v.* MALLINSON (1783), 3 Doug. K. B. 333; 99 E. R. 682.

Annotations:—**Refd.** Glaister *v.* Hewer (1798), 7 Term Rep. 498; Cowley *v.* Dunlop (1798), 7 Term Rep. 565.

1101. —— —— —— Neither due nor dishonoured at time of act of bankruptcy.]—*Qu.:* whether a bill of exchange is a good petitioning creditor's debt against the drawer, before it becomes due or has been dishonoured.—ROSE *v.* ROWCROFT (1815), 4 Camp. 245, N. P.

1102. —— —— —— Becoming due after bankruptcy.]—Bills of exchange to the amount of £100 drawn & issued before an act of bkpcy., but becoming due afterwards, are sufficient when due to found a petition for a commission of bkpcy. against him.—BRETT *v.* LEVETT (1811), 13 East, 213; 1 Rose, 102; 104 E. R. 351.

Annotations:—**Refd.** *Ex p.* Douthat (1820), 4 B. & Ald. 67. **Mentd.** Hill *v.* Heap (1823), Dow. & Ry. N. P. 57; Smallcombe *v.* Bruges (1824), 13 Price, 136.

1103. —— —— —— Not accepted at time of act of bankruptcy.]—A. having drawn a bill of exchange for £148 in favour of B., to whom he was previously indebted in that amount, committed an act of bkpcy. before either the bill was due or had been presented for acceptance:—*Held:* such bill of exchange was a good petitioning creditor's debt, although, subsequently to the commission, the bill had been duly presented & paid by the acceptors.—*Ex p.* DOUTHAT (1820), 4 B. & Ald. 67; 106 E. R. 863.

Annotations:—**Refd.** Cooper *v.* Machin (1824), 1 Bing. 426; Poolly *v.* Millard (1831), 9 L. J. O. S. Ex. 114; *Re* Lamplough, *Ex p.* Jones (1834), 3 Deac. & Ch. 697; *Re* Barr, *Ex p.* Wolfe, [1896] 1 Q. B. 616.

1104. —— Against maker — Note indorsed at under value.]—An assignee or indorsee of a bkpt.'s notes at an under value is a creditor for the full sums of the notes, & may sue out a commission as a creditor for such full sums.—*Ex p.* LEE (1721), 1 P. Wms. 782; 2 Eq. Cas. Abr. 97, pl. 3; 24 E. R. 614, L. C.

1105. —— —— Note made before bankruptcy—Indorsed after.]—A note given before an act of bkpcy., though indorsed after, is a debt upon which the indorsee may take out a commission of bkpcy. against the drawer.—*Ex p.* THOMAS (1747), 1 Atk. 73, 126; 26 E. R. 82.

1106. —— —— —— ——.]—The indorsee of a note after the act of bkpcy. may be the petitioning creditor.—ANON. (1761), 2 Wils. K. B. 135; 95 E. R. 728.

1107. —— —— —— —— Debt insufficient apart from note.]—The petitioning creditor's debt did not amount to the statutory sum at the time of the act of bkpcy., but was increased to a little more by a promissory note of bkpt. due at that time being

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PART III. SECT. 1, SUB-SECT. 2.—F.

1104 i. *By holder—Against maker—Note not yet due.*]—A promissory note not yet due is not a good petitioning creditor's debt.—*Re* TAYLOR, *Ex p.* YOUNG BROTHERS (1891), 17 V. L. R. 121.—**AUS.**

1104 ii. —— —— —— *Creditor holder at date of petition.*]—*Held:* a debt in respect of a current promissory note made by debtor, & of which the creditor was the holder at the date of the petition, was a good petitioning creditor's debt.—DAVID *v.* MALOUF (1908), 5 C. L. R. 749.—**AUS.**

1104 iii. —— —— *Note given for statute-barred debt.*]—Where a promissory note was given in respect of a prescribed debt, the indorsee with full knowledge of the circumstances was not entitled to petition.—NICHOLL *v.* NICHOLL (1916), W. L. D. 22.—**S. AF.**

1104 iv. —— —— *Offer to give up note—Valuation.*]—Where a petition for sequestration of a debtor's estate is founded upon the debt due upon & by virtue of his promissory note, no offer need be made to give it up, nor any estimate of its value given.—*Re* COHEN (1889), 15 V. L. R. 664.—**AUS.**

Sect. 1.—Creditor's petition: Sub-sect. 2, F. & G.]

indorsed to him before he petitioned for the commission:—*Held:* the debt was sufficient to support the commission.—GLAISTER *v.* HEWER (1798), 7 Term Rep. 498; 101 E. R. 1097.

Annotation:—**Consd.** Brett *v.* Levett (1811), 13 East, 213.

1108. —— —— Note given as security—For contingent debt.]—Debtor gave his promissory note to petitioning creditor, payable on demand, to secure a contingent debt, which could only become due if debtor's wife predeceased him. Petitioning creditor having sued out a commission on the note, the debt still being a contingent debt:—*Held:* the promissory note though, in form, a present debt, was a security for a contingent debt, & was not a debt to support a commission.—*Re* PAGE, *Ex p.* PAGE (1821), 1 Gl. & J. 100.

Annotation:—**Refd.** Hope *v.* Meek (1855), 10 Exch. 829.

1109. —— —— ——Original debt reduced.]—Petitioning creditor was the president of a money club, & the preceding president had, in accordance with the rules of the club, in June, 1851, indorsed to him two promissory notes for £50 each, expressed to be payable on demand, which were part of the property, & securities of the club. The shares of the club were £50 shares, & bkpt., who had been a subscriber for two shares previously to the month of May, became the purchaser of two shares, & had with two sureties executed the notes on his becoming such purchaser. According to the rules of the club he was to pay 10*s.* per month on each share, & interest at £5 per cent. upon the amount, &, by one of the rules, it was provided "that, in case either of the sureties should die before the subscriber's share be paid up, such subscriber should have immediate notice, in writing, from the president & stewards, to provide a fresh surety, to the satisfaction of the committee, within a reasonable time as the necessity of the case might require, &, in case of neglect, the committee should have power to recover the whole amount of such subscriber's share or shares then unpaid by an action at law." Bkpt. had paid all the monthly payments, & the interest due up to the time of his bkpcy., but, in May, 1851, one of the sureties died, & a notice was sent to bkpt. to provide a fresh surety, which he had neglected to do, & at the time of the committing of the act of bkpcy. in Nov., 1851, more than £50 remained unpaid to the clerk. The sum due upon the two promissory notes was relied on as petitioning creditor's debt:—*Held:* petitioning creditor's debt was valid.—HOPE *v.* MEEK (1855), 10 Exch. 829; 25 L. J. Ex. 11; 156 E. R. 676.

Annotations:—**Refd.** Watson *v.* Humphrey (1855), 10 Exch. 781. **Mentd.** Topping *v.* Keysell (1864), 33 L. J. C. P. 225; Evans *v.* Hallam (1871), 24 L. T. 939; Lucas *v.* Dicker (1880), 5 C. P. D. 150.

1110. —— —— Note given for released debt—No consideration.]—A composition had been accepted upon a debt, which had been released by deed. Afterwards a promissory note was given by debtor, for the amount so released:—*Semble:* such promissory note was not a sufficient petitioning creditor's debt.—*Re* HALL, *Ex p.* HALL (1835), 1 Deac. 171; 4 L. J. Bcy. 91, Ct. of R.

1111. —— Against acceptor — Undertaking by partner of petitioning creditor to provide for acceptance.]—One of three partners undertook to provide for two bills of exchange drawn by the three partners, & accepted by a fourth person, when they should become due:—*Held:* such acceptances would not support a commission of bkpcy. on the petition of the three partners against the acceptor, although the conduct of the partner against his co-partners might have been fraudulent.—RICHMOND *v.* HEAPY (1816), 1 Stark. 202.

Annotation:—**Mentd.** Meyer *v.* Dresser (1864), 33 L. J. C. P. 289.

1112. —— —— Bill blank as to drawer at time of bankruptcy.]—A. purchased coals of B., & agreed to give him a bill of exchange for part of the purchase money payable at two months. Afterwards A. sent to B. a paper, purporting to be a bill accepted by him with a blank left for the name of B. as the drawer. B. kept the paper but did not fill up the blank till after he had sued out a commission against A.:—*Held:* the bill did not constitute a valid petitioning creditor's debt.—*Re* FARENDEN, *Ex p.* FARENDEN (1817), Buck, 34, L. C.

1113. —— —— Unauthorised acceptance in name of firm.]—One of two partners gave an acceptance in the name of the firm for a pre-existing debt of his own, without the authority of the other:—*Held:* such acceptance was not a good petitioning creditor's debt to support a joint fiat against the two partners.—*Re* WESCOTT, *Ex p.* AUSTEN (1840), 1 Mont. D. & De G. 247, Ct. of R.

See, now, 1914 Act, s. 149.

1114. —— —— Acceptance forged but acknowledged.]—A party accepted a bill in bkpt.'s name, without his authority:—*Held:* an acknowledgment by bkpt. to the holder after it became due, that he was responsible for the payment of the bill, did not constitute a good petitioning creditor's debt.

No subsequent acknowledgment of an acceptance, which was a forgery in the first instance, can render the acceptance binding in law (*per* CUR.).—*Re* LATHAM, *Ex p.* EDWARDS (1841), 2 Mont. D. & De G. 241; 10 L. J. Bcy. 62; 5 Jur. 706, Ct. of R.

See, further, AGENCY, Vol. I., p. 397.

1115. —— —— Bill not issued until after act of bankruptcy.]—An acceptance was written on an incomplete bill of exchange, to which no drawer's name was affixed. The acceptor soon afterwards assigned all his property for the benefit of his creditors. Some weeks after this the bill, which had remained in the hands of the acceptor's agent, was completed & indorsed to a *bonâ fide* holder for value, who, on its being dishonoured, obtained an adjudication in bkpcy. against the acceptor, grounded on the assignment as an act of bkpcy.:—*Held:* the adjudication must be reversed, as no debt existed on the bill till it was issued, which was after the act of bkpcy.—*Re* HAYWARD, *Ex p.* HAYWARD (1871), 6 Ch. App. 546; 40 L. J. Bcy. 49; 24 L. T. 782; 19 W. R. 833, L. JJ.

Annotations:—**Mentd.** *Re* Foulds, *Ex p.* Learoyd (1878), 10 Ch. D. 3, C. A.; Faulks *v.* Atkins (1893), 10 T. L. R. 178; *Re* Moore, Bartholomew's Case (1899), 68 L. J. Ch. 302, C. A.

1116. —— Against indorser—No notice of dishonour—Laches of holder.]—A holder of a dishonoured bill of exchange cannot establish a petitioning creditor's debt against an indorser who has had no notice of dishonour, through the laches of the holder.—*Re* — (1850), Fonbl. 175.

1117. By accommodation acceptor—Against drawer—Cross bills—Petitioning creditor's acceptance not paid.]—If two persons exchange acceptances, & before the bills are mature, one of the acceptors commits an act of bkpcy., there is not such a debt due from him to the other as will sustain a commission, before the other has paid his own acceptance.—SARRATT *v.* AUSTIN (1811), 4 Taunt. 200; 2 Rose, 112; 128 E. R. 305.

Annotations:—**Apld.** *Re* Knowles, *Ex p.* Solarte (1832), 2 Deac. & Ch. 261, Ct. of R. **Consd.** *Re* Dyer & Swayne, *Ex p.* Solarte (1834), 3 Deac. & Ch. 419. **Refd.** Hope *v.* Meek (1855), 10 Exch. 829.

1118. —— —— Bill in hands of third party—Bill paid after act of bankruptcy.]—Petitioning creditor accepted a bill for the accommodation of debtor. The bill, which was in the hands of a third party, became due after debtor had committed an act of bkpcy. Petitioner paid the bill: —*Held:* petitioner was a mere surety for debtor, & did not become a creditor till he had paid the bill, & as the payment was after the act of bkpcy., it could not create a good petitioning debt.—*Re* HOLDING, *Ex p.* HOLDING (1821), 1 Gl. & J. 97.

See, now, 1914 Act, s. 4 (1) (*b*).

1119. —— —— —— Part payment & balance due.]—A petitioning creditor's debt, made up of a sum paid in part discharge of a bill, & the remainder unpaid, & the bill being in the hands of an adverse holder:—*Held:* bad.—*Re* HEATH, *Ex p.* CALDECOTT (1839), Mont. & Ch. 600; 4 Deac. 264; 9 L. J. Bcy. 1; 3 Jur. 1003, Ct. of R.

1120. By drawer—Against acceptor—Bills taken up after commission—In hands of holder for value at time of bankruptcy.]—The drawer of bills of exchange, who takes them up after the commission of an act of bkpcy. by the acceptor, they having been, at the date of the act of bkpcy., in the hands of holders for value, has a good debt upon which to found a petition for adjudication of bkpcy. against the acceptor.—*Re* BROADRIDGE, *Ex p.* CYRUS (1869), 5 Ch. App. 176; 21 L. T. 664; 18 W. R. 155, L. J.

1121. By husband of payee—Against maker—Note given to wife dum sola.]—The husband alone may sue out a commission upon a promissory note given to the wife *dum sola.*—*Re* SHAW, *Ex p.* BARBER (1821), 1 Gl. & J. 1.

G. Sums due on Judgments and Orders.

1122. Judgment debt—Debtor discharged from custody—Judgments Act, 1838 (c. 110).]—*Held:* a judgment debt was a good debt on which to found a petition in bkpcy., although debtor had been taken in execution under a *ca. sa.* & subsequently & before the date of the petition discharged from custody under the above Act, & the debt duly inserted in the sched.—WATSON *v.* HUMPHREY (1855), 10 Exch. 781; 24 L. J. Ex. 190; 24 L. T. O. S. 291; 3 W. R. 254; 3 C. L. R. 1048; 156 E. R. 656.

Annotation:—**Refd.** *Re* Clagett (1855), 2 Bankr. & Ins. R. 101.

1123. —— Assumed to be due in respect of original debt.]—Where a debt exists in the shape of a judgment, it must be considered to be due in respect of the original debt, for the purpose of supporting the bkpcy.—PYKE *v.* GUICHARD (1862), 7 L. T. 170.

See, also, Nos. 1012 *et seq.*, 1094 *et seq.*, *ante.*

1124. —— Extinguished by new contract—Balance due thereunder less than £50.]—A judgment creditor issued a bkpcy. notice, which was withdrawn in consideration of a part payment & an agreement by debtor to pay the balance by instalments. Default having been made in payment of the instalments, the creditor issued a bkpcy. notice for the balance of the judgment debt. The instalments in arrear were under £50:—*Held:* the agreement extinguished the creditor's right under the judgment & substituted a new contract, &, as less than £50 was due under it at the date of the presentation of the petition, there was no sufficient petitioning creditor's debt.—*Re* A DEBTOR, *Ex p.* LONDON & COUNTY DISCOUNT CO., LTD. (1909), 100 L. T. 380; 53 Sol. Jo. 246; 16 Mans. 205.

1125. —— Statute-barred.]—A judgment creditor is not entitled, after the expiration of twelve years without payment of interest or acknowledgment of his right, to obtain an adjudication in bkpcy. against debtor, though within the twelve years

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PART III. SECT. 1, SUB-SECT. 2.—G.

1122 i. *Judgment debt—Immaterial misstatement in order.*]—An order *nisi* stated petitioning creditor's debt to be upon a judgment in an action at law, "whereby petitioner recovered against debtor the sum of £85," & the execution was issued therein & returned unsatisfied, & that debtor had been called upon to satisfy such judgment:—*Held:* the debt as stated constituted a good petitioning creditor's debt, & the allegation that debtor had been called upon to satisfy, following, instead of preceding the allegation that the writ had been returned was not material.—*Re* ALLEN (1879), 5 V. L. R. 25.—**AUS.**

1122 ii. —— *Judgment reducible to one shilling—On return of property.*]—A judgment was recovered in a county ct. for £107 6*s.* 8*d.*, to be reduced to a 1*s.* on a certain house being given up:—*Held:* such judgment did not constitute a good petitioning creditor's debt under Insolvency Act, 1871 (No. 379), s. 37.—*Re* KELLACKY (1877), 3 V. L. R. 96.—**AUS.**

1122 iii. —— *Amount of consideration under void deed.*]—*Held:* a judgment obtained for the amount of the consideration under an agreement void as contrary to public policy could not be relied upon as a foundation of bkpcy. proceedings.—WILKINSON *v.* OSBORNE (1915), 21 C. L. R. 89.—**AUS.**

1122 iv. —— *Discharged by credits—Course of dealing between creditor & bankrupt.*]—By a course of dealing between a mine owner & lessee, for the working of a coal mine, the proceeds of the sale of coal raised were received & credited to the lessee's account by the mine owner, who made advances for the necessary expenses of carrying on the mine, which were debited to the lessee. On Feb. 29, 1912, the general balance of account between the parties showed a debit of £1,863 against the lessee, & for that sum the mine owner secured judgment with costs on Apr. 20. The parties meantime had continued the same business relations, & the mine owner during Mar. received on behalf of the lessee, for the sale of coal, £2,653, which he placed to the lessee's credit in the books of account kept by him relating to the business, & he made advances in respect of the mine exceeding £2,600, leaving a debit of £2,043 on Mar. 31, which included the amount which had been sued for. In Apr. & May, the same course was followed, notwithstanding the judgment on Apr. 20, & on May 31 the mine owner presented a petition in bkpcy. founded upon the judgment, & a receiving order was made:—*Held:* the amount of the judgment must be regarded as part of the general account to the end of the account & must be regarded as having been discharged by the credits.—BEDLINGTON *v.* LANE (1912), 14 W. A. L. R. 134.—**AUS.**

1122 v. —— *Execution unsatisfied.*]—Where all disposable property pointed out by a debtor to the sheriff is manifestly insufficient to satisfy a writ, the creditor may apply for sequestration without realising such property.—KENT *v.* TRANSVAALSCHE BANK (1907), T. S. 765.—**S. AF.**

1122 vi. —— *Debtor alleging solvency.*]—If a petitioner's judgment debt is unsatisfied, allegations by debtor that he is in reality in solvent circumstances will be no answer to an application for sequestration of his estate. *Qu.:* whether another creditor could successfully oppose the application on such a ground.—SCHARFF *v.* GROBLER (1908), 18 C. T. R. 485.—**S. AF.**

b. —— *Arising out of tort—Judgment creditor must be party instituting proceedings.*]—A judgment recovered in tort may be relied upon under Insolvency Act, 1871 (No. 379) s. 37 (viii) as well as a judgment recovered in contract.

The creditor recovering the judgment must be the same person as the party who instituted the proceedings, upon which such judgment was recovered, & a judgment by set-off in favour of deft. will not entitle him to proceed under s. 37 (viii).—*Re* ALLEN (1879), 5 V. L. R. 25.—**AUS.**

c. —— —— *Committed before Debtors Act,* 1872.]—To sustain an adjudication against a non-trader, a judgment debt arising out of a tort is insufficient, if the tort was committed before the passing of the above Act, although the judgment was obtained afterwards.—*Re* M'W. (1877), I. R. 11 Eq. 508.—**IR.**

d. —— *Assignment at valuation to be agreed—Petition after assignment & before valuation.*]—The A. Bank obtained a judgment against resp. which was not satisfied & afterwards it assigned all its debts & assets to the C. Bank, at a valuation to be agreed upon. Before valuation made, the A. Bank petitioned for the sequestration of resp.'s estate:—*Held:* notwithstanding the assignment it had a sufficient debt in law or in equity to constitute it a good petitioning creditor.—*Re* DWYER (1879), 5 V. L. R. 198.—**AUS.**

e. "*Money secured by judgment*"—*I. E. Act.*]—When a judgment debtor becomes bkpt., the money due on foot of the judgment is not "money secured by judgment" within the above Act, & when a petition is presented, even by the assignee of bkpt. under the Act, the comrs. will dismiss it.—*Re* LAWDER (1851), 3 Ir. Jur. 385.—**IR.**

Sect. 1.—Creditor's petition: Sub-sect. 2, G., H., J., K. & L.]

a suggestion has been entered on the roll under C. L. P. Act (c. 76), 1852, s. 129.—*Re* TYNTE, *Ex p.* TYNTE (1880), 15 Ch. D. 125; 42 L. T. 598; 28 W. R. 767.

Annotations:—**Distd.** *Re* Whitley, *Ex p.* Mirfield Commercial Co. (1891), 65 L. T. 351, D. C. **Dbtd.** *Re* Mendelssohn, *Ex p.* Mendelssohn, [1903] 1 K. B. 216, C. A. **Refd.** *Re* Outram, *Ex p.* Ashworth & Outram (1893), 63 L. J. Q. B. 308. **Mentd.** Jay *v.* Johnstone (1892), 67 L. T. 655.

1126. Order of Court of Equity—Equitable debt only.]—*Held:* the obligation to pay a sum of money under an order of a Ct. of Equity was merely an equitable debt, notwithstanding Judgments Act, 1838 (c. 110), s. 18, & could not be made the ground of a petition for adjudication in bkpcy.—*Re* BLENCOWE, *Ex p.* BLENCOWE (1866), 1 Ch. App. 393; 35 L. J. Bcy. 18; 14 L. T. 389; 12 Jur. N. S. 366; 14 W. R. 623, L. JJ.

1127. Order for damages in divorce suit.]—In a divorce suit co-resp. was ordered to pay into the registry the amount of damages assessed by the jury. The decree was made absolute. Co-resp. being resident abroad, the order for payment could not be enforced against him, & an order was obtained from the Divorce Ct. rescinding so much of the decree as ordered payment into the registry, & ordering the damages to be paid to the husband, he undertaking to pay it into the registry to abide the further order of the ct. The husband then commenced proceedings in bkpcy. against co-resp.:—*Held:* the damages did not constitute a good petitioning creditor's debt, the husband being merely the receiver of the ct.—*Re* MUIRHEAD, *Ex p.* MUIRHEAD (1876), 2 Ch. D. 22; 45 L. J. Bcy. 65; 34 L. T. 303; 24 W. R. 351, C. A.

Annotations:—**Distd.** *Re* Lewis, *Ex p.* Harris (1876), 2 Ch. D. 423; *Re* Rayner, *Ex p.* Rayner (1877), 37 L. T. 38. **Consd.** *Re* Fryer, *Ex p.* Fryer (1886), 17 Q. B. D. 718, C. A. **Folld.** *Re* Sacker, *Ex p.* Sacker (1888), 22 Q. B. D. 179, C. A. **Consd.** *Re* O'Gorman, *Ex p.* Bale, [1899] 2 Q. B. 62.

1128. ——.]—Damages awarded a petitioner in the Divorce Ct., against a co-resp., ordered to be paid into ct., will not support a bkpcy. petition.—*Re* O'GORMAN, *Ex p.* BALE, [1899] 2 Q. B. 62; 68 L. J. Q. B. 650; 80 L. T. 501; 47 W. R. 543; 43 Sol. Jo. 480; 6 Mans. 204.

Right of court to go behind judgments, awards, etc.]—*See* Part VIII., Sect. 7, *post.*

H. Joint Debts.

1129. Debt due to petitioning creditors & others jointly.]—*Semble:* a commission is defective where the debt on which it is founded is not due to petitioning creditors alone, but to them together with other persons with whom they are in partnership.—*Re* MOTT, *Ex p.* HALL (1828), Mont. & M. 39.

See, also, Nos. 1009, 1010, *ante.*

1130. Separate debt—Insufficient to support joint fiat.]—If a joint fiat issue against partners, & only one be adjudged bkpt. there is no debt on which the fiat can be supported, as the fiat is joint, & a separate debt cannot support it.—*Re* CLARKE, *Ex p.* CLARKE (1832), 1 Deac. & Ch. 544; 1 L. J. Bcy. 97, Ct. of R.

1131. Debt due jointly by two partners—Joint commission against two of three partners.]—*Qu.:* as to the validity of a joint commission against two of three partners, on a debt jointly due from the two.—*Re* CHAMBERS, *Ex p.* CHAMBERS (1835), 2 Mont. & A. 440.

Annotations:—**Mentd.** *Re* Durrant, *Ex p.* Thirkill (1836), 5 L. J. Bcy. 40; *Re* Newall, *Ex p.* Newall (1838), 3 Mont. & A. 666, Ct. of R.; *Re* Prescott, *Ex p.* Prescott (1840), 4 Jur. 852; *Re* Scowcroft, *Ex p.* Rees (1845), 6 L. T. O. S. 104.

See, now, 1914 Act, s. 119, & 1915 Rules, r. 288.

J. Costs.

1132. Taxed costs as in case of non-suit.]—Taxed costs upon a judgment, as in case of a non-suit, under a rule of ct., do not constitute a good petitioning creditor's debt.—*Re* STEVENSON, *Ex p.* STEVENSON (1829), Mont. & M. 262.

Annotation:—**Folld.** *Re* Miller (1863), 1 New Rep. 310.

1133. In divorce suit.]—The amount due upon an order of the Ct. of Divorce, for payment of costs, is not such a debt as will sustain a petition in bkpcy.—*Re* MILLER (1863), 1 New Rep. 310; 11 W. R. 374.

See, now, 1914 Act, s. 1 (1) (*g*).

1134. —— **Costs of King's proctor.**] — The taxed costs of "the Queen's Proctor" intervening in a suit in the Divorce Ct. which was dismissed with costs to be paid to that officer, form a good petition in bkpcy. against the person ordered to pay them.—*Re* RAYNER, *Ex p.* RAYNER (1877), 37 L. T. 38; 25 W. R. 851.

Annotation:—**Mentd.** *Re* Purrett, *Ex p.* Purrett (1895), 73 L. T. 224.

1127 i. *Order for damages in divorce suit.*]—Where, under a decree in a divorce suit, petitioner is absolutely entitled to the half of damages awarded against co-resp., an order that co-resp. do pay the damages awarded to petitioner, on condition that an undertaking be given by petitioner to pay the amount received into ct., creates a good creditor's petitioning debt in bkpcy. proceedings.—THOMSON *v.* THOMSON (1892), 11 N. Z. L. R. 483.—**N.Z.**

PART III. SECT. 1, SUB-SECT. 2.—H.

f. *Two creditors — Not jointly interested in whole debt.*]—C. & her husband sued jointly for damages in respect of a personal injury to C., & consequential loss to her husband. The damages were separately assessed, the amount awarded to C. being £25, & that awarded to her husband being £2 2*s.* 0*d.* The costs were taxed at £24 17*s.* 0*d.* Deft. then committed an act of insolvency, & C. & her husband presented a joint creditors' petition against B., which was dismissed, on the ground that they were not jointly interested in a debt of £50.—*Re* BOWLER, *Ex p.* CALDWELL (1895), 6 Q. L. J. 242.—**AUS.**

g. —— *Not partners in trade.*]—*Held:* if a debt of £100 were due to two or more jointly, it was a sufficient petitioning creditor's debt, under 6 Geo. 4, c. 16, s. 115, although such persons were not partners in trade.—TRONSON *v.* CALLAN (1827), 1 Hud. & B. 113.—**IR.**

h. *Partnership debt—Petition for sequestration of partner's separate estate.*]—A creditor may obtain the sequestration of the separate estate of one partner in a firm on a debt due to him by the firm.—*Re* STEVENSON (1893), 19 V. L. R. 660.—**AUS**

k. —— ——.]—A man may be made insolvent upon a debt which he & another conjointly owe, & in cases of partnership the creditor is not bound to proceed to make the firm insolvent, although he may do so if he please.—*Re* DRYSDALE (1866), 3 W. W. & A'B. 30.—**AUS.**

l. —— *Partners ceasing to carry on business.*]—Q. & F. carried on business as contractors in copartnership, & in so doing incurred a partnership debt. They afterwards ceased to be partners. The creditors presented a petition asking for adjudication as bkpts. of Q. & F.:—*Held:* there was no provision in 1892 Act, s. 51, for presenting a petition against partners who had ceased to carry on business.—*Re* QUINLAN & FOSTER (1907), 26 N. Z. L. R. 513.—**N.Z.**

PART III. SECT. 1, SUB-SECT. 2.—J.

m. *Scale costs.*]—A judgment awarding scale costs, which amount to not less than £30, is a good petitioning creditor's debt in bkpcy. Where no authority is given to tax additional costs, not fixed by scale, a petitioning creditor may waive these, & proceed on the costs determined by the scale.—*Re* PHILLIPS & NUGHERER (1895), 13 N. Z. L. R. 639.—**N.Z.**

n. *Costs of demurrer—Issues untried—Set-off.*]—A trader was brought before the ct. upon a trader-debtor summons to compel payment of a debt, composed of costs of a demurrer to one of the defences filed by the trader in an action. The issues were still untried. The ct. dismissed the petition, because upon a general finding deft. might be entitled to have the costs of the demurrer set off against those of the verdict, & because there might be a verdict for deft.—*Re* A SUMMONED TRADER (1866), 11 Ir. Jur. 240.—**IR.**

1135. Whether costs can be added to bring debt up to statutory amount—Costs taxed after act of bankruptcy.]—At the date of the act of bkpcy., debtor had appeared to a writ issued by a creditor to recover £49 11*s.* 7*d.* & £3 costs. The costs were, after the act of bkpcy. & judgment signed, taxed at £8 9*s.* 6*d.* :—*Held :* the amount of the costs could not be added in order to constitute a good petitioning creditor's debt of £50 & over.—*Re* WHELAN, *Ex p.* SADLER (1878), 48 L. J. Bcy. 43 ; 39 L. T. 361 ; 27 W. R. 156.

1136. —— Costs of abortive execution.]—The costs of an abortive execution cannot be added to the judgment debt for the purpose of making up the amount of debt required to support a bkpcy. petition.—*Re* LONG & Co., *Ex p.* CUDDEFORD (1888), 20 Q. B. D. 316 ; 57 L. J. Q. B. 360 ; 58 L. T. 664 ; 36 W. R. 346 ; 4 T. L. R. 232 ; 5 Morr. 29, C. A.

1137. Set-off—Costs forming part of petitioning creditor's debt.]—There can be no set-off of costs in bkpcy. proceedings between a creditor & his debtor, where the creditor makes costs payable to him part of the debt on which he bases his bkpcy. petition against his debtor, although, if such costs had not been made part of petitioning creditor's debt, a set-off of costs would have been allowed.—*Re* A DEBTOR, *Ex p.* PETITIONING CREDITORS, [1907] 2 K. B. 896 ; 97 L. T. 644 ; 51 Sol. Jo. 705.

Set-off in bankruptcy, generally, *see* Part X., *post ; see, also,* Nos. 1439, 1440, *post.*

K. Interest.

1138. Whether interest can be added in making up amount of debt—On bill of exchange—Not carrying interest on face thereof.]—If a bill of exchange do not carry interest upon the face of it, a debt made up of the principal sum secured by the bill, & the interest up to the act of bkpcy., though the bill be noted & protested according to 9 Will. 3, c. 17, is not a good petitioning creditor's debt.—*Re* BURGESS, *Ex p.* GREENWAY (1818), Buck, 412 ; 2 Moore, C. P. 745 ; 8 Taunt. 660 ; 129 E. R. 541, L. C ; *subsequent proceedings* (1819), Buck, 418, L. C.

1139. —— —— ——.]—Interest accruing before the act of bkpcy. cannot be added to the principal sum due on a bill of exchange, so as to constitute a good petitioning creditor's debt, unless interest be specially made payable on the face of the bill.—CAMERON *v.* SMITH (1819), 2 B. & Ald. 305 ; 106 E. R. 378.

Annotations :—**Expld.** Laing *v.* Stone (1828), 2 Man. & Ry. K. B. 561. **Distd.** Montgomery *v.* Bridge (1831), 2 Dow & Cl. 297, H. L. **Consd.** Cook *v.* Fowler (1874), L. R. 7 H. L. 27, H. L. **Refd.** Webster *v.* British Empire Mutual Life Assce. (1880), 15 Ch. D. 169, C. A. ; Stearns *v.* Village Main Reef Gold Mining Co. (1904), 48 Sol. Jo. 700. **Mentd.** *Re* Dixon, Heynes *v.* Dixon, [1900] 2 Ch. 561, C. A.

1140. ——On dishonoured bill.]—*Qu. :* whether the interest of a dishonoured bill can form part of petitioning creditor's debt.—POOLLY *v.* MILLARD (1831), 9 L. J. O. S. Ex. 114.

1141. —— On judgment debt.]—A judgment creditor in issuing a bkpcy. notice against a debtor under 1883 Act, s. 4 (1) (*g*), is entitled to include in such bkpcy. notice a claim for interest on the judgment debt.—*Re* LEHMANN, *Ex p.* HASLUCK (1890), 62 L. T. 941 ; 39 W. R. 16 ; 6 T. L. R. 376 ; 7 Morr. 181, D. C.

L. Solicitor's Bill of Costs.

1142. Bill under taxation.]—A solr. may take out a commission of bkpcy. for his fees, whilst his bill is under taxation by order of ct.—ANON. (1728), Mos. 27 ; 25 E. R. 250, L. C.

1143. Bill not taxed.]—The validity of petitioning creditor's debt was impeached on the ground that it was founded on an attorney's bill, which had never been taxed, & that if it were taxed, the debt would be reduced below the minimum allowed by stat. :—*Held :* the amount of the debt should be referred to the registrar, who should inquire whether there was a good petitioning creditor's debt at the date of the fiat.

A solr. may take out a fiat on his bill before taxation, but if, upon the taxation of it, the bill is reduced below £100, the fiat will be superseded (SIR GEORGE ROSE).—*Re* FORD, *Ex p.* FORD (1838), 3 Deac. 494 ; Mont. & Ch. 97.

1144. —— Time for taxation—At whose instance.]—A commission issued upon a debt due to petitioning creditor as the balance of a solr.'s bill of costs. Petitioning creditor had proved his debt for a dividend without any objection to the charges. Creditors having petitioned to have the bill taxed :—*Held :* the bill should be taxed.

If at the time of the commission bkpt. was not concluded from the taxation of this bill, then it is fit that it should now be taxed ; & every creditor has an interest in the taxation, more especially, if the validity of the commission is to depend on the amount (LEACH, V.-C.).—*Re* SYMES, *Ex p.* PRIDEAUX (1821), 1 Gl. & J. 28.

1145. —— Subsequent taxation to reduce sums below statutory amount refused.]—The ct. will not grant a rule for the taxation of an attorney's bill of costs at the instance of a third party, who makes the application simply for the collateral purpose of reducing the bill so low as to make the attorney a bad petitioning creditor.—CLUTTERBUCK *v.* COMBES (1833), 5 B. & Ald. 400 ; 2 Nev. & M. K. B. 209 ; 110 E. R. 838.

Annotations :—**Folld.** *Ex p.* Bowles (1835), 1 Bing. N. C. 632. **Refd.** Doe d. Palmer & Butler *v.* Roe (1835), 1 Har. & W. 339.

1146. Bill not delivered.]—An attorney's bill of costs, though it has not been signed & delivered under 2 Geo. 2, c. 23, is a legal debt, upon which a commission of bkpcy. may issue.—*Ex p.* SUTTON (1805), 11 Ves. 163 ; 32 E. R. 1050, L. C.

1147. —— Reference to taxation.] — An attorney, not having delivered his bill according to 2 Geo. 2, c. 23, may be petitioning creditor in a commission of bkpcy., but his debt must be afterwards examined.—*Ex p.* STEELE (1809), 16 Ves. 161 ; 33 E. R. 945, L. C.

Annotations :—**Mentd.** Bray, Alexander, Holme, & Bleasdale *v.* Hine & Fox (1818), 6 Price, 205 ; *Re* Gould, *Ex p.* Shearman (1849), 14 L. T. O. S. 186, 208.

PART III. SECT. 1, SUB-SECT. 2.—K.

1141 i. *Whether interest can be added in making up amount of debt—On judgment debt.*]—Where a petitioning creditor's debt is founded on a judgment of the Supreme Ct. it is available for purposes of sequestration, when accumulations of interest thereon have raised it above the sum of £50.—*Re* WILSON (1877), 3 V. L. R. 95.— **AUS.**

1141 ii. —— ——.]—A debt for less than £40, founded on a judgment, when the interest on it brings it up to £40, is sufficient to ground an adjudication.—*Re* IRWIN (1873), 8 I. L. T. Jo. 54.—**IR.**

PART III. SECT. 1, SUB-SECT. 2.—L.

1143 i. *Bill not taxed—Law 12 of 1899, s. 13—Transvaal.*]—Under the above sect. an attorney practising in the lower cts. is not entitled to payment on his bill of costs before it has been taxed :—*Held :* an agreement to pay a lump sum for costs in a civil case is therefore invalid & cannot be made the ground of a petition for sequestration.—MARKS & HOLLAND *v.* PALMER (1915), T. P. D. 246.—**S. AF.**

1146 i. *Bill not delivered—Guarantee to pay.*]—A guarantee to pay a bill of costs of another person for over £50 may form a good petitioning creditor's debt, notwithstanding no signed bill has been delivered according to Common Law Procedure Act, 1864.—*Re* LAWLER (1878), 4 V. L. R. 8.—**AUS.**

Sect. 1.—*Creditor's petition: Sub-sect.* 2, *L.; sub-sect.* 3, *A. & B.*]

1148. ——— ———.]—A solr. sued out a commission of bkpcy. against his client for his debt for costs, without having delivered his bill:—*Held:* although the legislature had required a solr. to deliver his bill a month before the bringing of an action on it, yet the stat. did not apply to the case of suing out a commission of bkpcy., but the bill ought to be referred to the master to be taxed after the commission, if it had not been previously delivered for that purpose.—*Re* HOWELL, *Ex p.* HOWELL (1812), 1 Rose, 312, L. C.

Annotation:—**Refd.** Brown *v.* Tibbits (1862), 11 C. B. N. S. 855.

See, generally, Part XVI., Sect. 5, *post.*

SUB-SECT. 3.—IN RESPECT OF WHAT ACTS OF BANKRUPTCY.

A. In General.

1149. Petition by officer of company—Act of bankruptcy committed after authority made—Special authority insufficient.]—A resolution of an incorporated co., authorising one of its officers "to present a petition in bkpcy. on behalf of the co." against a debtor, "& to carry on & act in the proceedings subsequent thereto" does not authorise the officer to present a petition founded on an act of bkpcy. committed after the date of the resolution.—*Re* A DEBTOR, *Ex p.* DEBTOR (No. 30 of 1914), [1915] 1 K. B. 287; 84 L. J. K. B. 254; 59 Sol. Jo. 130; *sub nom. Re* A DEBTOR; *Ex p.* WILKINSON & HOUGHTON, 112 L. T. 310; *sub nom. Re* DEBTOR (No. 30 of 1914), *Ex p.* PETITIONING CREDITORS, [1915] H. B. R. 18, D. C.

Annotation:—**Consd. & Expld.** *Re* A Debtor (No. 28 of 1917), [1917] 2 K. B. 808, D. C.

1150. ——— ——— **General authority sufficient.**]—Under 1914 Act, s. 149, an incorporated co. may by resolution under seal give a general authority to one of its officers to present petitions in bkpcy. in the future in respect of acts of bkpcy. which may not have been committed at the date when the authority was given.—*Re* A DEBTOR (No. 28 OF 1917), *Ex p.* PETITIONING CREDITORS *v.* THE DEBTOR, [1917] 2 K. B. 808; 87 L. J. K. B. 783; [1917] H. B. R. 235, D. C.

See, also, Nos. 993 *et seq.*, *ante*, 1228, 1229, 1252, 1253, *post.*

1151. Act of bankruptcy on same day as petition.]—An act of bkpcy. subsequent to the striking of the docket, but previous to the sealing of the commission, & for that purpose a fraction of a day is admitted, will sustain the commission.—*Ex p.* DUFRENE (1812), 1 Ves. & B. 51; 1 Rose, 333; 35 E. R. 20, L. C.

1152. Act of bankruptcy complete before order on judgment summons.]—A judgment summons was issued in the county ct. on a final judgment in the High Ct., & on Oct. 17, 1903, a bkpcy. notice was served, which was not complied with. On Nov. 2 an order to pay by instalments was made on the judgment summons. On Nov. 3 a bkpcy. petition was presented by another creditor, founded on the non-compliance with the bkpcy. notice:—*Held:* petitioning creditor was entitled to a receiving order, debtor having committed an act of bkpcy. before the making of the order on the judgment summons, which any creditor could take advantage of.—*Re* A DEBTOR (No. 112 of 1903), *Ex p.* ROCK RED BRICK CO. (1904), 90 L. T. 64; 52 W. R. 302; 48 Sol. Jo. 209.

1153. Act of bankruptcy committed before 1883 Act—Petition under Act.]—A receiving order can be made on a bkpcy. petition presented under the above Act, founded on an act of bkpcy. committed before the Act came into operation, but in respect of which no bkpcy. proceedings had been taken before that date.—*Re* PRATT, *Ex p.* PRATT (1884), 12 Q. B. D. 334; 53 L. J. Ch. 613; 50 L. T. 294; 32 W. R. 420; 1 Morr. 27, C. A.

Annotations:—**Expld.** *Re* May, *Ex p.* May (1884), 12 Q. B. D. 497, C. A. **Consd.** *Re* Pulborough School Board Election, Bourke *v.* Nutt, [1894] 1 Q. B. 725, C. A.

1154. Act of bankruptcy committed after ceasing to trade—Debt contracted during trading.]—*Held:* a party, to become bkpt., must be a trader at the time of petitioning creditor's debt, but, if petitioning creditor's debt accrued during the trading, & the party left off trade, & then committed an act of bkpcy., petitioning creditor might still sue out a commission of bkpcy. against him, notwithstanding he had retired from trade.—DOE d. BARRAUD *v.* LAWRENCE (1825), 2 C. & P. 134.

1155. ——— **Debt contracted before beginning to trade.**]—A. contracted a debt, & afterwards became a trader. The debt remained unpaid, & he went out of trade, & then committed an act of bkpcy.:—*Held:* a commission of bkpcy. could be maintained upon such debt & act of bkpcy.—BAILLIE *v.* GRANT (1832), 9 Bing. 121; 6 Bli. N. S. 459; 1 Cl. & Fin. 238; 2 Moo. & S. 193; 131 E. R. 561, H. L.

See 1914 Act, s. 4 (1) (*a*), (*b*).

1156. Act of bankruptcy committed during trading—Debt contracted before beginning trade.]—A debt contracted before a man enters into trade may be the ground of a petition for a commission of bkpcy.—BUTCHER *v.* EASTO (1779), 1 Doug. K. B. 295; 99 E. R. 191.

Annotations:—**Consd.** Newton *v.* Chantler (1806), 7 East, 138. **Refd.** Bailie *v.* Grant (1832), 9 Bing. 121; Lindon *v.* Sharp (1843), 7 Scott, N. R. 730. **Mentd.** Baxter *v.* Pritchard (1834), 1 Ad. & El. 456; Harrison *v.* Cohen (1875), 32 L. T. 717.

B. Concerted Acts of Bankruptcy.

1157. Creditor consenting party—Accepting security.]—No act of bkpcy. can be taken advantage of by a creditor who is a party to it; & where petitioning creditor is a consenting party to the non-payment, & has accepted security *pro tempore*, no act of bkpcy. is committed.—*Re* BROWN, *Ex p.* BROWN (1838), Mont. & Ch. 177, Ct. of R.

1158. Creditors privy to act.]—A concerted act of bkpcy. not available, except for creditors not privy to it.—*Ex p.* BOURNE (1809), 16 Ves. 145; 33 E. R. 939.

1159. ———.]—Where a creditor is privy to the suspension of the payment of the debt till after the expiration of the time limited by Judgments Act, 1838 (c. 110), he cannot petition against debtor, on the ground that he has not paid or secured the debt within that time.—*Re* BUDD, *Ex p.* BUDD (1841), 1 Mont. D. & De G. 436; 10 L. J. Bcy. 17; 5 Jur. 272, Ct. of R.

Annotations:—**Consd.** *Re* Johnson, *Ex p.* Johnson (1842), 2 Mont. D. & De G. 678. **Distd.** *Re* Kelday, *Ex p.* Meston (1888), 36 W. R. 585, C. A.

PART III. SECT. 1, SUB-SECT. 3.—A.

o. Failure to comply with resolutions made at meeting.]—A meeting convened by some of debtor's creditors, at which a chairman is appointed & resolutions are passed in debtor's presence requesting debtor to surrender his estate under "Insolvency Stat. 1871" (No. 379), part IV., & to which no objection is then made by debtor, is a sufficient meeting, & failure to comply with such resolutions is an act of insolvency upon which an order for sequestration may issue.—*Re* INGLIS (1877), 3 V. L. R. 100.—AUS.

PART III. SECT. 1, SUB-SECT. 3.—B.

p. In general.]—An act of bkpcy. concerted by bkpt. & a creditor, or one acting for him, is void against all the creditors not privy to it.—BOURKE *v.* CROSTHWAITE (1846), Bl. D. & Osb. 74.—IR

1160. Absolute bill of sale—Assenting to & acting under.]—A creditor, who assents to & acts under an absolute bill of sale for the benefit of creditors, but does not sign the deed, cannot afterwards sue out a commission against debtor on the ground that the absolute bill of sale was an act of bkpcy.—*Ex p.* SHAW (1816), 1 Madd. 598; 56 E. R. 220.

Annotations :—**Refd.** Forbes *v.* Limond (1853), 1 Sm. & G. 554. **Mentd.** *Re* Jermyn, *Ex p.* Elliott (1837), 2 Deac. 179.

1161. Assignment for creditors—Creditors instigating execution.]—Two creditors persuaded bkpt. to execute an assignment of his effects to them for the benefit of his creditors, & then issued a fiat against him, setting up this assignment as the act of bkpcy. They then seized his furniture & stock, without taking any proceedings under the fiat. On the application of a *bonâ fide* creditor, this fiat was ordered to be annulled & a new one issued. —*Re* MUCKLOW, *Ex p.* MUCKLOW (1833), 3 Deac. & Ch. 25.

Annotation :—**Refd.** *Re* Wayre, *Ex p.* Ellis (1837), 6 L. J. Bcy. 89.

1162. —— ——.]—A creditor who instigates his debtor to execute a creditor's deed, is bound by the deed, notwithstanding that he refuses himself to execute it.—GURNEY'S, ALEXANDER, & CO. *v.* REYNOLDS (1885), 1 T. L. R. 592.

1163. —— **Creditor party to deed.**]—If a creditor sign a trust deed, he cannot take advantage of its being an act of bkpcy.; & if he be an equitable creditor, he cannot call upon his trustee to do that which he could not himself do, if he had the legal right to the debt (LORD ELDON, C.).—*Re* BATTIER, *Ex p.* BATTIER (1819), Buck, 426.

1164. —— ——.]—*Held :* 1 & 2 Will. 4, c. 53, s. 42, did not give validity to commissions of bkpcy. founded on concerted acts of bkpcy., & the execution of a deed whereby a trader assigned all his property to a trustee for the benefit of all his creditors was not an act of bkpcy. sufficient to support a commission founded on the petition of a creditor who was either party or privy to such deed.—MARSHALL *v.* BARKWORTH (1833), 4 B. & Ad. 508; 1 Nev. & M. K. B. 279; 2 L. J. K. B. 75; 110 E. R. 546.

Annotation :—**Mentd.** *Re* Clark, *Ex p.* Dickenson (1894), 70 L. T. 284.

1165. —— ——.]—A party to a deed creating the act of bkpcy. cannot be petitioning creditor.—*Re* COOK (1839), 4 Deac. 82; Mont. & Ch. 349, Ct. of R.

1166. —— —— **Cannot set up any act of bankruptcy.**]—A party to a creditor's deed cannot set up the deed as an act of bkpcy., & cannot set up any other act of bkpcy.—*Re* BUNN, *Ex p.* BUNN (1838), 3 Deac. 119.

1167. —— **Creditor assenting or privy to deed—Can set up other act of bankruptcy.**]—A creditor, who has so acted with reference to an assignment for the benefit of creditors executed by his debtor, that he cannot be allowed to found a bkpcy. petition against debtor on the deed as an act of bkpcy., is yet, if he is not bound by the deed, entitled to present a bkpcy. petition against debtor founded on an independent act of bkpcy., though the result may be that the deed will be avoided as against the trustee in debtor's bkpcy.—*Re* MILLS, *Ex p.* MILLS, [1906] 1 K. B. 389; 94 L. T. 41; 54 W. R. 322, C. A.

Annotations :—**Folld.** *Re* Sunderland, [1911] 2 K. B. 658 C. A. **Mentd.** *Re* Walker (1910), 26 T. L. R. 260.

1168. —— ——.]—A deed of assignment was entered into by A. for the benefit of such of his creditors as would sign a deed of compromise by a certain time. Subsequently a commission of bkpcy. was taken out against A. which was at the suit of the very persons who were privy to the deed of assignment, & who relied on that deed as an act of bkpcy., under which commission two trustees of the deed of assignment were chosen assignees :—*Held :* the parties who were privies, & had assented to the deed of assignment, could not set it up as an act of bkpcy.—BAMFORD *v.* BARON (1788), 2 Term Rep. 594, n.; 100 E. R. 319, n.

Annotations :—**Consd.** Edwards *v.* Harben (1788), 2 Term Rep. 587; *Re* Whalley, *Ex p.* Whalley (1803), 1 Smith, K. B. 118; *Ex p.* Bourne (1809), 16 Ves. 145. **Apld.** Back *v.* Gooch (1815), 4 Camp. 232. **Distd.** Doe d. Pitcher *v.* Anderson (1816), 5 M. & S. 161. **Refd.** Tappenden *v.* Burgess (1803), 4 East, 230; Read *v.* Wilmott (1831), 9 L. J. O. S. C. P. 176; Marshall *v.* Barkworth (1833), 4 B. & Ad. 503.

1169. —— —— **Executed by debtor only.**]—Petitioning creditor was privy to the execution of a deed of assignment by bkpt. to trustees for the benefit of creditors; it was not executed by the trustees or creditors :—*Held :* the creditor could not take advantage of the deed as an act of bkpcy. —HICKS *v.* BURFITT (1812), 4 Camp. 235, n.

Annotation :—**Dbtd.** *Re* Bayly, *Ex p.* Bayly (1830), Mont. & M. 438.

1170. —— —— **Approval of acts done under.**]—A creditor who, without executing an assignment for the benefit of creditors, has assented to the deed by approving of acts done under it, is estopped from setting it up as an act of bkpcy., & it will not support a commission sued out by him as petitioning creditor.—BACK *v.* GOOCH (1815), 4 Camp. 232; Holt, N. P. 13, N. P.

Annotations :—**Refd.** Marshall *v.* Barkworth (1833), 4 B. & Ad. 508. **Mentd.** *Re* Robinson, *Ex p.* Fernandes (1840), 1 Mont. D. & De G. 114, Ct. of R.

1171. —— —— **Accepting benefit under.**]—*Held :* 1842 Act, s. 8, did not enable a creditor to sue out a fiat founded on a trust deed for the benefit of creditors as the act of bkpcy., if that creditor accepted a benefit under the trusts of the deed.—*Re* TAVERNER, *Ex p.* PAYNE (1847), De G. 534; 9 L. T. O. S. 314; 11 Jur. 568.

1163 i. *Assignment for creditors — Creditor party to deed.*]—K. assigned her property for the benefit of her creditors generally, & W., a creditor, joined with the other creditors in the execution of the deed. Subsequently W. presented a petition for adjudication of insolvency against K. on the ground that she had committed an act of insolvency in making the assignment : —*Held :* as W. was a party to the deed of assignment he was prevented from relying on its execution by K. as an act of insolvency.—*Re* KENNEDY, *Ex p.* WILSON, [1903] S. R. Q. 127.—**AUS.**

1163 ii. *S. P. Re* LITTLE'S INSOLVENCY, *Ex p.* BROOKING (1818), 1 Nfld. L. R. 101.—**NFLD.**

1163 iii. *S. P. Re* PEARSE, [1905] V. L. R. 208.—**AUS.**

1163 iv. —— —— A deed of arrangement for the benefit of creditors was executed by a bkpt. under Bkpcy. Act, 1867, but was not declared completely executed within the time limited. One of the creditors, who had acquiesced in & executed the deed, presented a petition for adjudication against debtor :—*Held :* petitioning creditor was estopped by his acquiescence in the deed, in the absence of proof that the acquiescence was obtained by fraud.—*Re* BERGER, 1 J. R. N. S. 87.—**N.Z.**

1163 v. —— —— *Company signing by one of its directors.*]——A deed of assignment was executed by a co. by a director of the co. signing on its behalf without affixing the common seal. The co. filed a creditor's petition, alleging the deed of assignment as an act of bkpcy. :—*Held :* it was sufficient to show that petitioning creditor was privy to the deed's execution, & the execution by the director was ample evidence that the creditor was privy to the deed.—*Re* ABURN (1908), 27 N. Z. L. R. 442. —**N.Z.**

1163 vi. —— —— *Assent obtained by fraud or misrepresentation.*]—If petitioning creditors with to make a deed of assignment by a debtor, to which they themselves are parties, the foundation of their petition, & wish to go behind the deed on the ground that their execution of the deed was obtained by misrepresentation, they must allege clearly the circumstances of the misrepresentation in order to enable them to adduce the necessary proof.—*Re* ABURN (1908), 27 N. Z. L. R. 442.—**N.Z.**

Sect. 1.—*Creditor's petition : Sub-sect.* 3, *B.*]

1172. —— —— Subsequent petition by non-assenting creditor.]—Objection having been taken to a petition on the ground that petitioning creditor had assented to the deed of assignment relied upon as the act of bkpcy., the hearing of the petition was adjourned *sine die*, with liberty to apply. Subsequently a receiving order was made against debtor on the petition of another creditor, who had not assented to the deed :—*Held :* the first petition should be dismissed without costs.—*Re* SMITH, *Ex p.* ROOKE (1889), 60 L. T. 192 ; 37 W. R. 558 ; 6 Morr. 30, D. C.

1173. —— —— Acting under.]—If a petitioning creditor has acted under a deed of assignment to trustees of all a trader's effects, although he may not have executed it, yet he cannot avail himself of it as an act of bkpcy. (LORD ELDON, C.).—*Ex p.* CAWKWELL (1812), 19 Ves. 233 ; 1 Rose, 313 ; 34 E. R. 505.

Annotations :—**Folld.** *Re* Reed (1845), 6 L. T. O. S. 105. **Refd.** *Re* A Disputed Adjudication (1860), 1 L. T. 449.

1174. —— —— Acting for trustee under.]—A. assigned all his estate to trustees for the benefit of his creditors, & B. also made a like assignment to trustees, two of whom were trustees under A.'s assignment. A., at the instance of his trustees, sued out a commission of bkpcy. against B., the act of bkpcy. relied on being B.'s assignment :—*Held :* the commission being that of A.'s trustees, who were privies & parties to B.'s deed of assignment, could not be supported.—*Re* KILNER, *Ex p.* KILNER (1817), Buck, 104.

1175. —— —— Attendance of agent after execution of deed—Estoppel.]—Petitioning creditors, who had refused to assent to a creditors' deed, were represented at a meeting of creditors held after its execution. Their representatives expressly stated that they had no authority to assent to the deed, & that they came only to ascertain what was to be proposed :—*Held :* they were not estopped from relying on the execution of the deed as an act of bkpcy.—*Re* WALKER (1910), 26 T. L. R. 260.

1176. —— —— Acquiescence.]—Bkpt. previous to the fiat having called a meeting of his creditors at Manchester, H. & Co., creditors at Halifax, wrote to G., an attorney at Manchester, to attend the meeting, on their behalf, saying " we will leave our interests in your hands." In pursuance of the resolutions passed at the meeting, which were communicated to H. & Co., a trust deed was prepared by G., & executed by bkpt. & many of the creditors, but not by H. & Co. A dividend was afterwards declared by the trustees, of which H. & Co. were also informed, without making any objections to the arrangement :—*Held :* they could not afterwards set up this deed, as an act of bkpcy.—*Re* TEALDI *Ex p.* TEALDI (1840), 1 Mont. D. & De G. 210.

Annotation :—**Refd.** *Re* A Disputed Adjudication (1860), 1 L. T. 449.

1177. —— —— ——.]—*Held :* petitioning creditor had estopped himself, by acquiescence in a deed of assignment by debtor, from relying on the circular convening the meeting at which the composition was voted, as a notice of suspension constituting act of bkpcy.—*Re* HAWLEY, *Ex p.* RIDGWAY (1897), 76 L. T. 501 : 4 Mans. 41, D. C.

Annotations :—**Apld.** *Re* Woodroff, *Ex p.* Woodroff (1897), 4 Mans. 46, D. C. **Distd.** *Re* Jones, *Ex p.* Associated Newspapers, [1912] 3 K. B. 234.

1178. —— —— Present at preparation of deed.]—Debtor having called his creditors together, proposals were made as to a composition. The creditors insisted on an assignment of debtor's property to trustees for their benefit. He refused to make it, but, after the meeting had broken up, he executed such an assignment. G., one of his creditors, was present during the preparation of this assignment, &, though he denied having been present at its execution, the ct. came to the conclusion that he had acquiesced in its being executed, & taken a benefit under it, by having the property protected from execution :—*Held :* G. could not avail himself of the deed as an act of bkpcy., although it might be that he had not so far assented to it as to be bound by its provisions.—*Re* STRAY, *Ex p.* STRAY (1867), 2 Ch. App. 374 ; 36 L. J. Bcy. 7 ; 16 L. T. 250 ; 15 W. R. 600, L. JJ.

Annotations :—**Folld.** *Re* Brindley, *Ex p.* Taylor, [1906] 1 K. B. 377, C. A. **Apld.** *Re* Mills, *Ex p.* Mills, [1916] 1 K. B. 389, C. A. **Distd.** *Re* Walker (1910), 26 T. L. R. 260. **Refd.** *Re* Michael, *Ex p.* Michael (1891), 8 Morr. 305, D. C. ; *Re* Adamson, *Ex p.* Viney (1894), 71 L. T. 579 ; *Re* Hawley, *Ex p.* Ridgway (1897), 76 L. T. 501 ; *Re* Carr, *Ex p.* Jacobs (1901), 85 L. T. 552, D. C. ; *Re* Mendelssohn, *Ex p.* Mendelssohn, [1903] 1 K. B. 216 , C. A. ; *Re* Jones, *Ex p.* Newnes & Associated Newspapers (1912), 107 L. T. 236, D. C. ; *Re* Beesley (1913), 109 L. T. 910. **Mentd.** *Re* Smith (1867), 16 L. T. 643.

1179. —— —— Attendance & voting for committee of inspection.]—Debtor, at a time when he was hopelessly insolvent & was about to call a meeting of his creditors, took delivery on credit of goods of considerable value from petitioning creditors. At the meeting petitioning creditors refused to assent to an assignment for the benefit of creditors, unless the goods were returned to them or their value allowed, but, after a resolution for an assignment had been passed, they took part in the nomination of the committee of inspection. On receiving a form of assent to the assignment they telephoned to the accountant, who had charge of debtor's affairs, repeating their demand for a return of the goods or payment of their value under threat of legal proceedings. On the refusal of their demand they commenced an action against debtor for goods sold & delivered & obtained final judgment against him, &, on his failure to comply with a bkpcy. notice issued in respect of that judgment, filed a petition in bkpcy. against him founded on his non-compliance with the bkpcy. notice :—*Held :* petitioning creditors had not either by any improper conduct or by any assent to the assignment precluded themselves from taking proceedings in bkpcy.—*Re* SUNDERLAND, [1911] 2 K. B. 658 ; 105 L. T. 233; 55 Sol. Jo. 568; 18 Mans. 123, C. A.

Annotation :—**Mentd.** *Re* Sleath, *Ex p.* Lotus Shoe Co. (1913), 109 L. T. 222, D. C.

1180. —— —— Advising on assignment.]—A trader executed a deed of assignment of all his estate & effects for the benefit of his creditors which purported to be made under the arrangement

1176 i. —— *Creditor assenting or privy to deed—Acquiescence.*]—A trader was indebted to a bank on bills drawn by L. & accepted by the trader. The bank handed to L. three of the trader's overdue acceptances, upon which L. issued a debtor's summons. Subsequently L.'s solr., in presence of an officer of the bank, offered to withdraw debtor's summons if the trader executed a trust deed vesting all his estate in trustees for the benefit of all his creditors, which he did without delay. The bank refused to execute the trust deeds &, relying upon it as an act of bkpcy., filed a petition against the trader & obtained an adjudication against him : —*Held :* the bank, having stood by while the trader was forced or induced to execute the deed, must be taken as having acquiesced in its execution, & assented thereto, & could not take advantage of it as an act of bkpcy.—*Re* EASDALE, *Ex p.* PROVINCIAL BANK (1874), 8 I. L. T. 209.—**IR.**

1178 i. —— —— *Present at preparation of deed—In person or by agent.*]—A creditor who is present, in person or by an authorised agent, at a meeting of creditors when the execution of an assignment by debtor of all his estate & effects, for the benefit of all his creditors, is sanctioned & directed, & who does nothing to signify dissent on his part, is estopped, as a privy thereto, from taking advantage of the deed as an act of bkpcy.—*Re* S. (1873), I. R. 8 Eq. 51 ; 8 I. L. T. 43.—**IR.**

clauses of 1849 Act, & a creditor advised the trader respecting a sale under such deed :—*Held :* the creditor had acquiesced in it so as to be precluded from treating it as an act of bkpcy.—*Re* REES, *Ex p.* ALSOP (1859), 1 De G. F. & J. 289 ; 29 L. J. Bcy. 7 ; 1 L. T. 285 ; 6 Jur. N. S. 282 ; 8 W. R. 106 ; 45 E. R. 370, L. JJ.

Annotations :—**Consd.** *Re* Stray, *Ex p.* Stray (1867), 2 Ch. App. 374, L. JJ. **Folld.** *Re* Brindley, *Ex p.* Taylor, [1906] 1 K. B. 377, C. A. **Distd.** *Re* Walker (1910), 26 T. L. R. 260. **Refd.** *Re* Michael, *Ex p.* Michael (1891), 8 Morr. 305, D. C. ; *Re* Adamson, *Ex p.* Viney (1894), 2 Mans. 153 ; *Re* Hawley, *Ex p.* Ridgway (1897), 76 L. T. 501.

1181. —— —— **Supplying goods to trustee under deed.**]—A creditor may, without executing or expressly assenting to a deed of assignment by his debtor, nevertheless so acquiesce in it tacitly by conduct, *e.g.* supplying goods to the trustee of the deed, as to estop himself from relying upon a circular convening the meeting to consider the proposed deed as a notice of suspension constituting an act of bkpcy., if the circular is part & parcel of the scheme.—*Re* WOODROFF, *Ex p.* WOODROFF (1897), 76 L. T. 502 ; 4 Mans. 46, D. C.

Annotations :—**Distd.** *Re* Jones, *Ex p.* Associated Newspapers, [1912] 3 K. B. 234. **Mentd.** *Re* Mills, *Ex p.* Mills, [1906] 1 K. B. 389, C. A.

1182. —— —— —— **Receiving payment.**]—An act of bkpcy. committed by a debtor under 1883 Act, s. 4 (1) (*h*), by the execution of an assignment for the benefit of his creditors, cannot be made the basis of a bkpcy. petition by a non-assenting creditor, if that creditor has done any act or acts amounting to an acquiescence in the deed or to a recognition of the trustee's title therein, *e.g.*, by supplying goods to & receiving payment therefor from the " trustee " as such, or by endeavouring to take advantage of a clause in the deed empowering the trustee of the deed in his own discretion or at the direction of the committee of inspection " to pay in full or otherwise than by dividends under these presents, any creditor or creditors who shall decline to execute or assent to these presents."—*Re* BRINDLEY, *Ex p.* TAYLOR, Sons & Co., [1906] 1 K. B. 377 ; 75 L. J. K. B. 46 ; 22 T. L. R. 115 ; 12 Mans. 387, C. A.

1183. —— —— —— **Order by trustee not necessarily notice of deed.**]—Debtors called a meeting of creditors at which petitioning creditors were represented. Their representative refused to have anything to do with a deed of assignment for the benefit of creditors. After he left the meeting a deed was executed. On the same day the trustee under the deed sent a small order to petitioning creditors " as trustee of the estate," which was received on the following day. By return post an invoice was sent to the trustee saying that the goods were " ready awaiting remittance." In exchange for the invoice the trustee sent a cheque, & on the same day as the cheque was received petitioning creditors received a specific notice of the execution of the deed, after which they dispatched the goods :—*Held :* (1) the order did not necessarily convey to petitioning creditors that a deed had been executed ; (2) the transaction was complete, although the goods had not been sent off before the specific notice was received, & petitioning creditors were not estopped from relying on the execution of the deed as an act of bkpcy.—*Re* CROW, *Ex p.* COLLIER (1907), 97 L. T. 140 ; 51 Sol. Jo. 593 ; 14 Mans. 279, D. C.

1184. —— —— **Assent obtained by misrepresentation.**]—Where a creditor, who has assented to the execution by debtors of a deed of assignment for the benefit of creditors, presents a petition alleging as the act of bkpcy. the execution of the deed, the ct. will not dismiss the petition, if it appears that the assent was procured by misrepresentation & misstatement.

A statement of affairs was submitted by debtors to their creditors showing assets £1,072 & liabilities £870. Subsequently an accountant reported that, so far as could be ascertained from debtors' books, there would be 20*s.* in the pound for the creditors. Nothing was done by debtors to lead the creditors to suppose that this was not a fair statement of their affairs, & thereupon a resolution was passed agreeing to the execution by debtors of an assignment for benefit of creditors. The assets in fact turned out to be about £550, & the liabilities about £1350. A creditor who had signed the resolution, presented a petition against debtors founded on the execution of the deed of assignment :—*Held :* as the assent to the execution of the deed had been obtained by misrepresentation & misstatement, the creditor was not precluded from presenting a petition.—*Re* TANNENBERG & SONS, *Ex p.* PARRIER (1889), 60 L. T. 270 ; *sub nom. Re* TANENBERG & SONS, *Ex p.* PERRIER, 37 W. R. 480 ; 6 Morr. 49, D.C.

Annotation :—**Refd.** *Re* Jones, *Ex p.* Associated Newspapers, [1912] 3 K. B. 234, D. C.

1185. —— **Creditor concurring in proposal—Deed differing from that proposed.**]—An agreement to assent to a creditors' deed implies that the trust deed shall be for the equal benefit of the creditors. If a clause is secretly introduced into the deed which gives an undue preference to one creditor, a creditor has a perfect right to refuse his assent to the deed, & to take bkpcy. proceedings.—*Re* BELL, *Ex p.* HALLOWELL (1838), 3 Deac. 278 ; 3 Mont. & A. 538, Ct. of R.

1186. —— —— ——.]—Although a creditor gave his assent to a proposal of bkpt. to assign his effects for the benefit of his creditors, yet, where the deed contained an unexplained stipulation in favour of a particular creditor, quite different from what he had reason to suppose it would contain :—*Held :* the creditor was not bound by the deed, but might sue out a fiat upon it as an act of bkpcy.—*Re* MARSHALL, *Ex p.* MARSHALL (1841), 1 Mont. D. & De G. 575 ; 10 L. J. Bcy. 34 ; 5 Jur. 466, Ct. of R.

See, also, No. 1192, *post.*

1187. —— —— **Assent withdrawn before deed executed.**]—A creditor who has assented to a proposed deed of assignment by a debtor for the benefit of his creditors, may revoke his assent before the deed is executed. A creditor so revoking his assent is not precluded from relying on any act leading to or connected with the proposed assignment as an act or acts of bkpcy. on which to found a petition.—*Re* JONES BROTHERS, *Ex p.* ASSOCIATED NEWSPAPERS, LTD., [1912] 3 K. B. 234 ; 81 L. J. K. B. 1178 ; 19 Mans. 349, D. C.

1188. —— **Assent by unauthorised agent—Solicitor conducting action.**]—A solr., who has been retained

1188 i. —— —— *Assent by unauthorised agent.*]—Petitioning creditors had as their agents in Belfast a firm which admittedly, by one of its members, had been active in procuring debtor to sign the trust deed relied on by petitioning creditors as an act of bkpcy. Petitioning creditors had no knowledge of the execution of the trust deed, & their agents were not agents in that behalf :—*Held :* petitioning creditors were not precluded from relying on the trust deed as an act of bkpcy.—*Re* EASDALE, *Ex p.* BIRLEY BROTHERS (1874), 8 I. L. T. 212.—**IR.**

q. *Return of nulla bona—Subsequent agreement to pay by instalments.*]—Resp. made a return of *nulla bona* to a writ upon a judgment, & then with the knowledge of appct. arranged with the judgment creditor to pay off the debt in instalments. Thereafter resp. became indebted to appct., who, relying solely upon the above return of *nulla bona* applied to sequestrate resp.'s estate :—*Held :* in the circumstances the return was not one of which appct. could take advantage.—WOLPERT *v.* ABOLSKY (1913), W. L. D. 102.—**S. AF.**

Sect. 1.—*Creditor's petition: Sub-sect.* 3, *B.; sub-sect.* 4.]

to take the necessary proceedings to recover compensation from deft., has no authority after judgment has been obtained to assent to the execution by deft. of a deed of assignment to a trustee for the benefit of his creditors.

A solr. having so assented:—*Held:* pltf. was not precluded from commencing bkpcy. proceedings against deft., alleging the deed of assignment as the act of bkpcy.—*Re* DEBTOR (NO. 1 OF 1914), *Ex p.* DEBTOR *v.* PETITIONING CREDITOR, [1914] 2 K. B. 758; 83 L. J. K. B. 1176; 58 Sol. Jo. 416; 21 Mans. 155, D. C.

1189. —— Onus of proof of assent to, acquiescence in, or submission to deed.]—Where a creditor has assented to, acquiesced in, or submitted to a deed of assignment executed by debtor in favour of his creditors, he cannot afterwards rely upon the execution of such deed as an act of bkpcy.

When the objection is taken to a petition presented by a creditor, that such creditor has assented to, acquiesced in, or submitted to a deed of assignment relied upon as the act of bkpcy., the onus is on the person raising the objection to establish such assent, acquiescence, or submission. If the allegation is an acquiescence or submission after the deed is executed, stronger proof will in general be required than where acquiescence before execution is alleged.

In order to support an allegation that the creditor has acquiesced in or submitted to the deed, it is not sufficient to show merely that such creditor had notice of its execution; but it must also be shown that he intentionally took advantage of the deed having been executed.—*Re* MICHAEL, *Ex p.* MICHAEL (1891), 8 Morr. 305, D. C.

Annotation:—**Refd.** *Re* Walker (1910), 26 T. L. R. 260, D. C.

1190. Composition deed—Signing & acting as trustee.]—By a composition deed, the insolvent assigned to four trustees all his goods, chattels, etc, upon trust to sell & to apply the proceeds rateably in discharge of his debts amongst his creditors, who should execute the deed, provided that the trustees & the creditors should, on or before a given day, make proof of the debts if required, & execute that deed. The creditors, as a release of their respective debts, covenanted that they would not implead the insolvent or his goods. The deed was executed by two only of the trustees:—*Held:* the debt of a trustee who had executed the deed was thereby extinguished, & he could not sue out a commission of bkpcy.—SMALL *v.* MARWOOD (1829), 9 B. & C. 300; 4 Man. & Ry. K. B. 181; 7 L. J. O. S. K. B. 197; 109 E. R. 112.

Annotations:—**Mentd.** Browell *v.* Reed (1842), 1 Hare, 434; Siggers *v.* Evans (1855), 5 E. & B. 367; Standing *v.* Bowring (1885), 31 Ch. D. 282, C. A.; London & County Banking Co. *v.* London & River Plate Bank (1888), 21 Q. B. D. 535, C. A.; Mallott *v.* Wilson, [1903] 2 Ch. 494.

See, now, Deeds of Arrangement Act, 1914 (c. 47), s. 3.

1191. —— Petitioning creditor assenting—Costs of petition.]—Where a petitioning creditor assents to a composition deed, although he has not executed it, he cannot avail himself of such deed as an act of bkpcy.; & where an adjudication has been made on such act of bkpcy. the ct. will annul the adjudication, & order petitioning creditor to pay all the costs of the commission.—*Re* REED (1845), 6 L. T. O. S. 105.

1192. —— Execution of deed demanded by trustee under terms of composition—Deed not in accordance with terms of composition.]—Debtor executed a deed of composition providing for the payment of 15*s.* in the pound by instalments, & for the execution of a deed of assignment for the benefit of creditors in case of default in payment of instalments, & to this deed petitioning creditors assented. Debtor made default, & executed a deed of assignment not in accordance with the terms of the deed of composition. Petitioning creditors dissented from the deed of assignment, & filed a petition, relying upon the execution of the deed of assignment as an act of bkpcy.:—*Held:* although the deed of assignment was not in accordance with the terms of the deed of composition & did not bind petitioning creditors, nevertheless they could not rely upon it as an act of bkpcy., since its execution had been demanded by the trustee under the composition deed as agent for them, & for the other creditors who assented to that deed.—*Re* ADAMSON, *Ex p.* VINEY (1894), 71 L. T. 579; 43 W. R. 192; 39 Sol. Jo. 12; 2 Mans. 153; 15 R. 248.

1193. Avoiding receiving payment.]—Petitioning creditor proceeded under Judgments Act, 1838 (c. 110), s. 8, &, for the period of a fortnight of the twenty-one days limited by the Act for the payment of the debt, kept out of the way, to avoid receiving it. During his absence debtor made a tender of the whole debt to the managing clerk of petitioning creditor, who refused to receive it:—*Held:* in these circumstances, petitioning creditor must be held to have concerted the act of bkpcy., & he could not support a fiat against his debtor for non-payment of the money within the twenty-one days.—*Re* GRATTON *Ex p.* GRATTON (1841), 2 Mont. D. & De G. 401, Ct. of R.

Annotations:—**Expld.** *Re* Baker, *Ex p.* Baker (1887), 58 L. T. 233, D. C. **Refd.** *Re* Greener, *Ex p.* Greener (1880), 15 Ch. D. 457, C. A. **Mentd.** *Re* Sedgwick, *Ex p.* McMurdo (1888), 60 L. T. 9, C. A.

1194. —— Instalment of composition—Neglect to cash cheque or apply for payment.]—Under 1869 Act the creditors of a liquidating debtor duly passed resolutions for a composition payable by instalments at certain definite times, & appointed a trustee. At the time when the first instalment of the composition became due debtor, who had sent cheques to all the creditors, also placed in the hands of the trustee funds sufficient to pay the amount of that instalment to a particular creditor, who neglected to present the cheque or apply to the trustee for the amount:—*Held:* such creditor was not entitled to institute bkpcy. proceedings against debtor with a view to having him adjudicated a bkpt. upon the ground that he had not in fact received the instalment of his composition upon the day named in the resolutions for payment.—*Re* SHERRATT, *Ex p.* ORTELLI (1882), 45 L. T. 799.

1195. Concerted denial.]—Traders employed an attorney, who was also employed by D., a creditor of their firm, & who afterwards became petitioning creditor. The attorney advised the traders to become bkpts., &, in order to procure an act of bkpcy., he took D. with him to their houses, having first concerted with them, that they should respectively deny themselves when D. called:—*Held:* although D. was not privy to such denial, yet, inasmuch as the attorney was his agent as well as of the traders, & accompanied him for the purpose of procuring such denials, such denials were fraudulent acts of bkpcy., & could not support a commission by petitioning creditor.—PROSSER *v.* SMITH (1816), Holt, N. P. 442, N. P.

1196. Execution—Issued at instance of petitioning creditor.]—A judgment creditor, who has seized & sold his debtor's property under an execution, may afterwards set up the execution as an act of bkpcy.

in support of a petition for adjudication.—*Re* SMITH (1867), 16 L. T. 643.

1197. Fraudulent conveyance—Creditor not signing but appointed trustee.]—A commission of bkpcy. was sued out on a fraudulent deed upon the petition of a creditor, who had not concurred in such deed, & who, together with others who had so concurred, was chosen assignee:—*Held:* if he had signed the deed he could not, as petitioning creditor, have availed himself of it as an act of bkpcy.

No objection can be urged against the right of [petitioning creditor] to be petitioning creditor, the object of whose petition was that bkpt.'s property might be by the comrs. transferred to assignees for the benefit of the creditors. The goodness of the petition depends on the right of the creditor to petition, & not upon who the assignees may be who are afterwards to be chosen, & in whom the assignment vests the property, notwithstanding any fraud they may have been guilty of, not connected with the assignment (LAWRENCE, J.).—TAPPENDEN *v.* BURGESS (1803), 4 East, 230; 1 Smith, K. B. 33; 102 E. R. 818.

Annotations:—**Distd.** Doe d. Pitcher *v.* Anderson (1816), 1 Stark. 262; Lee *v.* Hart (1856), 11 Exch. 880, Ex. Ch. **Refd.** Fawcett *v.* Fearne (1844), 6 Q. B. 20.

1198. When not available to petitioning creditor—Not available to assignees.]—The assignees of a bkpt., though neither of them be petitioning creditor, cannot avail themselves of an act of bkpcy. from which petitioning creditor would be estopped from availing himself.—TOPE *v.* HOCKIN (1827), 7 B. & C. 101; 9 Dow. & Ry. K. B. 881; 5 L. J. O. S. K. B. 342; 108 E. R. 663.

Annotations:—**Refd.** *Re* Robinson, *Ex p.* Fernandez (1840), 1 Mont. D. & De G. 114; *Re* Chapman, *Ex p.* Edwards (1884), 13 Q. B. D. 747, C. A. **Mentd.** Pearson *v.* Graham (1838), 7 L. J. Q. B. 247; Kynaston *v.* Crouch (1845), 14 M. & W. 266

1199. Solicitor concerting act of bankruptcy under early law—Costs.]—Where a solr. persuaded a party to sue out a fiat as petitioning creditor, who was afterwards chosen assignee, upon an invalid act of bkpcy., which was concerted between the solr. & bkpt., & there did not appear any other act of bkpcy. to support the fiat, the ct. refused to make an order on the assignee to pay the solr.'s bill of costs up to the choice of assignees.—*Re* HARDY, *Ex p.* WOODWARD (1841), 2 Mont. D. & De G. 249; 10 L. J. Bcy, 70; 5 Jur. 733.

See, further, Nos. 1739-1741, *post.*

SUB-SECT. 4.—WITHIN WHAT TIME.

1200. Same day as act of bankruptcy.]—Fraction of a day, in support of a commission of bkpcy., by admitting evidence, that the act of bkpcy., though on the same day, was previous to the issuing of the commission.—WYDOWN'S CASE (1807), 14 Ves. 80; 33 E. R. 451.

Annotations:—**Mentd.** Ledbetter *v.* Salt (1828), 4 Bing. 623; *Re* Digan (1849), 14 L. T. O. S. 293.

1201. ——.]—The fact that the act of bkpcy. alleged in a creditor's petition was committed on the same day as that on which such petition was presented, is not a ground which will necessarily justify the ct. in dismissing such petition.—*Re* HAYNES, *Ex p.* KIBBLE (1890), 7 Morr. 50, D. C.

Annotation:—**Mentd.** *Re* John, *Ex p.* Spears (1893), 10 Morr. 190.

See, also, No. 1151, *ante.*

1202. Within six months—When time begins to run—Time for giving security under debtor's summons extended.]—A creditor, on July 21, 1870, served on a non-trader a debtor's summons for a sum exceeding £50. Debtor filed an affidavit denying the debt, & on Aug. 5 obtained the common order that he should give security within seven days, & that on his so doing proceedings should be stayed till the ct., in which proceedings should be taken for recovery of the debt, had come to a decision. On Aug. 12 an order was made by consent giving him a week's further time to complete the security. He never gave the security, & on Feb. 16, 1871, the creditor filed a petition for adjudication, on the ground of neglect to pay, secure, or compound for the debt:—*Held:* the petition, not having been filed till more than six months after the expiration of three weeks from the service of the summons, though within six months from the expiration of the extended time for giving security, was too late.—*Re* WIER, *Ex p.* WIER (1871), 6 Ch. App. 875; 41 L. J. Bcy. 14 25 L. T. 369; 19 W. R. 1042, L. JJ.

Annotations:—**Refd.** *Re* Moojen, *Ex p.* Bouchard (1879), 12 Ch. D. 26, C. A.; *Re* Powell, *Ex p.* Powell, [1891] 2 Q. B. 324, D. C.; **Mentd.** *Re* Shorey, *Ex p.* Shorey (1872), 21 W. R. 105; *Re* Green (1881), 44 L. T. 619, C. A.

1203. Within three months—When time begins to run.]—The act of bkpcy. committed by a debtor by reason of his non-compliance with a bkpcy. notice duly served on him under 1883 Act, s. 4 (1) (*g*), is complete at the last moment of the seven days allowed to him by the sect. to comply with the requirements of such notice.

On Nov. 20, 1890, a bkpcy. notice was served upon debtor, & on Dec. 4, a petition in bkpcy. was presented against him. On Jan. 2, 1891, the debt of petitioning creditor was paid & the petition was dismissed, but on Feb. 7, a bkpcy. notice was served upon debtor by another judgment creditor, upon which a petition was presented on Feb. 28, & a receiving order made. On the application of the official receiver it was held by the county ct. judge that the act of bkpcy. committed by the non-compliance of debtor with the bkpcy. notice served on him on Nov. 20, 1890, must be taken to have occurred on Nov. 28, & that the petition filed on Feb. 28, 1891, being within three months from that date, the money paid in settlement of the first petition must be repaid:—*Held:* the act of bkpcy. committed by the non-compliance with the bkpcy. notice served on Nov. 20, 1890, was complete at the last moment of Nov. 27, & at any time on Nov. 28 a bkpcy. petition might have been presented against debtor founded on that act of bkpcy., & that being so, the petition presented on Feb. 28, 1891, was not within the three months.—*Re* MAUD, *Ex p.* TOWNEND (1891), 64 L. T. 743; 40 W. R. 47; 7 T. L. R. 511; 8 Morr. 144, D. C.

1204. —— Day of presentation excluded.]—An act of bkpcy. was committed on Aug. 13, & the petition was filed on Nov. 13:—*Held:* in computing the three months within which, under 1883 Act, s. 6 (1) (*c*), the act of bkpcy. on which a petition was grounded must have occurred, the day on which such petition was presented was to be excluded, & the petition was presented in time.—*Re* HANSON, *Ex p.* FORSTER (1887), 56 L. T. 573; 35 W. R. 456; 4 Morr. 98, D. C.

Annotation:—**Folld.** *Re* Dawes, *Ex p.* Official Receiver (1897), 4 Mans. 117.

See, now, 1914 Act, ss. 4 (1) (*c*), 145.

1205. —— ——.]—In calculating the period of three months in 1883 Act, s. 48, the day

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PART III. SECT. 1, SUB-SECT. 4.

r. Debtor in custody—Pauper declaration.]—When an insolvent is in custody, & has made a pauper declaration & has not made satisfaction for the debt, etc., the detaining creditor may forthwith, after notice in the *Gazette*, file a petition of insolvency & is not bound, & ought not to wait until the expiration of the twenty-one days mentioned in 1857 Act, s. 183.—*Re* PRATT (1859), 8 I. Ch. R. 386.—**IR.**

Sect. 1.—*Creditor's petition: Sub-sects.* 4 & 5. *Sect.* 2.]

on which the bkpcy. petition is presented must be excluded.—*Re* DAWES, *Ex p.* OFFICIAL RECEIVER (1897), 4 Mans. 117.

See, now, 1914 Act, s. 44 (1).

SUB-SECT. 5.—SECOND PETITION BY SAME CREDITOR.

1206. Time expired through inadvertence.]—*Held:* the same petitioning creditor might issue a second fiat, the time for opening having expired through inadvertence, from a mistake as to the construction of the Act relating to insolvent debtors.—*Re* KNIBB, *Ex p.* PARTRIDGE (1839), 1 Mont. & Ch. 165, Ct. of R.

1207. No act of bankruptcy proved under first fiat.]—A new fiat was issued on the petition of the same petitioning creditor before the time for opening had expired, he having been unable to prove an act of bkpcy. before, but one having been since committed.—*Re* WILLIAMS, *Ex p.* LLEWELLYN (1835), 2 Mont. & A. 298, Ct. of R.

1208. ——.]—A fiat is not necessarily irregular because it was sued out without the special leave of the ct. by the same petitioning creditor, who had on the same debt sued out a former fiat, which had been annulled on the ground that no act of bkpcy. had been proved.—*Re* THOMAS, *Ex p.* THOMAS (1843), 1 L. T. O. S. 151; 7 Jur. 450, Ct. of R.

1209. First petition dismissed for lack of proof—Second petition founded on same act of bankruptcy—Another creditor joined—Whether proceedings vexatious.]—A creditor presented a petition against a married woman, which was dismissed by the registrar on the ground that petitioner had failed to prove separate trading. Petitioner afterwards presented a fresh joint petition by himself & another creditor, but founded so far as the first petitioner was concerned on the same debt & the same act of bkpcy., & the registrar, treating the matter as *res judicata*, in the exercise of his discretion dismissed the second petition as vexatious:—*Held:* the discretion had been properly exercised.—*Re* LARARD, *Ex p.* YEOMANS & HEAP (1896), 3 Mans. 317, C. A.

Annotation:—**Refd.** *Re* G. E. B., [1903] 2 K. B. 340, C. A.

1210. First petition dismissed on terms—Petition on new debt—Absence of extortion.]—Where a creditor, having presented a bkpcy. petition against his debtor based upon a particular debt, such as a judgment debt, consents to its being dismissed upon the terms of debtor agreeing to pay a fresh debt of increased amount, it is not an abuse of the process of the ct. for the creditor, in case of debtor making default, to present a second petition based upon the new debt, provided he has not used extortion or pressure towards debtor.—*Re* BEBRO, [1900] 2 Q. B. 316; 69 L. J. Q. B. 618; 82 L. T. 773; 48 W. R. 561; 7 Mans. 284; *sub nom. Re* M. B., *Ex p.* G., 44 Sol. Jo. 501, C. A.

Annotation:—**Mentd.** *Re* Sunderland, [1911] 2 K. B. 658, C. A.

1211. Debt proved in former bankruptcy.]—A debtor was adjudicated bkpt. on his own petition, in Dec., 1869, in a county ct. A creditor, who had proved under the bkpcy., filed a fresh petition for adjudication, in Jan., 1870, in the Ct. of London, for the purpose of impeaching the first bkpcy., under which debtor was a second time adjudicated bkpt.:—*Held:* the creditor's debt was sufficient to support the petition for adjudication, notwithstanding it had been proved in the former bkpcy.—*Re* WIELAND, *Ex p.* WIELAND (1870), 5 Ch. App. 486; 22 L. T. 324; 18 W. R. 616, L.J.

1212. Failure to prosecute previous commission.]—A petitioning creditor, who has neglected to prosecute a commission of bkpcy., shall not have another.—*Re* GIBSON & JOHNSON (1788), cited 18 Ves., p. 298; 2 Rose, 443; 34 E. R. 330.

1213. ——.]—Where a commission was not prosecuted upon an agreement for a composition, an application, on failure of debtor to pay instalments under the composition, to strike a docket for another commission, for the purpose of compelling the composition, was disapproved & not aided.—*Ex p.* MASTERMAN (1811), 18 Ves. 298; 2 Rose, 443; 34 E. R. 330.

See, now, 1914 Act, s. 5 (7) & 1915 Rules, r. 172.

1214. —— **Prosecution dropped on promise to give security — Condonation.**]—Prior to the hearing of a bkpcy. petition an arrangement was entered into between petitioning creditor & debtor, by which the petition was dismissed as for want of prosecution in consideration of debtor having promised to give security for the debt. Debtor having failed to give the agreed security, the creditor, by leave of the ct., presented a second petition based upon the same act of bkpcy.:—*Held:* petitioning creditor was entitled to present the second petition, there having been no condonation of the act of bkpcy.—*Re* JAGGER, *Ex p.* LOVE (1874), L. R. 17 Eq. 454; 43 L. J. Bcy. 37; 30 L. T. 71; 22 W. R. 366.

1215. —— **Notice of discontinuance given.**]—A petitioning creditor, who gives notice to discontinue his petition & fails to attend at a subsequent hearing of the petition at which it is dismissed with costs, is not a creditor who "neglects to appear on his petition" within 1883 Rules, r. 172, & he is free to present a fresh petition in respect of the same act of bkpcy. without first obtaining the leave of the ct.—*Re* GENTRY, [1910] 1 K. B. 825; 79 L. J. K. B. 585; 54 Sol. Jo. 252; 17 Mans. 104, D. C.; *revsd.* on another point, [1910] 1 K. B. 833, C. A.

Annotation:—**Mentd.** *Re* A Debtor, *Ex p.* Petitioning Creditor, [1917] 2 K. B. 60, C. A.

See, now, 1915 Rules, r. 172.

1216. Previous fiat obstructing payment of debt.]—A trader was summoned before a Comr. under 1842 Act, s. 11, & before the proper time had elapsed to constitute an act of bkpcy., within s. 13, a fiat was by mistake issued, which was afterwards annulled:—*Held:* the existence of that fiat was such an obstruction to the payment of petitioning creditor's debt that, if he sued out a new fiat founded on the omission to pay, etc., according to the terms of s. 14,, the ct. would annul such new fiat. *Qu.:* whether payment of the debt, after the issuing of the improperly issued fiat, would have constituted an act of bkpcy. under 6 Geo. 4, c. 16, s. 8.—*Re* MUSGROVE, *Ex p.* MUSGROVE, *Ex p.* RUSSELL (1843), 3 Mont. D. & De G. 386; 8 Jur. 87, Ct. of R.

Annotations:—**Refd.** *Re* Greener, *Ex p.* Greener (1880), 15 Ch. D. 457, C. A.; *Re* Sedgwick, *Ex p.* McMurdo (1888), 60 L. T. 9, C. A.

1217. —— **What must be proved.**]—After service of a debtor's summons, & before expiration of the time limited for payment of the debt, the summoning creditor presented a bkpcy. petition against debtor, founded on the same debt, but on an alleged prior act of bkpcy. The debt was not paid within the

s. *Renewal after lapse of time*—*Application not opposed.*]—The ct. will renew a commission of bkpcy. though issued forty years since, there being no objection made to the application.—*Re* KELLET, *Ex p.* COLE (1850), 3 Ir. Jur. 3.—IR.

time limited, & the creditor then presented a second petition founded on the alleged neglect of debtor to pay the debt according to the requirements of the summons:—*Held:* to resist adjudication on the second petition debtor must prove as a matter of fact that the pendency of the first petition had prevented him from paying the debt.—*Re* GREENER, *Ex p.* GREENER (1880), 15 Ch. D. 457; 43 L. T. 184, C. A.

Annotations:—**Consd.** *Re* Sedgwick, *Ex p.* Sedgwick (1888), 5 Morr. 262, C. A.; *Re* Dennis, *Ex p.* Dennis (1888), 60 L. T. 348, C. A.; *Re* Wilson, *Ex p.* Jones, [1916] H. B. R. 1.

1218. In respect of what debts—Debt held insufficient in previous petition—Registrar's decision not res judicata.]—Upon the hearing in a county ct. of a bkpcy. petition against a judgment debtor, founded on his non-compliance with a bkpcy. notice served upon him by the judgment creditor, the registrar inquired into the consideration of the debt for which judgment had been obtained, &, being of opinion that it did not constitute a good petitioning creditor's debt, refused to make a receiving order:—*Held:* the decision of the registrar did not operate as *res judicata* with respect to the sufficiency of petitioning creditor's debt, & did not prevent the creditor from serving another bkpcy. notice, & obtaining a receiving order in respect of the same judgment debt.—*Re* VITORIA, *Ex p.* VITORIA, [1894] 2 Q. B. 387; 63 L. J. Q. B. 795; 71 L. T. 48; 42 W. R. 529; 10 T. L. R. 491; 38 Sol. Jo. 532; 1 Mans. 236; 9 R. 536, C. A.

Annotations:—**Apprvd.** King *v.* Henderson, [1898] A. C. 720, P. C. **Refd.** *Re* Larard, *Ex p.* Yeomans & Heap (1896), 3 Mans. 317, C. A. **Mentd.** *Re* A Debtor, *Ex p.* Petitioning Creditor, [1917] 2 K. B. 60, C. A.

SECT. 2.—DEBTOR'S PETITION.

1219. For whose benefit—Whether for debtor's benefit alone.]—It was doubtful whether a trader could, under 1861 Act, petition for adjudication against himself for his own benefit alone.—*Re* DRINKWATER, *Ex p.* HEWITT (1862), 31 L. J. Bcy. 83; 6 L. T. 730; 8 Jur. N. S. 757, L. JJ.

Annotations:—**Consd.** *Re* Painter, *Ex p.* Painter, [1895] 1 Q. B. 85. **Mentd.** *Re* Button, *Ex p.* Hairside, [1907] 2 K. B. 180, C. A.

1220. Intention of evading committal orders—Whether abuse of process of court.]—A debtor, with the intention of evading committal orders made against him upon judgment summonses, presented his own bkpcy. petition, upon which a receiving order was made. He had previously at short intervals & with the same object presented two other bkpcy. petitions upon which receiving orders had been made, & was an undischarged bkpt. under three bkptcies.:—*Held:* the presentation of the petition by debtor in such circumstances was an abuse of the process of the ct., & the receiving order founded upon it must be rescinded.—*Re* BETTS, *Ex p.* OFFICIAL RECEIVER, [1901] 2 K. B. 39; 70 L. J. K. B. 511; 84 L. T. 427; 49 W. R. 447; 17 T. L. R. 383; 45 Sol. Jo. 381; 8 Mans. 227, D. C.

1221. —— ——.]—*Semble:* it was the intention of the Legislature, by 1883 Act, to enable a debtor, in a proper case to relieve himself from the pressure of a commital order by obtaining an adjudication in bkpcy. against himself.—*Re* HANCOCK, *Ex p.* HILLEARYS, [1904] 1 K. B. 585; 73 L. J. K. B. 245; 90 L. T. 389; 52 W. R. 547; 48 Sol. Jo. 260; 11 Mans. 1, C. A.

Annotation:—**Mentd.** Hamilton *v.* Caldwell (1919), 88 L. J. P. C. 173, H. L.

1222. Where only one creditor—Assets very small.]—A. became indebted to B. upon a judgment, in the sum of £59; he owed no other debts, except some of very trifling amount, & one to his own attorney, for defending him in the action brought by B. The only assets he had possessed he had sold, in order to raise money to defend the action:—*Held:* he might petition against himself in bkpcy.—*Re* ENSBY, *Ex p.* ENSBY (1866), 35 L. J. Bcy. 23; 14 L. T. 692; 12 Jur. N. S. 579; 14 W. R. 849, L. JJ.

Annotation:—**Consd.** *Re* Painter, *Ex p.* Painter (1894), 64 L. J. Q. B. 22.

1223. —— —— **Whether abuse of process of court.**]—Bkpt., who had an inalienable pension, had judgment recovered against him. On a judgment summons an order was made for payment by instalments. He then presented his petition, with the object of evading the judgment, & was adjudicated bkpt. The judgment creditor was practically the sole creditor, & the assets were very small:—*Held:* the presentation of the petition was not an abuse of the process of the ct., & did not entitle the ct. to annul the adjudication.—*Re* PAINTER, *Ex p.* PAINTER, [1895] 1 Q. B. 85; 64 L. J. Q. B. 22; 71 L. T. 581; 43 W. R. 144; 11 T. L. R. 9; 39 Sol. Jo. 168; 1 Mans. 499; 15 R. 16, D. C.

Annotations:—**Distd.** *Re* Betts, *Ex p.* Official Receiver, [1901] 2 K. B. 39, D. C. **Folld.** *Re* Archer, *Ex p.* Archer (1904), 20 T. L. R. 390; *Re* Hancock, *Ex p.* Hillearys, [1904] 1 K. B. 585, C. A. **Refd.** *Re* Button, *Ex p.* Hairside, [1907] 2 K. B. 180, C. A.

1224. —— —— ——.]—A judgment summons was issued against debtor, in respect of damages & costs obtained by the judgment creditor in an action for breach of promise of marriage. The judgment creditor was the only creditor, & debtor possessed some assets:—*Held:* the presentation of a bkpcy. petition against himself by debtor was not an abuse of the process of the ct.—*Re* ARCHER, *Ex p.* ARCHER (1904), 20 T. L. R. 390.

1225. ——————.]—A creditor obtained judgment against a debtor, whose sole income was derived from his salary or wages, payable weekly, & commission on sales. He had two children dependent upon him. On debtor failing to pay the creditor obtained, on a judgment summons, an order for payment by instalments. The instalments having fallen into arrear, the creditor obtained a committal order, under pressure of which debtor paid. The instalments having again fallen into arrear, the creditor obtained a second committal order, whereupon debtor, finding himself unable to comply with it, presented a bkpcy. petition, which was followed, upon his own application, by a receiving order & adjudication. The judgment creditor was his only creditor, & he had no assets beyond the personal earnings from his employment. The judgment creditor applied for annulment of the bkpcy. proceedings on the ground that they were an abuse of the process of the ct.:—*Held:* the proceedings were not, in the circumstances, an abuse of the process of the ct., & would not prejudice the judgment creditor, inasmuch as the personal earnings of the bkpt., beyond what was necessary for the maintenance of himself & his family, could be applied, in the proceedings, towards payment of the judgment debt.—*Re* HANCOCK, *Ex p.* HILLEARYS, [1904] 1 K. B. 585; 73 L. J. K. B. 245;

PART III. SECT. 2.

1222 i. *Where only one substantial creditor.*]—Bkpt. having got very far behind in his payments to his wife under a deed of separation, owing to ill health, the wife obtained judgment for arrears, amounting to £262 8*s.*, with costs. Bkpt. was adjudicated bkpt. on his own petition, his other debts amounting to £12:—*Held:* not an abuse of the process of he ct. —IRELAND *v.* IRELAND (1911), 30 N. Z. L. R. 1250.—**N.Z.**

Sect. 2.—*Debtor's petition: Sect.* 3: *Sub-sect.* 1, *A., B., C. & D.*]

90 L. T. 389; 52 W. R. 547; 48 Sol. Jo. 260; 11 Mans. 1, C. A.

Annotation:—**Mentd.** Hamilton *v.* Caldwell (1919), 88 L. J. P. C. 173, H. L.

1226. Second petition dismissed—First petition dismissed for fraud.]—Where a petition had been dismissed for fraud, & a second petition filed, the ct. dismissed the second petition & ordered that another petition was not to be filed without leave of the ct.—*Re* BACHELOR (1855), 25 L. T. O. S. 248.

1227. —— After sanction of composition.]—A debtor cannot present a second petition, when a composition has been sanctioned which is capable of being enforced against him.—*Re* SYDNEY, *Ex p.* SYDNEY (1875), 10 Ch. App. 208; 44 L. J. Bcy. 21; 31 L. T. 714; 23 W. R. 205 L. JJ.

Annotations:—**Apld.** *Re* Robinson, *Ex p.* Burrell (1876), 1 Ch. D. 537, C. A.; *Re* Andrews, *Ex p.* Barrow (1881), 18 Ch. D. 464, C. A.

Procedure on debtor's petition, *see* Sect. 3, *post.*

See, also, cases in Part IV., Sect. 2, Part VI., Sect. 3, *post.*

SECT. 3.—PROCEDURE ON PETITION.

SUB-SECT. 1.—FORM OF PETITION.

A. In whose Name.

1228. Petition by company—Whether in name of company—Or of official liquidator.]—A balance order was made against A. to pay to B., the official liquidator of a co., a sum for calls due from him to the co. B. brought an action as official liquidator on that order, & obtained judgment against A., & thereupon issued a bkpcy. notice in his own name as official liquidator of the co. A petition having been presented founded on that notice:—*Held:* the petition was irregular, as it was presented in the name of B., as official liquidator of the co., & not in the name of the co., & was rightly dismissed.—*Re* SHIRLEY, *Ex p.* MACKAY (1887), 58 L. T. 237.

Annotation:—**Mentd.** *Re* Boyd, *Ex p.* McDermott, [1895] 1 Q. B. 611, C. A.

1229. —— —— ——.]—The liquidator of a limited co. cannot present a bkpcy. petition on behalf of the co. in his own name, but must present it in the name of the co.—*Re* BASSETT, *Ex p.* LEWIS (1895), 43 W. R. 427; 39 Sol. Jo. 399; 2 Mans. 177; 15 R. 357.

1230. —— —— Or of secretary—Stannaries Act, 1869 (c. 19) s. 13.]—*Held:* the above sect. did not empower a cost book mining co. to institute bkpcy. proceedings, in the name of the secretary, in respect of a judgment recovered in an action by the secretary against a shareholder for the amount of unpaid calls.—*Re* NANCE, *Ex p.* ASHMEAD, [1893] 1 Q. B. 590; 62 L. J. Q. B. 500; 68 L. T. 733; 41 W. R. 370; 9 T. L. R. 307; 37 Sol. Jo. 306; 4 R. 311, C. A.

See, also, Nos. 993 *et seq.*, 1149, 1150, *ante*, 1252, 1253, *post.*

1231. Petition by firm—After dissolution—In name of dissolved firm.]—A bkpcy. petition was presented in the following form:—"*Re* J. H.: *Ex p.* W. & H. A. We W. & H. A., formerly of, etc.: W. H. A., one of the members of the late firm of W. & H. A., now residing at, etc., & H. S. A., the other member of the firm, now residing at etc. Hereby petition the ct. that a receiving order may be made in respect of the estate of J. H. Signed W. & H. A., by H. S. A., late partner in the firm. Signed by petitioner H. S. A." The petition was founded upon non-compliance with the requirements of a bkpcy. notice in respect of a debt due upon a judgment against debtor, obtained by the firm of W. & H. A., which firm had been dissolved before the date of the petition. Debtor objected to the petition on the ground that it was bad in form, because it purported to be presented on behalf of a firm, & a petition could not be presented in the name of a dissolved firm:—*Held:* the petition was good in form, inasmuch as it purported, on the face of it, to be presented by two persons in respect of a joint debt.—*Re* HOBBS, *Ex p.* HOBBS (1892), 66 L. T. 144; 8 T. L. R. 279, C. A.

B. Name and Description of Debtor.

1232. Creditor's petition—Debtor must be described at length—& occupation given.]—In a petition for adjudication the party against whom the adjudication is sought must be described at length as of etc., adding his occupation.—*Re* A PETITION FOR ADJUDICATION, *Ex p.* BENNOCK (1869), 21 L. T. 625.

1233. —— Judgment against debtor in trade name—Petition in real & assumed names.]—Judgment having been obtained against debtor, in an assumed name, under which he had traded, a bkpcy. notice was issued against him under his assumed name:—*Held:* a petition could be presented in both his real & assumed names.—*Re* MYLES, *Ex. p.* MYLES (1891), 7 T. L. R. 633; 8 Morr. 255.

1234. —— Judgment against dissolved firm in firm name—Petition against one partner alone.]—Judgment was recovered against a late partnership firm of "W. Bros.," in an action brought against it after its dissolution, for a debt incurred during the partnership. The writ had been served on each of the late partners, J. W. & T. W. A bkpcy. notice in the usual form, & following the judgment, was then addressed to "W. Bros." & served personally on each of the late partners. The notice not having been complied with, the judgment creditor presented a petition against J. W. alone:—*Held:* the bkpcy. notice was sufficient to support a receiving order against J. W. alone.—*Re* WENHAM, *Ex p.* BATTAMS, [1900] 2 Q. B. 698; 69 L. J. Q. B. 803; 83 L. T. 94; 48 W. R. 627; 44 Sol. Jo. 609; 7 Mans. 309, C. A.

1235. Effect of giving wrong Christian names.]—The ct. refused, on the petition of bkpt., to annul the fiat, on the ground that he was described in it as "John G.", instead of "John Christian G." his right name, when he had been examined before the comr., & never mentioned that he was wrongly named in the fiat.—*Re* GILLIGAN, *Ex p.* GILLIGAN (1840), 1 Mont. D. & De G. 144; 4 Jur. 584.

See, now, 1914 Act, s. 147, & 1915 Rules, r. 146.

1236. Debtor's petition—Name—Trade name must be given.]—A trader having held himself out to the world as trading under the name or style of

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PART III. SECT. 3, SUB-SECT. 1.—B.

1232 i. *Creditor's petition—Insolvency of debtor.*]—Where it is sought to sequestrate an estate under Act 38 of 1884, the petition & summons, following the language of the Act, should clearly allege that deft. is insolvent & that it would be for the benefit of creditors that such estate should be sequestrated.—SEDGWICK & Co., LTD. *v.* NATHAN (1914), C. P. D. 292.—S. AF.

t. —— *Against surviving partner.*]—A commission of bkpcy. against a surviving partner need not describe him expressly as surviving partner, though petitioning creditor's & other debts be debts of the firm.—*Re* M'INTYRE, *Ex p.* MACKEY (1848), 12 I. Eq. R. 318.—IR.

u. —— *Partnership firm—Names of partners.*]—Applications for the sequestration of a partnership firm should set out the names of the partners inasmuch as a partnership is not a *persona* in terms of the Insolvency Law.—MOSENTHAL BROTHERS, LTD. *v.* MAHOMED EBRAHIM & CO. (1915), T. P. D. 621.—S. AF.

a firm, " G. & Co.," must so describe himself in his petition for adjudication against himself, although it does not appear that any debts were contracted by him under such trading.—*Re* GASHION, *Ex p.* GASHION (1863), 8 L. T. 522 ; 11 W. R. 810.

1237. —— Occupation—Must be stated eo nomine.] —A cowkeeper describing himself in his petition as a milkman will have his petition dismissed, a cowkeeper being made a trader *eo nomine* by 1842 Act. —*Re* BYGRAVE (1849), 14 L. T. O. S. 381.

See, now, 1914 Act, ss. 14, 109.

1238. —— —— Dealer in spruce — Described as commercial traveller.] — If bkpt. wilfully describe himself in his petition for adjudication incorrectly, so that his creditors are misled thereby, as, when being a dealer in spruce, etc., he described himself as a commercial traveller, his petition will be dismissed.—*Re* LAW (1861), 5 L. T. 464.

1239. —— —— Effect of omitting to give.]—It is no objection to a petition for adjudication that bkpt. has not described himself as of any occupation, the fact being that when the opposing creditor's debt was incurred he was in business as a merchant. —*Re* HESKETH (1861), 5 L. T. 465.

1240. —— —— ——.]—*Re* BOATE, *Ex p.* CABBAN, No. 1242, *post.*

1241. —— Residence—Effect of omitting to give.] —*Held :* the omission from debtor's petition of a residence during the six months preceding the date of the petition was fatal.—*Re* BARBER (1856), 28 L. T. O. S. 147.

1242. —— —— ——.]—If a bkpt. omit, in his petition for adjudication, his occupation & place of residence, where several of his debts were contracted, the ct. will dismiss the petition as calculated to mislead creditors.—*Re* BOATE, *Ex p.* CABBAN (1862), 6 L. T. 372.

1243. —— —— —— Business address given.]—A debtor described himself in his liquidation petition by his business address only, omitting all mention of his private residence :—*Held :* this was a misdescription, & the defect was not a mere formal one, but was a matter of substance.—*Re* JERNINGHAM, *Ex p.* JERNINGHAM (1878), 9 Ch. D. 466 ; 47 L. J. Bcy. 115 ; 39 L. T. 186 ; 27 W. R. 157, C. A.

Annotations :—**Distd.** *Re* Mason, *Ex p.* Kirkwood (1879), 11 Ch. D. 724, C. A. **Mentd.** Burliner *v.* Royle (1880), 5 C. P. D. 354.

1244. —— —— Different place from that given in bill of sale.]—A bkpt. in a petition for adjudication described himself as of a different place from that of which he was described in a bill of sale executed by him shortly before his bkpcy. :—*Held :* the petition must be dismissed.—*Re* SANDERS (1863), 3 New Rep. 196.

1245. —— Place of business—Effect of omitting to give—Private residence given.]—Where a bkpt. omits his place of business from his petition, notwithstanding that he inserts his private residence, his petition will be dismissed.—*Re* BAKER (1862), 6 L. T. 837.

1246. —— —— Effect of omitting to give all places of business.]—Where a bkpt. has not described himself in his petition as of all his residences & places of business where his debts were contracted, his petition will be dismissed, as the main object of the description is that all creditors should know who it is that petitions the ct.—*Re* SAVORY (1862), 7 L. T. 475.

C. Description of Act of Bankruptcy.

1247. Date of act of bankruptcy.]—Where the act of bkpcy. relied on by a petitioning creditor is failure to comply with a bkpcy. notice, the petition must state the date of the act of bkpcy.

A bkpcy. petition stated that debtor had failed to comply with a bkpcy. notice served on him on a day named :—*Held :* this statement was insufficient, & the petition ought to state that debtor had failed before a day, eight days later than the day on which the bkpcy. notice was stated to have been served, to comply with such notice.—*Re* DUNHILL, *Ex p.* DUNHILL, [1894] 2 Q. B. 234 ; 63 L. J. Q. B. 686 ; *sub nom. Re* DUNHILL, *Ex p.* WILSON, 1 Mans. 242 ; 10 R. 349, D. C.

1248. That debtor left dwelling-house — With intent to defeat or delay creditors—" Being a trader " omitted.] — A bkpcy. petition was presented against P., in which it was alleged that " he carried on business as a licensed victualler," & " that the act of bkpcy. committed by him was that he has with intent to defeat or delay his creditors departed from his dwelling-house & place of business, or otherwise absented himself." P. was adjudicated bkpt., & appealed from the adjudication on the grounds that the words " being a trader " were omitted from the description of the act of bkpcy. in the petition :—*Held :* the allegations in the petition that debtor was a licensed victualler, & that he had departed from his dwelling-house with intent to defeat or delay his creditors, were sufficient to describe the act of bkpcy.—*Re* PALMER, *Ex p.* PALMER (1881), 45 L. T. 93, C. A.

D. Description of Debt.

1249. Debt on dishonoured bill — Need not be strictly stated.]—Where a debtor's summons is sued out upon a dishonoured bill of exchange it is not necessary to state or to prove the debt with the same strictness as in an action at law ; it is sufficient to state it so that debtor shall not be misled.—*Re* LOWENTHAL, *Ex p.* LOWENTHAL (1874), 9 Ch. App. 324 ; 43 L. J. Bcy. 132 ; 30 L. T. 282 ; 22 W. R. 459, L. C. & L. J.

Annotations :—**Mentd.** *Re* Latham, *Ex p.* Latham (1876), 4 Ch. D. 105 ; Blaiberg *v.* Parke (1882), 10 Q. B. D. 90.

1250. Consideration need not be stated.]—A bkpcy. petition must show clearly the case which debtor is called upon to answer, but it need not state the consideration for the debt on which the petition is founded.—*Re* BARNETT, *Ex p.* BARNETT (1874), 31 L. T. 664.

See, now, 1915 Rules, form 11.

See, further, cases in Part IV., sect. 5, *post.*

PART III. SECT. 3, SUB-SECT. 1.—C.

1248 i. *That debtor left place of business —" With intent to defeat or delay creditors " omitted—Inserted in affidavit in support.*]—A petition alleged that debtors " departed from their place of business & were secreting themselves so as to deprive their creditors of the means of communicating with them." The affidavit in support alleged debtors were " secreting themselves for the purpose of evading their creditors " :—*Held :* a sufficient statement of intent to defeat or delay creditors. If the act of insolvency is not expressed with sufficient certainty the ct. may look at the affidavit & after reading the petition with the affidavit find that the act of insolvency is charged with sufficient certainty.—GUNNIS & Co. *v.* MAHOMED AYYUB SAHIB (1913), I. L. R. 37 Mad. 555.—**IND.**

w. *That warrant of distress issued —" Against debtor "—Instead of against his property.*]—It is not a defect sufficient to invalidate a creditor's petition that it alleges that a warrant of distress was issued against debtor instead of against the property of debtor.—*Re* SOMERVILLE (1909), 28 N. Z. L. R. 1055.—**N.Z.**

PART III. SECT. 3, SUB-SECT. 1.—D.

y. *Statement that debt not secured—Sufficiency of statement.*]—In a petition for the sequestration of a debtor's estate, it is not sufficient for petitioner to allege that he does not hold any security on deft.'s estate for the payment of the debt ; he must state that neither he nor any person on his behalf holds any security whatever for the payment of his claim or any part thereof.—BONELLA *v.* COOKE (1916), 36 N. L. R. 226.—**S. AF.**

Sect. 3.—*Procedure on petition: Sub-sect.* 1, *E. & F.; sub-sect.* 2.]

E. Signature.

1251. In general — Agent holding power of attorney.]—A bkpcy. petition may be signed on behalf of petitioning creditor by a person holding a power of attorney from him, if the terms of the power are wide enough.—*Re* WALLACE, *Ex p.* WALLACE (1884), 14 Q. B. D. 22; 54 L. J. Q. B. 293; 51 L. T. 551; 33 W. R. 66; 1 T. L. R. 17; 1 Morr. 246, C. A.

Annotation:—**Consd.** *Re* Debtor (No. 28 of 1917), [1917] 2 K. B. 808, D. C.

1252. On behalf of company—Sealed with corporate seal—Signed by two directors & secretary.]—Where a limited co. presents a petition for adjudication under 1861 Act, s. 87, it is the practice for the petition to be sealed with the corporate seal & signed by two directors & the secretary.—*Re* CALTHROP (1868), 3 Ch. App. 252; 37 L. J. Bcy. 17; 18 L. T. 166; 16 W. R. 446, L. J.

Annotations:—**Mentd.** *Re* Bristow, *Ex p.* Emanuel (1868), 18 L. T. 222, L. J.; *Re* Turner, *Ex p.* Attwater (1877), 5 Ch. D. 27, C. A.; *Re* Bowes, *Ex p.* Jackson (1880), 14 Ch. D. 725, C. A.

1253. —— "Officer"—Clerk duly authorised by seal.]—Any person in the employment of a co. incorporated under Cos. Acts *bonâ fide* chosen by the co. & duly appointed under seal to take proceedings in bkpcy. on behalf of the co., becomes thereby an "officer" of the co. within 1883 Act, s. 148, to take such proceedings, although he was not before his appointment in any ordinary sense an officer of the co.; & a petition in bkpcy. presented by a limited co. & signed for the co. by a clerk of the co. duly authorised under the seal of the co.. is a good petition.—*Re* TOMKINS & Co., [1901] 1 K. B. 476; 70 L. J. Q. B. 223; 84 L. T. 341; 49 W. R. 294; 17 T. L. R. 198; 45 Sol. Jo. 218; 8 Mans. 232, C. A.

Annotation:—**Consd.** *Re* A Debtor (No. 28 of 1917), [1917] 2 K. B. 808, D. C.

See, also, Nos. 993 *et seq.*, 1149, 1150, 1228–1230, *ante*, No. 1286, *post.*

1254. On behalf of partnership—One partner—Bond.]—Where partners are petitioning creditors, signature of the bond by one is sufficient.—*Ex p.* HODGKINSON (1815), Coop. G. 99; 19 Ves. 291; 35 E. R. 492.

Annotations:—**Mentd.** *Re* Mogg, *Ex p.* Mogg (1828), 6 L. J. O. S. Ch. 162; Butler *v.* Hobson (1838), 5 Bing. N. C. 128; *Re* English & Irish Church & University Assce. Soc. (1863), 11 W. R. 681.

1255. On behalf of joint creditors—One on behalf of himself & other.]—A petition is good in form where it purports on the face of it to be presented by two persons in respect of a joint debt & to be signed by one of those persons on behalf of himself & the other.—*Re* HOBBS, *Ex p.* HOBBS (1892), 66 L. T. 144; 8 T. L. R. 279, C. A.

1256. On behalf of building society—Secretary duly authorised—Affidavit of authority unnecessary.]—A petition by an incorporated building society may be signed by the secretary if duly authorised, & does not need an affidavit in support of his authorisation.—*Re* TOVEY (1910), 26 T. L. R. 456, D. C.

See, now, 1914 Act, s. 149.

F. Attestation.

1257. Signed by marksman — No statement in attestation that petition read to him—Cured by statement in affidavit.]—The ct. will hear the petition of a marksman, although the attestation of it is defective in not stating that the petition has been read to him, if petitioner's affidavit, being an echo of the petition, is expressed, in the *jurat*, to have been read to him.—*Re* BROWN, *Ex p.* WASHBROOK (1842), 2 Mont. D. & De G. 490; 6 Jur. 156, Ct. of R.

1258. Signature of one petitioning creditor not attested—Cured by resigning & attesting—After three months from act of bankruptcy—Amendment.]—A bkpcy. petition was presented by two creditors, the signature of one of petitioners not being attested as required by 1890 Rules, r. 146:—*Held:* this was a formal defect within 1883 Act, s. 143, & could be amended under r. 350 by allowing the creditor to resign the petition & to have his signature properly attested, though three months had elapsed since the act of bkpcy. upon which the petition was founded.—*Re* A DEBTOR (No. 3 of 1902), *Ex p.* PETITIONING CREDITORS *v.* THE DEBTOR (1902), 86 L. T. 688; *sub nom. Re* DEAN, *Ex p.* BLAIN & BREFFIT, 18 T. L. R. 606, D. C.

See, further, Sub-sect. 12, *post.*

SUB-SECT. 2.—SERVICE AND FILING.

1259. By whom served—Person not in permanent employment of petitioning creditor.]—The person who attempts to effect personal service need not be in the permanent employment of petitioning creditor or his solr.—*Re* BLACKMAN, *Ex p.* BRANFILL (1892), 40 W. R. 670: 36 Sol. Jo. 525; 9 Morr. 157, D. C.

1260. On whom served—On receiver & manager of dissolving firm.]—A notice, for which personal service is necessary, cannot be served upon a receiver & manager of a partnership business, appointed by the ct. in an action for dissolution of the partnership.—*Re* FLOWERS & Co., [1897] 1 Q. B. 14; 65 L. J. Q. B. 679; 75 L. T. 306; 45 W. R. 118; 13 T. L. R. 9; 41 Sol. Jo. 30; 3 Mans. 294, C. A.

See, now, 1915 Rules, rr. 279, 280.

PART III. SECT. 3, SUB-SECT. 1.—E.

1251 i. *In general—Attorney of bankrupt.*]—A petition for an adjudication in bkpcy. may be signed by an attorney of bkpt.—*Re* MCQUADE, *Ex p.* TURNER, 2 J. R. 164.—**N.Z.**

1252 i. *On behalf of company—Sealed with corporate seal—Signed by two directors & secretary.*]—A limited co. can maintain a petition for adjudication under 1857 Act, s. 116. It will be sufficient for the petition to be sealed with the corporate seal, & signed by two directors & the secretary.—NORTHERN BANKING CO. *v.* PORTER (1873), 7 I. L. T. 18.—**IR.**

a. *On behalf of Commissioners of Taxation—One Commissioner on behalf of all.*]—A bkpcy. petition by the Comrs. of Taxation may be signed by one comr. on behalf of all of them.—*Re* CARTER SMITH, *Ex p.* TAXATION COMRS. (1908), 8 S. R. N. S. W. 246.—**AUS.**

1254 i. *On behalf of partnership—One partner.*]—Where petitioning creditor is a partnership firm, it is sufficient for one partner to sign the petition in the name of the firm. It is unnecessary that the order *nisi* should disclose on its face the names of the individual partners.—*Re* VAGG (1886–7), 13 V. L. R. 172.—**AUS.**

PART III. SECT. 3, SUB-SECT. 1.—F.

b. *Signature not attested properly—Cured by evidence.*]—The omission of the word "Justice" or of the words "Justices of the Peace" from the attestation to the signature to a bkpcy. petition is a mere irregularity, & can be cured by evidence that the attesting witness was in fact a qualified person.—*Re* PAWSON (1910), 29 N. Z. L. R. 920.—**N.Z.**

PART III. SECT. 3, SUB-SECT. 2.

c. *Duty to serve notices.*]—When a person himself files a petition in insolvency, he has the carriage of it, & he must serve notices on the creditors at his own expense, & bring the petition to a hearing.—DOSSA GOPAL *v.* BHANJI DAMJI (1901), I. L. R. 26 Bom. 171.—**IND.**

1260 i. *On whom served—On Attorney-General—Through Crown Solicitor.*]—The service of a petition by a bkpt. on the A.-G. at his house is irregular; the proper service on the A.-G. is through the Crown Solr.—*Re* MULLAY, *Ex p.* MULLAY (1829), 3 Mol. 71.—**IR.**

1260 ii. —— *Agent with general power of attorney.*]—A petition was filed by a creditor for an order to adjudicate his debtor an insolvent & a notice of such petition was served on his agent with a general power of attorney from debtor who was residing outside the jurisdiction of the ct.:—*Held:* the service of notice on the agent was in law sufficient though no notice was sent by the ct. to debtor through registered post.—KALIANJI *v.* BANK OF MADRAS (1916), I. L. R. 39 Mad. 693.—**IND.**

1261. —— On partner of debtor.]—A petition in bkpcy. against a person trading in partnership with another under his own name, as that of the firm, cannot support a receiving order against the other partner, on the ground that service on the first partner is service on the firm. The official receiver has no authority to convert the petition against the individual into one against the firm.—*Re* A DEBTOR (No. 3 of 1912), *Ex p.* THE DEBTOR (1912), 1 L. J. C. C. 29, D. C.

1262. —— On manager of debtor's business.]—A petition against a debtor, who, to the knowledge of the creditor, carries on business alone under a partnership or trade name, must be served personally upon debtor, & it is not sufficient to serve it upon a person having at the time of service the control or management of the business.—*Re* THE DEBTORS (No. 21 of 1912), *Ex p.* THE PETITIONING CREDITORS (1912), 107 L. T. 624; *sub nom. Re* PATRICK, *Ex p.* HALL & Co., 57 Sol. Jo. 9, D. C.

1263. Substituted service—Jurisdiction to order—Debtor leaving district to avoid service.]—A debtor, by leaving the district for the purpose of avoiding service does not deprive the county ct. of jurisdiction to order substituted service.—*Re* WILLIAMS (1873), 8 Ch. App. 690; 42 L. J. Bcy. 28; 28 L. T. 488; 21 W. R. 451, L. J.

Annotations:—**Refd.** *Re* Bowie, *Ex p.* Breull (1880), 16 Ch. D. 484, C. A. **Mentd.** *Re* Holdsworth, *Ex p.* North Kent Bank (1878), 9 Ch. D. 333, C. A.

1264. —— —— ——.]—An order for substituted service of a bkpcy. notice or petition may be made, notwithstanding that debtor is out of the jurisdiction, if the ct. is satisfied by the evidence that he went out of the jurisdiction in order to avoid service.—*Re* URQUHART, *Ex p.* URQUHART (1890), 24 Q. B. D. 723; 59 L. J. Q. B. 364; 38 W. R. 612; 7 Morr. 94, C. A.

Annotation:—**Consd.** Porter *v.* Freudenberg, Kreglinger *v.* Samuel & Rosenfeld, *Re* Merten's Patents, [1915] 1 K. B. 857, C. A.

1265. —— —— Departure in embarrassed circumstances—Debtor pretending to have committed suicide.]—Debtor departed from his dwelling-house, & on the same day a hat bearing his name was discovered in the neighbouring canal, & a letter was also received from debtor by his manager intimating that before such letter arrived he would be out of his trouble, but it appeared that debtor was at the time in very embarrassed circumstances, & that, on the day before, he had collected about £25 from persons who owed him money, which sum he took with him, & that he also took his best clothes, clean linen, & such jewellery as he possessed. The canal was thoroughly dragged by the police, but nothing was found:—*Held:* in the circumstances, the ct. was not bound to presume that debtor was dead, & substituted service of a bkpcy. petition presented against debtor, alleging the departure of debtor as the act of bkpcy., would be allowed by advertisement in local & London newspapers.—*Re* LEWIS, *Ex p.* BECKER (1893), 9 T. L. R. 406; 10 Morr. 141, D. C.

1266. —— —— Debtor absconding.]—Where a debtor has absconded from his usual place of residence, & cannot be found, & it is impossible to effect personal service, the county ct. of the district, in which his usual place of residence was, has jurisdiction to order substituted service.—*Re* HOLDSWORTH, *Ex p.* NORTH KENT BANK (1878), 9 Ch. D. 333; 39 L. T. 379; 27 W. R. 158, C. A.

1267. —— By registered letter—Court satisfied that debtor avoiding service.]—If the ct. is satisfied by affidavit that debtor is keeping out of the way in order to avoid service, an order may be made directing service of the petition by registered letter.—*Re* BLACKMAN, *Ex p.* BRANFILL (1892), 40 W. R. 670; 36 Sol. Jo. 525; 9 Morr. 157, D. C.

1268. —— Addressed to debtor at father's house in London—Debtor stationed in Ireland.]—Substituted service of a bkpcy. petition on an officer quartered in Ireland by sending it by registered post to him at his father's address in London:—*Held:* good service of the petition, the ct. being satisfied on the evidence that letters so addressed were duly forwarded to & reached debtor promptly.—*Re* NELSON, *Ex p.* DARE & DOLPHIN, [1918] 1 K. B. 459; 87 L. J. K. B. 628; 118 L. T. 549; [1918-19] B. & C. R. 1; *sub nom. Re* DEBTOR (No. 333 OF 1917), *Ex p.* DEBTOR, 34 T. L. R. 277; 62 Sol. Jo. 348, C. A.

1269. —— By advertisement—In what papers.]—On proof that a debtor is avoiding personal service of a petition, substituted service may be effected by publication of a notice in the *London Gazette* & the *Times*.—*Re* COLLINSON, *Ex p.* COLLINSON (1887), 4 Morr. 161, C. A.

1270. —— —— ——.]—Circumstances (*see* No. 1265, *ante*) in which substituted service allowed by publication of notice in one local paper, & also in the *Times*, the *Daily Chronicle*, & *Lloyd's News*.—*Re* LEWIS, *Ex p.* BECKER (1893), 9 T. L. R. 406; 10 Morr. 141, D. C.

1271. —— Validity of order may be questioned.]—The question as to the validity of an order for substituted service & of the service under it, is open on a petition for adjudication in bkpcy.—*Re* STUDER, *Ex p.* CHATTERIS (1875), 10 Ch. App. 227; 44 L. J. Bcy. 90; 32 L. T. 290; 23 W. R. 760, L. JJ.

1272. —— Grounds for setting aside.]—An

1260 iii. —— *On person of same name as creditor—Creditor insufficiently described.*]—When a creditor is described merely as residing in London, service of the order for hearing on a person of that name in London will not be deemed good service, unless inquiry has been made at the residence of that creditor at the date of contracting the debt, to ascertain whither he has gone.—*Re* TRAIN (1868), 2 I. L. T. Jo. 197.—**IR.**

1260 iv. —— *On agent—Creditors residing out of jurisdiction.*]—When creditors reside out of the United Kingdom, it is necessary to ascertain if they have any agent upon whom service may be effected. When debts are all returned as admitted, it is all the more necessary that service of the order of hearing should be perfect.—*Re* TRAIN (1868), 2 I. L. T. Jo. 197.—**IR.**

d. *Service of summons—Time for—Bankruptcy Act*, 1908, *ss.* 36, 37.]—The above sects. do not require the filing of a creditor's petition & the issue of the summons to debtor to be contemporaneous. It is sufficient if the creditor after filing his petition proceeds with reasonable diligence to have it verified by affidavit & thereafter to have the summons issued & served.—*Re* OLSEN, [1919] N. Z. L. R. 73.—**N.Z.**

1263 i. *Substituted service—Form of order.*]—A judge of the Insolvency Ct. made an order for substituted service at the last known place of abode in Victoria of a foreigner who had remained in the colony only a few days, & in the order declared what was his last known place of abode:—*Held:* the declaration of the last known place of abode was mere surplusage, & the rest of the order was good.—*Re* OPPENHEIMER (1872), 3 V. R. 20.—**AUS.**

1263 ii. —— *Person out of jurisdiction.*]—Personal service of an order *nisi* for the sequestration of an estate, may be made upon resp. out of the jurisdiction. The provision made by the latter part of "Insolvency Stat., 1871, s. 44" for effecting substituted service on resp. who has left Victoria, is merely ancillary to the general rule requiring personal service upon resp.—*Re* THONEMAN (1887), 13 V. L. R. 162, 201.—**AUS.**

1263 iii. —— *Power to rescind order for.*]—A judge in insolvency has power to rescind an order made by him for substitutional service of a writ of attachment; & the ct., on appeal, refused to interfere with an order for such rescission.—EATON *v.* SHANNON (1867), 17 C. P. 592.—**CAN.**

Sect. 3.—Procedure on petition: Sub-sects. 2, 3 & 4.]

order for substituted service of a bkpcy. petition will not be set aside, when debtor is out of the jurisdiction, although debtor may not be keeping out of the way to avoid service, if " for any other cause prompt personal service cannot be effected," Bkpcy. Rules, 1915, rr. 156 & 158.—*Re* NELSON, *Ex p.* DARE & DOLPHIN, [1918] 1 K. B. 459; 87 L. J. K. B. 628; 118 L. T. 549; [1918-19] B. & C. R. 1; *sub nom. Re* DEBTOR (NO. 333 OF 1917), *Ex p.* DEBTOR, 34 T. L. R. 277; 62 Sol. Jo. 348, C. A.

1273. —— Not readily set aside.]—Where debtor leaves the district to avoid service an order for substituted service will not be set aside, even if the evidence on which it was obtained was not satisfactory.—*Re* WILLIAMS (1873), 8 Ch. App. 690; 42 L. J. Bcy. 28; 28 L. T. 488; 21 W. R. 451, L. J.

Annotations:—**Mentd.** *Re* Holdsworth, *Ex p.* North Kent Bank (1878), 9 Ch. D. 333, C. A.; *Re* Bowie, *Ex p.* Breull (1880), 16 Ch. D. 484, C. A.

1274. Affidavit of service—Should be filed before petition sealed.]—A registrar ought to refuse to seal the copies of the petition till the affidavit of service of debtor's summons has been filed; yet the rules being merely directory, an adjudication is not invalidated by his omission to do so.—*Re* HUNT, *Ex p.* HUNT (1872), 8 Ch. App. 234; 28 L. T. 3; 21 W. R. 164, L. JJ.

Annotation:—**Mentd.** *Re* Lancaster, *Ex p.* Lancaster (1876), 3 Ch. D. 498, C. A.

See 1915 Rules, r. 157.

1275. Filing—Time for.]—A petition is good, although it may have been filed after office hours. —*Re* WILLIAMS, *Ex p.* JONES (1880), 42 L. T. 157.

SUB-SECT. 3.—AFFIDAVIT IN SUPPORT.

1276. Necessity for affidavit of verification.]—*Semble:* every petition for adjudication of bkpcy. must be accompanied with an affidavit verifying the allegations therein, or it will not be received.—ANON. (1861), 5 L. T. 527.

See, now, 1914 Act, s. 5 (1), & 1915 Rules, rr. 151, 152.

1277. Who may make affidavit — Petitioning creditor — Personal knowledge unnecessary.]—It is no objection to the validity of a petition that the affidavit filed with the petition is not made by a person who can depose to the facts as within his own knowledge, but it is sufficient if it be made by petitioning creditor, & the petition be proceeded with under General Rules, 1870, r. 32.—*Re* A PETITION FOR ADJUDICATION, *Ex p.* BENNOCK (1869), 21 L. T. 625.

See, now, 1915 Rules, forms 11 & 12.

1278. Before whom sworn—Solicitor of petitioning creditor.]—*Held:* it was not a valid ground of objection to the docket papers, that the affidavit of debt, on striking the docket, had been sworn before the solr. to the creditor petitioning for the commission.—*Re* ELFORD & CO. (1825), 2 Gl. & J. 65.

1279. —— ——.]—The fact of the affidavits in support of petitioning creditor's debt having been sworn before the solr. to the fiat, is not necessarily a fatal objection to the fiat, but one on which the ct. will act on its own discretion.—*Re* WRIGHT, *Ex p.* WRIGHT (1843), 3 Mont. D. & De G. 320; 7 Jur. 522, Ct. of R.

See, now, 1915 Rules, rr. 58, 385.

1280. At what time sworn—Before petition filed.]—An affidavit sworn before the petition is filed cannot be read, but the petition will stand over to have it re-sworn.—*Re* PERCIVAL, *Ex p.* TAYLOR (1834), 2 Mont. & A. 36; 4 L. J. Bcy. 4, Ct. of R.

1281. What affidavit may contain—Only facts true to knowledge of petitioning creditor.]—The affidavit in 1886-1890 Rules, Appendix, Form 12, verifying the truth of the statements in a bkpcy. petition must be confined to the facts which are true to the

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1275 i. *Filing—Notice of—To official assignee.*]—It is immaterial, so far as debtor is concerned, whether notice of the filing of the petition has been given by the registrar to the official assignee. —*Re* SLATER, *Ex p.* AUCKLAND CORPN. (1890), 8 N. Z. L. R. 641.—**N.Z.**

PART III. SECT. 3, SUB-SECT. 3.

1276 i. *Necessity for affidavit of verification.*]—It is not necessary that a petition for adjudication of insolvency under Insolvency Act, 1874, s. 43, should be supported by affidavit.—R. *v.* KING (1876), Q. L. R. (Beor) 73.—**AUS.**

e. *Affidavit unsigned — Waiver of defect.*]—The want of a signature to the *jurat* of the affidavit of the applying creditor upon which a warrant of attachment is issued under 26 Geo. 3, c. 13, is a fatal defect in the proceedings, & is not waived by an application for a *supersedeas* by debtor.—*Ex p.* NASON (1833), N. B. Dig. 2 (14).—**CAN.**

f. *How intituled.*]—In intituling affidavits for an attachment under 1864 Act form F. should be followed.—SHARP *v.* MATTHEWS (1869), 5 P. R. R. 10.—**CAN.**

g. ——.]—A debtor was described as a merchant in the heading of affdt. on which an attachment in insolvency issued, but no other description was given:—*Held:* no allegation of fact was made, the heading being only a descriptive one.—*Re* CREEN (1879), 15 U. C. L. J. N. S. 35.—**CAN**

1277 i. *Who may make affidavit—Attorney of bankrupt.*]—The affidavit verifying a petition for adjudication in bkpcy. may be made by an attorney of bkpt.—*Re* MCQUADE, *Ex p.* TURNER, 2 J. R. 164.—**N.Z.**

1277 ii. —— *Solicitor of petitioning creditor.*]—Where the affidavit of verification was made by a solr. in the employ of the firm of solrs. acting for petitioning creditor, & amongst other facts he swore that he was informed by petitioning creditor, a co., that it had no security for the debt:—*Held:* inasmuch as the verifying affidavit was not conclusive proof of the matters alleged in it, & the statements contained in the petition, unless the judge dispensed with the attendance of witnesses, would have to be proved by oral evidence, the solr. had sufficient knowledge of the facts to enable him to make the affidavit.—*Re* SOMERVILLE (1909), 28 N. Z. L. R. 1055.—**N.Z.**

1277 iii. —— *Committee of lunatic.*]—When petitioning creditor is a lunatic so found by inquisition, the affidavit verifying the petition may be sworn by his committee.—*Re* BRADY (1887), 19 L. R. Ir. 71.—**IR.**

1277 iv. —— *Manager of limited company.*]—Where a limited co. has duly presented a petition for adjudication under 1857 Act, s. 116, a manager of the co., duly authorised, can make the necessary oath.—NORTHERN BANKING CO. *v.* PORTER (1873), 7 I. L. T. 18.—**IR.**

1277 v. —— *Corporation—Affidavit & bond made & given by different officers.*]—Where petitioning creditor was a corpn. aggregate the affidavit was made by one officer of the corpn., & the bond given by another officer:—*Held:* the commission, although not strictly regular, should, in the discretion of the ct., be declared valid.—*Re* SNEYDS, *Ex p.* BANK OF IRELAND (1829), 1 Mol. 261.—**IR.**

1277 vi. —— *Party testifying to act of bankruptcy.*]—1864 Act, s. 3 (7), is complied with, although the creditor or his agent who swears to the debt is also one of the two persons testifying to the facts & circumstances relied on as constituting insolvency.—SHARP *v.* MATTHEWS (1869), 5 P. R. R. 10.—**CAN.**

1280 i. *At what time sworn—Before petition filed.*]—The affidavit verifying a petition, where it is not intituled " In the matter of the petition," may be sworn before the filing of the petition.—*Re* SOMERVILLE (1909), 28 N. Z. L. R. 1055.—**N.Z.**

1280 ii. *Within period for petitioning.*]—A trader having ceased to meet his liabilities, a demand was served upon him on Jan. 31, 1865, requiring him to make an assignment. On Feb. 6, the 5th being Sunday, an order was granted for & attachment issued. One of the affidavits filed on the application for attachment was sworn to on Feb. 4. On an application to set aside the writ & all proceedings for irregularity:—*Held:* it was immaterial that one of the affidavits was made within the five days allowed for petitioning, or for making an assignment in accordance with the demand.—MCINNES *v.* BROOKS, 1 C. L. J. 162.—**CAN.**

1280 iii. —— *Bankruptcy Act,* 1908, *ss.* 36, 37.]—The above sects. do not require the filing of a creditor's petition, & the filing of his verifying affidavit, to be contemporaneous. It is sufficient if the creditor proceeds with reasonable diligence, after filing his petition, to have it verified by affidavit.—*Re* OLSEN, [1919] N. Z. L. R. 73.—**N.Z.**

knowledge of petitioner.—*Re* DEBTOR (No. 7 of 1910), [1910] 2 K. B. 59 ; 79 L. J. K. B. 1065 ; 102 L. T. 691 ; 26 T. L. R. 429 ; 54 Sol. Jo. 459 ; 17 Mans. 263, C. A.

1282. Sufficiency of affidavit—What must be stated—Debt due at time of act of bankruptcy.]—Where no notice has been given to dispute the bkpcy. in an action by the assignees, it ought to appear from the deposition that petitioning creditor's debt was due at the time of the act of bkpcy.—LAWSON *v.* ROBINSON (1816), 1 Stark. 456.

1283. —— —— —— Insufficient to show debt due at date of commission.]—A deposition was in the following form : "That J. B., against whom, etc., was at & before the date of the suing forth of the commission, justly & truly indebted to this deponent in the sum of £130 13*s.* 11*d.* for goods sold & delivered," etc. The act of bkpcy. was on July 26 & the commission was dated Aug. 9 :—*Held :* the deposition was insufficient, since it merely showed that a debt to the amount of £100 was due at the date of the commission, & did not show that bkpt. was indebted to that amount at the time of the act of bkpcy.—CLARKE *v.* ASKEW (1816), 1 Stark. 458, n.

Annotation :—**Refd.** Key *v.* Cook (1829), 7 L. J. O. S. C. P. 153.

1284. —— —— Endorsement of bills to petitioning creditor before act of bankruptcy.]—The deposition of a petitioning creditor, that bkpt. was indebted to him upon, & by virtue of, certain bills of exchange, at & before the date & suing forth of the commission, which bills appeared, by a sched. underwritten to have been drawn & indorsed by bkpt. :—*Held :* not sufficient, as it should have been shown that the bills were indorsed to petitioning creditor before the act of bkpcy.—KEY *v.* COOK (1829), 2 Moo. & P. 720 ; 7 L. J. O. S. C. P. 153.

Annotation :—**Refd.** Kay *v.* Goodwin (1830), 6 Bing. 576.

1285. —— —— Existence of acceptance & that petitioning creditor holder thereof.]—A creditor, who was the holder of debtor's acceptance treated the acceptance as dishonoured, & presented a petition based on the original debt. The affidavit of verification swore to the existence of the original debt, & the acceptance was produced at the hearing of the petition :—*Held :* (1) the affidavit ought to mention the existence of the acceptance & to state petitioning creditor was the holder.—*Re* RAATZ, *Ex p.* RAATZ, [1897] 2 Q. B. 80 ; 66 L. J. Q. B. 501 ; 76 L. T. 503 ; 45 W. R. 666 ; 41 Sol. Jo. 470 ; 4 Mans. 127, D. C.

1286. —— —— Petition by public officer of company.]—In an affidavit filed by the public officer of a co. in support of a debtor's summons he was described as the registered public officer of the co., but the affidavit did not contain an express statement that he was such public officer, & it contained a statement that he was authorised to make the affidavit, but no statement that he was authorised to sue out the debtor's summons :—*Held :* the affidavit sufficiently complied with 1870 Rules, r. 15.—*Re* LOWENTHAL, *Ex p.* LOWENTHAL (1874), 9 Ch. App. 324 ; 43 L. J. Bcy. 132 ; 30 L. T. 282 ; 22 W. R. 459, L. C. & L. J.

Annotations :—**Refd.** Blaiberg *v.* Parke (1882), 10 Q. B. D. 90. **Mentd.** *Re* Latham, *Ex p.* Latham (1876), 4 Ch. D. 105.

SUB-SECT. 4.—HEARING.

1287. Duty of court—Notice given to dispute debt & act of bankruptcy—Debt not established at law.]—Debtor was served with a debtor's summons for the balance of an account. An application to dismiss the summons was refused with costs, on the ground of a defect in the *jurat* of his affidavit. A petition having been presented debtor gave notice to dispute the debt & the act of bkpcy. On hearing the petition the registrar ordered debtor within seven days to enter into a bond with two sureties to pay what might be recoverable in an action, & stayed proceedings in bkpcy. till the action had been tried. Seven days having elapsed without the bond being given, a notice was given to proceed in bkpcy., & on the hearing of the motion the registrar, without entering into the merits, adjudged debtor bkpt. :—*Held :* the order for adjudication was wrong, for the debt not having been established at law, it was the duty of the registrar to investigate the account & decide whether a debt sufficient to support an adjudication was due.—*Re* HARRIS, *Ex p.* HARRIS (1875), 10 Ch. App. 264 ; 44 L. J. Bcy. 33 ; 32 L. T. 417 ; 23 W. R. 531, L. JJ. ; *subsequent proceedings*, 10 Ch. App. 458, L. JJ.

1288. Discretion of court—Two petitions presented against same debtor.]—Where two bkpcy. petitions are presented against the same debtor, 1870 Rules, r. 48, gives the ct. a discretion to hear the second petition first.—*Re* WHITE, *Ex p.* MASON (1880), 14 Ch. D. 71 ; 49 L. J. Bcy. 56 ; 42 L. T. 884 ; 28 W. R. 749, C. A.

1289. Rights & duties of petitioning creditor —Duty to produce bill of exchange establishing

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1282 i. *Sufficiency of affidavit—What must be stated—Act of bankruptcy.*]—The act of bkpcy. must be stated in the affidavits filed with the judge.—*Re* GILLESPIE (1844), 2 O. S. 2.—**CAN.**

1282 ii. —— —— —— *Sufficiency of statement.*]—*Held :* an affidavit for a writ of attachment under 1875 Act, s. 9, which set out the fact that debtor had called a meeting to compound with his creditors, had exhibited a statement showing his inability to meet his liabilities, & had otherwise acknowledged his insolvency, was sufficient.—FOSTER *v.* ROOME (1878), 3 R. & C. 344.—**CAN.**

1282 iii. —— —— *Debt due—Defective petition.*]—A petition for sequestration having been presented to the Ct. of Session, founding, on a bill written on a wrong stamp & an affidavit to the verity of the debt :—*Held :* the affidavit to the verity of the debt was sufficient to support the petition, accompanied by the bill.—GEDDES *v.* MOWAT (1824), 2 Sh. Sc. App. 230.—**SCOT.**

1282 iv. —— *Description of parties.*]—*Semble :* the omission to describe the parties in the intituling of an affidavit for an attachment under 1875 Act, is not a fatal objection if the description appear in the body of the affidavit.—MCDONALD *v.* CLELAND (1876), 6 P. R. 289.—**CAN.**

PART III. SECT. 3, SUB-SECT. 4.

1287 i. *Duty of court—To inquire into alleged set-off.*]—On a creditor's petition in bkpcy., the ct. should inquire into any equitable set-off which debtor alleges he has against petitioning creditor's debt.—*Re* BURKE (1886), 4 N. Z. L. R. 303.—**N.Z.**

1287 ii. —— *Creditor's petition — Priority.*]—A trader presented a petition for arrangement on Jan. 3. The first private sitting was fixed for Jan. 10, when the petition was dismissed for non-attendance. During the sitting of the ct., on that day, the trader filed a declaration of insolvency, & a petition of bkpcy. against himself, founded on the declaration of insolvency. On Jan. 13 a creditor filed a petition of bkpcy. against him, founded on the dismissal of the petition for arrangement :—*Held :* the creditor's petition should be proceeded with in preference to the trader's.—*Re* HEGARTY (1860), 10 I. Ch. R. 117.—**IR.**

h. *Debtor last witness examined—On own petition.*]—An insolvent is always the last witness examined at the hearing of his petition.—*Re* CHRISTIAN (1870), 4 I. L. T. Jo. 661.—**IR.**

k. *Conduct of proceedings.*]—When an arrangement case is turned into bkpcy., the creditor whose proceedings have brought the matter into ct. will be given the carriage of the proceedings.—*Re* CALLAGHAN (1868), 2 I. L. T. Jo. 720.—**IR.**

l. *Who may oppose.*]—Upon a creditor applying for the sequestration of debtor's estate on the ground of the return of *nulla bona* to a writ of execution, the judgment creditor objected on the ground that the judgment had since been satisfied by debtor allowing execution upon certain immovable property :—*Held :* the judgment creditor had no *locus standi*.—HURLEY *v.* WESSELS (1884), 1 G. 24 ; 2 C. L. J. 52.—**S. AF.**

Sect. 3.—Procedure on petition: Sub-sects. 4 & 5.]

debt.]—A petitioning creditor was held responsible for the production of a bill of exchange, upon the direct proof of which petitioning creditor's debt had been established, & ordered to pay the cost of inquiries as to it.

Petitioning creditor is the moving principle which regulates the whole proceedings under the bkpcy., & it is his duty to throw no aspersion or doubt on that commission which originates from himself, for the validity of which he has pledged himself at the issuing, & which, in all its stages, he is bound to be assistant to. I will not suffer a petitioning creditor, thus establishing the commission, to say the bill is in any other hands than his own. Even supposing [petitioning creditor] was not bound himself to have retained the bill, yet still he never could be permitted to say that he was ignorant where the bill was to be found, if he was not himself able to produce it, as the foundation of the commission. Putting it at the lowest he ought to have taken reasonable care that that evidence, if necessary, would be forthcoming (LORD ELDON, C.).—*Re* KEMP, *Ex p.* GLOSSOP (1816), 2 Rose, 386.

1290. —— Right to production of debtor's books—Entitled to call debtor to prove act of bankruptcy.]—Upon the hearing of a bkpcy. petition, petitioning creditor is entitled to call for the production of debtor's books, for the purpose of proving the allegations in the petition. *Semble:* petitioning creditor is also entitled to call debtor for the purpose of proving the acts of bkpcy. alleged against him.—*Re* X. Y., *Ex p.* HAES, [1902] 1 K. B. 98; 71 L. J. K. B. 102; 85 L. T. 564; 8 Mans. 5; *sub nom. Re* A DEBTOR, *Ex p.* PETITIONING CREDITORS, 50 W. R. 182; 18 T. L. R. 66; 46 Sol. Jo. 68, C. A.

Annotation:—**Distd.** *Re* Debtor (No. 7 of 1910), [1910] 2 K. B. 59, C. A.

1291. —— Right to discovery & interrogatories.]—A bkpcy. petition having been presented against a debtor, petitioning creditor applied under 1886–1890 Rules, r. 72, for discovery of documents, & leave to administer interrogatories:—*Held:* he was not entitled to either before a receiving order had been made.—*Re* A DEBTOR (No. 7 of 1910), [1910] 2 K. B. 59; 79 L. J. K. B. 1065; 102 L. T. 691; 26 T. L. R. 429; 54 Sol. Jo. 459; 17 Mans. 263, C. A.

—— In regard to refusing tender.]—*See* Nos. 1074 *et seq., ante.*

1292. Right of debtor—To dispute debt—After withdrawing notice to dispute.]—A debtor, against whom a bkpcy. petition had been presented, gave notice of his intention to dispute petitioning creditor's debt. He afterwards withdrew the notice, but on the hearing of the petition, without having given a fresh notice, he claimed the right to dispute the amount of the debt, on the ground that, since the withdrawal of the notice, he had made a payment to the creditor which reduced the debt below £50. The creditor was not present:—*Held:* debtor was not precluded from disputing the amount of the debt, but the creditor ought to have an opportunity of giving evidence to contradict debtor.—*Re* LUTTMAN, *Ex p.* LEAROYD (1880), 13 Ch. D. 321; 42 L. T. 162; 28 W. R. 402, C. A.

Annotation:—**Mentd.** *Re* Langtry, *Ex p.* Stephenson (1894), 63 L. J. Q. B. 570.

1293. —— —— Notice to dispute inadvertently omitted.]—A debtor, against whom a bkpcy. petition had been presented, instructed his solr. to oppose it. The solr. inadvertently omitted to give the notice required by the 1870 Rules, r. 36, but he appeared at the hearing of the petition, & asked to be allowed to dispute the validity of petitioning creditor's debt:—*Held:* debtor ought to have been allowed to adduce his evidence, but he should pay the costs occasioned by the omission to give the notice.—*Re* DALE, *Ex p.* DALE (1876), 3 Ch. D. 322; 45 L. J. Bcy. 129; 34 L. T. 745; 24 W. R. 852.

Annotation:—**Mentd.** *Re* Sanders, *Ex p.* Sanders (1894), 63 L. J. Q. B. 734, D. C.

1294. —— To appeal—After appearing without raising objection.]—If, on the hearing of a bkpcy. petition, the act of bkpcy., alleged is not strictly proved, but debtor appears & does not raise the objection, & a receiving order is made, he cannot on an appeal from that order raise the objection.—*Re* PRATT, *Ex p.* PRATT (1884), 12 Q. B. D. 334; 53 L. J. Ch. 613; 50 L. T. 294; 32 W. R. 420; 1 Morr. 27, C. A.

Annotations:—**Mentd.** *Re* May, *Ex p.* May (1884), 12 Q. B. D. 497, C. A.; *Re* Pulborough School Board Election, Bourke *v.* Nutt, [1894] 1 Q. B. 725, C. A.

1295. Adjourned hearing—Evidence need not be repeated.]—Where a petition is adjourned, if petitioning creditor has already proved his debt, the service of the petition, & the act of bkpcy. he need not repeat the evidence at the adjourned hearing.—*Re* WINBY, *Ex p.* WINBY (1886), 3 Morr. 108, C. A.

1296. —— Admission of further evidence.]—A petition having been adjourned, fresh affidavits in reply were filed since the adjournment:—*Held:* such affidavits ought to be read, in order that the ct. might judge whether a *vivâ voce* examination would be necessary.—*Ex p.* BAILEY (1835), 4 L. J. Bcy. 50.

Dismissal of petition.]—*See* Part IV., Sect. 2, *post.*

SUB-SECT. 5.—ATTENDANCE OF PARTIES.

1297. Petitioning creditor—Attendance necessary—Unless dispensed with by court.]—According to the established practice the attendance of petitioning creditor is necessary at the hearing of the petition, unless the ct. think fit to dispense with it, notwithstanding that the debt is based on a judgment.—*Re* PURRETT, *Ex p.* PURRETT (1895), 73 L. T. 224; 44 W. R. 171; 39 Sol. Jo. 726; 2 Mans. 403; 15 R. 644, D. C.

1298. —— Debtor denying debt & act of bankruptcy—Whether absolute right to insist on attendance.]—Creditors in partnership, residing abroad, issued a debtor's summons against an Englishman. The affidavit in support of the summons was made by their agent in England. Debtor denied the debt & applied to the ct. to dismiss the summons, & he gave notice to the creditors that he required them to attend on the hearing of his application, for the purpose of being examined as to the alleged debt:—*Held:* debtor had, in the circumstances, no absolute right to require the presence of the summoning creditors on the hearing of his application.—*Re* IRVING, *Ex p.* BARRON (1875), 10 Ch. App. 269; 44 L. J. Bcy. 66; 32 L. T. 139; 23 W. R. 432, L. JJ.

1299. —— Discretion of court to dispense with.]—The discretion of the ct. in dispensing with the attendance of petitioning creditor upon the hearing of a bkpcy. petition, will not, without good cause, be interfered with.—*Re* RAYNER, *Ex p.* RAYNER (1877), 37 L. T. 38; 25 W. R. 851.

Annotation:—**Refd.** *Re* Purrett, *Ex p.* Purrett (1895), 73 L. T. 224, D. C.

1300. —— Grounds for exercising discretion—Dangerous illness.]—A petitioning creditor was

dangerously ill at Bristol, & prayed the comrs. to admit proof of his debts in bkpcy. proceedings in London, on production of the office copy of the affidavit, on which the commission was granted. LORD ELDON, C., made the order asked for on production of a medical affidavit that petitioner would not travel to London without danger.—*Ex p.* EDWARDS (1803), 8 Ves. 318 ; 32 E. R. 377.

1301. —— —— **Risk to health.**]—Where petitioning creditor was seventy-seven years of age, resided one hundred & fifty-four miles from the place where the fiat was to be worked & could not go but at the risk of his life :—*Held :* the ct. would dispense with his personal attendance.—*Re* WOOD (1832), 1 Mont. 509.

1302. —— —— **Distance.**]—A distance of eighty miles :—*Held :* not a cause for non-attendance of petitioning creditors.—*Ex p.* COX (1832), Mont. 390 ; 1 Deac. & Ch. 205.

1303. ——————.]—*Held :* when petitioning creditor resided eighty miles from the place of opening the fiat, his personal attendance was dispensed with.—*Re* POLTON (1834), 3 Deac. & Ch. 688.

1304. —— —— ——.]—Petitioning creditor's attendance was dispensed with, the distance being one hundred & ten miles.—*Re* FREEMAN (1836), 3 Mont. & A. 33.

1305. ——————.]—Attendance of petitioning creditor dispensed with, the distance being one hundred & thirty miles.—*Re* GITTON, *Ex p.* MARSHALL (1837), 3 Mont. & A. 133.

1306. —— —— ——.]—Petitioning creditor residing in Manchester was excused personal attendance at Evesham in Worcestershire.—*Re* FITZ (1837), 1 Jur. 288.

1307. —— —— —— **& inconvenience.**]—The fact that the opening of the commission was to take place at a distance of forty-seven miles from petitioning creditor's residence, where he carried on a manufactory, which he could not leave without great inconvenience :—*Held :* too slight for dispensing with his attendance at the opening of the commission.—*Re* GLYNN, *Ex p.* WILLIAMSON (1820), 1 Jac. & W. 240 ; 37 E. R. 366.

Annotation :—**Refd.** *Ex p.* COX (1832), 1 Deac. & Ch. 205.

1308. ——————.]—On the application of petitioning creditor to dispense with his personal attendance at the opening of the fiat, it appeared the fiat might have been executed in London, but that would have caused great expense & inconvenience to the creditors, other than petitioning creditor, as the distance was over two hundred miles :—*Held :* neither the mere personal inconvenience, nor the distance, standing alone, was sufficient, but the combination of circumstances sufficed to induce the ct. to allow the application.—*Re* KIRBY, *Ex p.* ROSS (1832), 1 Deac. & Ch. 552, Ct. of R.

1309. ——————.]—The attendance of three petitioning creditors dispensed with, on the ground that they were the only partners of their respective firms, who conducted the business, & could not, without great inconvenience, attend at the distance of forty miles.—*Re* SHANNON (1838), 7 L. J. Bcy. 41

1310 —— **Effect of order dispensing with attendance — Debtor wishing to cross-examine — Adjournment.**]—Where the attendance of petitioning creditor had been dispensed with, & the party showing cause against it sought to cross-examine him, & where petitioning creditor's debt was founded on a judgment, & petitioning creditor resided in Ireland, the ct. adjourned the hearing to enable him to attend.—*Re* PHŒNIX LIFE ASSURANCE CO., *Ex p.* MARTIN (1860), 2 L. T. 196.

1311. —— —— **Debtor disputing — Statements in petition must be proved.**]—A petitioning creditor, who obtains an order *ex p.* dispensing with his attendance on the hearing of his petition, is not relieved from the necessity of proving the statements in the petition, if debtor subsequently gives notice of his intention to dispute such statements.—*Re* DEBTOR (No. 1 of 1916), [1916] H. B. R. 54, D. C.

1312. —— **Failure to appear—Petition may be dismissed—With costs.**]—If, upon the day appointed for the hearing of a petition for adjudication, neither petitioning creditor, nor his solr., nor any one on his behalf, attends to support the petition, the ct. will, upon the application of alleged debtor, dismiss the petition with costs, pursuant to the discretion vested in the ct. by 1869 Act, s. 8.—*Re* H. B., *Ex p.* ANON. (1870), 22 L. T. 179.

1313. —— —— —— **Petition not served on debtor.**]—The ct. has control over the proceedings & over the petition, & if petitioning creditor does not appear on the hearing, it can dismiss the petition, even if it has not been served on debtor.—*Re* STOCKLEY, *Ex p.* DISCOUNT CO. (1893), 37 Sol. Jo. 511 ; 10 Morr. 131 ; 5 R. 353, D. C.

1314. —— —— **Without attendance being dispensed with.**]—A petitioning creditor in bkpcy. must personally attend the hearing none the less that his debt is a judgment debt, for the ct. may wish to go behind the judgment, or satisfy itself of his *bonâ fides*. If petitioning creditor fails to attend, or refuses to submit to cross-examination on the demand of debtor without such attendance or cross-examination having been dispensed with by the registrar, the receiving order will be set aside as irregular.—*Re* PURRETT, *Ex p.* PURRETT (1895), 73 L. T. 224 ; 44 W. R. 171 ; 39 Sol. Jo. 726 ; 2 Mans. 403 ; 15 R. 644, D. C.

1315. —— —— **After notice of intention not to proceed—Right to present second petition.**]—*Re* GENTRY, No. 1215, *ante*.

1316. —— —— **At postponed hearing — Dismissal of petition.**]—After a petition has been called on, & the hearing postponed to a future day, by consent of both parties, if petitioner does not then appear to support it, resp. is entitled to have the petition dismissed with costs, without an affidavit that he has been served with the petition.—*Re* TORIE, *Ex p.* WARD (1835), 1 Deac. 86.

1317. —— —— **At adjourned hearing — Dismissal of appeal through delay.**]—Petitioning creditor agreed to grant debtor an adjournment, but the petition was dismissed on account of the non-appearance of petitioning creditor. Notice of appeal having been given, a receiving order was made on debtor's petition. The appeal was by consent adjourned, & was not heard for a year. It was then dismissed on the ground of the delay.—*Re* GAMLEN, *Ex p.* WARD & CO. (1887), 4 Morr. 301, D. C.

1318. —— **Privilege from arrest.**]—A petitioning creditor attending the comrs. for the purpose of watching the progress of the commission, & of proposing himself as an assignee, is protected from arrest *eundo, morando, et redeundo*.—SELBY *v.* HILLS (1832), 8 Bing. 166 ; 1 Dowl. 257 ; 1 Moo. & S. 253 ; 1 L. J. C. P. 55 ; 131 E. R. 364.

Annotation :—**Mentd.** Hare *v.* Hide (1851), 15 J. P. 67.

1319. Debtor—Accidentally delayed in appearing — Rehearing.]—Debtor having given notice to dispute petitioning creditor's debt, did not attend at the time appointed for the hearing, but the registrar received a telegram stating that

Sect. 3.—*Procedure on petition: Sub-sects.* 5, 6, 7, *A. & B.; sub-sect.* 8.]

counsel was on the way to the ct., & would shortly arrive to appear for debtor. The registrar waited ten minutes, & then, no one being present on behalf of debtor, adjudicated him a bkpt. Ten minutes afterwards, debtor, attended by his solr. & counsel, arrived, but the registrar refused to re-open the matter:—*Held:* there had been undue haste in the proceedings, & the petition must be remitted to the ct. below to be heard on its merits. —*Re* PHILLIPS, *Ex p.* PHILLIPS (1874), 44 L. J. Bcy. 11; 31 L. T. 416; 23 W. R. 24.

1320. Person proving act of bankruptcy—Ordered to attend.]—Separate commissions of bkpcy. against partners, were taken out by a joint creditor on the same debt, & on the same day. A joint commission having issued, & petitioning creditor under the separate commissions refusing to disclose the person who proved the act of bkpcy., LORD ELDON, C., ordered that person to attend the comrs. under the joint commission at the peril of costs.—*Ex p.* GARDNER (1812), 1 Ves. & B. 74; 35 E. R. 29.

1321. —— & trading—Personal attendance dispensed with—Distance.]—Personal attendance of witnesses to prove the trading & act of bkpcy., not required, where the distance exceeds twenty-five miles.—ANON. (1843), 1 L. T. O. S. 338.

SUB-SECT. 6.—WHAT MUST BE PROVED.

1322. Allegations in petition — Though unopposed.]—At the hearing of a bkpcy. petition, even though resp. has given no notice of his intention to show cause against the petition, & does not appear, the allegations contained in the petition must be supported by further evidence than the common affidavit.—*Re* LINDSAY, *Ex p.* LINDSAY (1874), L. R. 19 Eq. 52; 44 L. J. Bcy. 5; 31 L. T. 415; 23 W. R. 44.

1323. —— Not included in debtor's notice to dispute.]—Upon the hearing of an opposed petition the affidavit of verification cannot be used in proof of any matters in the petition, & petitioning creditor should go provided with proof of all the essential matters in his petition, for the ct. will usually allow debtor to require proof of all essential matters, whether mentioned in his notice to dispute or not, unless it appear that such objections by debtor are merely dilatory.—*Re* SANDERS, *Ex p.* SANDERS (1894), 63 L. J. Q. B. 734; 71 L. T. 236; 42 W. R. 650; 38 Sol. Jo. 632; 1 Mans. 382; 10 R. 443, D. C.

See, now, 1914 Act, s. 5 (2).

1324. —— Petitioning creditor's debt—Debtor claiming set-off.]—Debtor gave notice to dispute petitioning creditor's claim, & filed an affidavit admitting the debt but claiming a set-off. At the hearing debtor & his witnesses were present, but, owing to the absence of his solrs., he did not tender any evidence:—*Held:* petitioning creditor's debt had not been sufficiently proved, in the absence of any further evidence than that contained in the affidavit filed with the petition.—*Re* ORMSTON, *Ex p.* DODD (1876), 3 Ch. D. 452; 25 W. R. 185, C. A.

See, now, 1915 Rules, r. 171.

1325. Petition founded on bills of exchange or notes—Indorsed to petitioning creditor—That indorsement before — Commission sued out.]—Where petitioning creditor's debt, set up to support a commission of bkpcy., is a bill of exchange drawn by bkpt. & indorsed to petitioning creditor, evidence must be adduced that it was so indorsed, before the suing out of the commission.—ROSE *v.* ROWCROFT (1815), 4 Camp. 245, N. P.

See, now, 1914 Act, s. 4 (1) (*b*).

1326. ——— ——— Act of bankruptcy.]—Where a petitioning creditor's debt arises on a note indorsed, or a bill accepted, by bkpt., evidence must be given that the indorsement or acceptance was prior to the act of bkpcy.; mere production of the instrument bearing an earlier date, is insufficient. —COWIE *v.* HARRIS (1827), Mood. & M. 141.

Annotations:—**Refd.** *Re* Hayward, *Ex p.* Hayward (1871), 6 Ch. App. 546, L. JJ. **Mentd.** Tregoning *v.* Attenborough (1830), 7 Bing. 97; Godson *v.* Sanctuary (1832), 2 L. J. K. B. 19; Pennell *v.* Attenborough (1843), 4 Q. B. 868.

1327. —— One dishonoured & one current—Current bill lost.]—On opening the commission, the debt of A., petitioning creditor, was established on two bills of exchange, one of which was dishonoured & the other undue, & the adjudication took place. The running bill was lost immediately afterwards. The commission being disputed at law by a party, whom A., who had been appointed assignee, sued in trover:—*Held:* it was sufficient to prove the existence of petitioning creditor's debt, giving secondary evidence of the bill, at the date of the commission, though it was contended that it ought to exist at the commencement of the action, & A., at that time, could not have recovered at law, as the bill might be in the hands of a

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PART III. SECT. 3, SUB-SECT. 6.

1324 i. *Allegations in petition—Petitioning creditor's debt.*]—It is necessary to prove in support of a creditor's petition for adjudication that petitioning creditor's debt was in existence at the date of the alleged act of bkpcy. —WIGGINS *v.* JONES (1887), 5 N. Z. L. R. 295.—**N.Z.**

1324 ii. —— ——.] — It is not necessary that a creditor seeking to revive a sequestration should prove that the original petitioning creditor's debt was a good one, although he must prove the insolvency in other respects & prove his own to be a good petitioning creditor's debt.—*Re* HEWITT, *Ex p.* STAUGHTON & DARBYSHIRE (1864), 1 W. W. & A'B. 15.—**AUS.**

1324 iii. —— —— *Sufficiency of debt less security.*]—In an application for the sequestration of an estate, whether under Ord. 6 of 1843 or Act 38 of 1884, petitioning creditor must prove that, after deducting the value of his security, his debt is of the amount set out in the stat.—MOHAMED *v.* DAVIDS (1915), C. P. D. 671.—**S. AF.**

m. *Under 7 Vict. c.* 10—*Act of bankruptcy—Trading.*]—A party suing out a commission of bkpcy., under 7 Vict. c. 10, must prove before the judge or comr., not only the act of bkpcy., but also the trading. Such evidence cannot be afterwards received to uphold a commission issued without the proof having been given.—*Re* ROSE (1844), 2 O. S. 14.—**CAN.**

n. *Petition for revival of sequestration—Proof of petitioning creditor's default.*]—A petition under 5 Vict. No. 17, s. 28, for revival of a sequestration, alleged default of petitioning creditor & also collusion between him & the insolvent as to the discharge of the rule *nisi* for sequestration, but no such collusion was proved:—*Held:* proof of default alone was sufficient without collusion & the allegation in the petition of collusion was to be regarded as mere surplusage.—*Re* HEWITT, *Ex p.* STAUGHTON & DARBYSHIRE (1864), 1 W. W. & A'B. 15.—**AUS.**

o. —— *How made—Jurisdiction.*]—Commission against a bkpt. in 1833, upon which no proceedings had since been taken. Any application to revive them should be made to the Ct. of Bkpcy. & Insolvency. The Chancellor's power to renew the commission was taken away by 20 & 21 Vict. c. 60.—*Re* DICKIE (1857), 10 Ir. Jur. 183.—**IR.**

p. *Debtor's petition—Proof of insolvency.*]—In an application for insolvency the law requires petitioner to make it appear to the satisfaction of the judge that he is insolvent before such judge can give petitioner the benefit of Insolvency Act.—*Re* MORISON'S INSOLVENCY (1860), 4 Nfld. L. R. 522.—**NFLD.**

q. —— —— *What amounts to.*]—It does not follow that, because a person has assets of a nominal value in excess of his liabilities, he is not entitled to be declared an insolvent. But where a person applies to be declared an insolvent & shows in his statement that his assets exceed his liabilities, he must show also that by the sale of his interests or other realisation of his assets a sum would not be secured which would enable him to pay his debts in full.—BALDEO DAS *v.* SUKHDEO DAS (1896), I. L. R. 19 All. 125.—**IND.**

bonâ fide holder.—POOLLY *v.* MILLARD (1831), 9 L. J. O. S. Ex. 114.

1328. Petition on cheque given to debtor—Proof of payment.]—A petitioning creditor's debt was created by his giving bkpt. a cheque on petitioning creditor's banker:—*Held:* (1) to establish the debt the payment of the cheque must be proved; (2) it was not sufficient (especially where bkpt.'s papers came to the hand of petitioning creditor) to show the cheque to have come to his hands again, & that his bankers, the day after the date of the cheque, paid on his account to bkpt.'s bankers a sum corresponding with the amount in the cheque. —BLEASBY *v.* CROSSLEY (1826), 3 Bing. 430; 11 Moore, C. P. 327; 4 L. J. O. S. C. P. 136; 130 E. R. 578.

1329. Petition founded on non-compliance with debtor's summons—Debt, service of summons & neglect to pay must be proved.]—On the hearing of a bkpcy. petition the act of bkpcy. must be directly proved. Where it is sought to found an adjudication of bkpcy. on a neglect to pay the amount demanded by a debtor's summons, the debt & the service of the summons, & the neglect to pay, must be proved by evidence adduced at the hearing. It is not enough to state in the petition the non-payment of the debt, & make merely the usual affidavit that the statements in the petition are true.—*Re* ROGERS, *Ex p.* ROGERS (1880), 15 Ch. D. 207; 43 L. T. 163; 29 W. R. 29, C. A.

Annotations:—**Distd.** *Re* Evans, *Ex p.* Evans (1883), 50 L. T. 158, C. A. **Consd.** *Re* Johnson, *Ex p.* Johnson (1883), 25 Ch. D. 112, C. A.

1330. Objection founded on notice to petitioning creditor of prior act of bankruptcy.]—Notice to a petitioning creditor of an act of bkpcy. prior to the debt is not to be presumed, although the fact that such a prior act was committed appears on the face of the depositions which are read in evidence to prove the act of bkpcy. on which the commission is founded.—THACKRAH *v.* WOOD (1822), 3 Stark. 141.

1331. At adjourned hearing.]—*Re* WINBY, *Ex p.* WINBY, No. 1295, *ante*.

SUB-SECT. 7.—SUFFICIENCY AND ADMISSIBILITY OF EVIDENCE.

A. Judgments and Awards.

Right of court to go behind judgments & awards.]—*See* Part VIII., Sect. 7, sub-sect. 1, *post*.

B. Other Cases.

1332. That debt existed at time of bankruptcy—Proof that debt once existed.]—In an action by the assignees of a bkpt., upon proof that petitioning creditor's debt once existed, the law will presume that it continued down to the time of the bkpcy. —JACKSON *v.* IRVIN (1809), 2 Camp. 48.

Annotations:—**Mentd.** Toussaint *v.* Hartop (1816), Holt, N. P. 335; *Re* Baldwin, *Ex p.* Foss (1858), 2 De G. & J. 230.

1333. —— Date on promissory note primâ facie evidence.]—The date upon a promissory note made by a bkpt. is *primâ facie* evidence to show that the note existed before the act of bkpcy. was committed, so as to establish a petitioning creditor's debt in an action by the assignees.—TAYLOR *v.* KENLOCH (1815), 1 Stark. 175.

Annotations:—**Consd.** Smallcombe *v.* Bruges (1824), M'Cle. 45; Obbard *v.* Betham (1830), Mood. & M. 483; Wright *v.* Lainson (1837), 2 M. & W. 739. **Refd.** Anderson *v.* Weston (1840), 8 Scott, 583.

1334. Of petitioning creditor's debt—Depositions not conclusive.]—*Held:* the depositions taken upon a commission of bkpcy., were not conclusive evidence under 49 Geo. 3, c. 121, of a petitioning creditor's debt.—COOPER *v.* MACHIN (1824), 1 Bing. 426; 8 Moore, C. P. 536; 2 L. J. O. S. C. P. 66; 130 E. R. 171.

1335. —— Admission of debt—Before issue of commission.]—An acknowledgment of a debt by a trader who had become bkpt., by an admission made before the issuing of the commission, to the attorney employed by the assignees in an action of trover brought by them against a third person on account of the estate is not admissible in evidence to establish petitioning creditor's debt in proving the bkpcy. in support of such action, if the admission were made after the act of bkpcy.—SMALLCOMBE *v.* BRUGES (1824), 13 Price, 136; M'Cle. 45; 147 E. R. 944.

Annotations:—**Expld.** Coole *v.* Braham (1848), 18 L. J. Ex. 105. **Refd.** Binns *v.* Tetley (1825), M'Cle. & Yo. 397.

1336. That debt existing at date of hearing—Oral evidence.]—Upon the hearing of a petition oral evidence may be given to prove that the debt set forth in the petition is still owing at the date of the hearing.—*Re* STABLES, *Ex p.* SMITH & SONS (1894), 42 W. R. 448; 38 Sol. Jo. 420; 1 Mans. 68, D. C.

1337. That petitioning creditor held bill on which petition founded.]—*Held:* there was sufficient evidence that at the date of the presentation of the petition petitioning creditor was the holder of the acceptance on which the petition was founded.—*Re* RAATZ, *Ex p.* RAATZ, [1897] 2 Q. B. 80; 66 L. J. Q. B. 501; 76 L. T. 503; 45 W. R. 666; 41 Sol. Jo. 470; 4 Mans. 127, D. C.

1338. Of act of bankruptcy—Assignment for benefit of creditors—Office copy.]—Upon the hearing of a bkpcy. petition, the only evidence adduced to prove the act of bkpcy. alleged, that debtor had executed an assignment of all his property for the benefit of his creditors, was an office copy of a deed, registered under 1887 Act, purporting to be executed by debtor:—*Held:* the office copy was, by reason of s. 11 of the Act, sufficient *primâ facie* evidence of the execution of the registered deed by debtor, & of its execution on the date appearing in the office copy.—*Re* SLATER, *Ex p.* SLATER (1897), 76 L. T. 704; 4 Mans. 118, C. A.

SUB-SECT. 8.—EFFECT OF DEATH OF PARTIES.

1339. Death of debtor — Debtor's petition—Jurisdiction of court.]—Petitioner for an adjudication in bkpcy. against himself had the petition granted & afterwards dismissed, & having given notice of appeal against such dismissal, died, the property meanwhile remaining in the custody of the official assignee:—*Held:* the ct. had no jurisdiction to make an order for the

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PART III. SECT. 3, SUB-SECT. 7.—B.

1334 i. *Of petitioning creditor's debt—Affidavit of verification—Whether admissible to prove allegations in petition.*]—The affidavit filed by a creditor verifying his petition ought not to be used at the hearing in support of the allegations of the petition, but such allegations must be proved by oral evidence.—*Re* EWING, *Ex p.* MORGAN (1905), 24 N. Z. L. R. 808.—**N.Z.**

1334 ii. —— *Evidence of another creditor.*]—On the question whether a commission of bkpcy. is or is not sustainable, *e.g.* whether petitioning creditor had a sufficient debt to entitle him to petition, a creditor of bkpt. is a competent witness to prove the negative.—*Re* CODD (1804), 2 Sch. & Lef. 116.—**IR.**

r. *Admissibility—Identity of petitioning creditor.*]—Evidence of identity of petitioning creditor with the person or co. executing the petition can be received at the hearing.—*Re* SOMERVILLE (1909), 28 N. Z. L. R. 1055.—**N.Z.**

s. —— *Further evidence after case closed.*]—It is in the discretion of a judge of a local Ct. of Bkpcy. as to whether he will permit petitioning creditor to call further evidence after he has stated that his case is closed.—WIGGINS *v.* JONES (1887), 5 N. Z. L. R. 295.—**N.Z.**

PART III. SECT. 3, SUB-SECT. 8.

1339 i. *Death of debtor — Debtor's*

Sect. 3.—*Procedure on petition: Sub-sects.* 8 & 9.]

disposition of the property, or a declaration as to the rights of the parties.—*Re* BIANCONI, *Ex p.* BIANCONI (1864), 10 L. T. 283, L. C.

1340. ——— ——— ———.]—In 1889 A., mortgaged property to secure £2,000 & interest. Shortly afterwards a receiving order was made against A., on his own petition. In July, 1890, he made a composition with his creditors under 1883 Act, s. 18, which was approved of by the ct., under which the creditors were to be paid by three instalments extending over a year. The mtgees. neither attended the creditors' meeting nor assented to the scheme of composition. Default was made in payment of the instalments. A. died two months after the expiration of the year, & an action was commenced by a creditor for the administration of his estate, which proved to be insolvent. The mtgees. valued their security at £1,500, & claimed to be admitted as creditors in the action for £500, the balance of their debt. Their proof had been admitted by the trustee under the composition deed:—*Held:* the Ct. of Bkpcy. had jurisdiction to proceed in the bkpcy. of A., under 1883 Act, ss. 18 (11), 108, notwithstanding his death, & the strict course would be to allow appcts. to take proceedings in that ct., but pltf. having submitted, in order to save delay & expense to abide by the judgment of the ct. on what would be the result of those proceedings, the claim was admitted.—*Re* HARDY, HARDY *v.* FARMER, [1896] 1 Ch. 904; 65 L. J. Ch. 461; 74 L. T. 403; 44 W. R. 503; 40 Sol. Jo. 437; 3 Mans. 150.

See, now, 1914 Act. s, 112.

1341. ——— ——— **Discretion of court.**]—A debtor having died two days after filing his petition:—*Held:* the bkpcy. proceedings might continue as though debtor were alive. *Semble:* if, in the above circumstances, debtor's representatives made arrangements with the creditors, the ct. would use the discretion given to it by 1883 Act, s. 108.—*Re* WALKER (1886), 54 L. T. 682; 34 W. R. 550; 3 Morr. 69, D. C.

Annotations:—**Distd.** *Re* Easy, *Ex p.* Hill & Hymans (1887), 19 Q. B. D. 538, C. A. **Refd.** *Re* Hardy, Hardy *v.* Farmer, [1896] 1 Ch. 904.

1342. ——— **Creditor's petition—Jurisdiction of court—Substituted service—Stay of proceedings.**]—Where a debtor against whom a creditor's petition in bkpcy. has been presented, dies before service of the petition upon him, there is no power to dispense with service or to order substituted service of the petition, & the bkpcy. proceedings must necessarily be stayed.—*Re* EASY, *Ex p.* HILL & HYMANS (1887), 19 Q. B. D. 538; 56 L. J. Q. B. 624; 35 W. R. 819; 4 Morr. 281, C. A.

Annotation:—**Refd.** *Re* Hardy, Hardy *v.* Farmer, [1896] 1 Ch. 904.

See, now, 1915 Rules, r. 159.

1343. Death of petitioning creditor—Attendance by executors—Extension of time.]—Petitioning creditor died after the issuing of the commission & before adjudication. LORD ELDON, C., gave liberty to his exors. to attend the comrs. to prove the debt on which the commission issued, & enlarged the time for opening the commission.—*Re* PARKER, *Ex p.* WINWOOD (1823), 1 Gl. & J. 252; *sub nom. Re* PARKER, *Ex p.* TANNER, Mont. & M. 292, n.

SUB-SECT. 9.—ADJOURNMENT OF HEARING AND STAY OF PROCEEDINGS.

1344. Discretion of court—Necessity for exercising—Inability to pay due to war.]—*Held:* the Ct. of Bkpcy. was bound to exercise the "absolute discretion" given to it by Cts. (Emergency Powers) Act, 1914 (c. 78), s. 1 (3), & where on the hearing of a bkpcy. petition a debtor's inability to pay his debts owing to circumstances attributable to the European war was proved, the ct. could in a proper case stay the proceedings on the petition.—*Re* A DEBTOR (No. 224 of 1916), [1916] H. B. R. 156.

1345. ——— **Must be judicially exercised.**]—A money-lender, who had advanced money to debtor, part of which she had repaid, recovered judgment against her by default for the balance—of principal & interest which he claimed to be due. She paid further sums in reduction of the debt, & he served her with a bkpcy. notice in respect of the balance due under the judgment. The creditor then presented a bkpcy. petition founded upon non-compliance with the notice, the validity of which was not disputed. On the hearing of the petition debtor disputed the debt, & claimed relief under Money-lenders Act, 1900 (c. 51), on the ground that the transactions between petitioning creditor & herself were "harsh & unconscionable." The registrar held that to be established, & he fixed, as the amount properly due to the creditor, a sum considerably in excess of £50. He refused, however, to make a receiving order, but adjourned the petition with leave to the creditor to amend & re-present it in order to give debtor an opportunity of discharging the debt:—*Held:* the registrar having found there was a good petitioning creditor's debt, namely, a debt exceeding £50, was bound to make a receiving order, & his order adjourning the petition was not a judicial exercise of his discretion, against which there was no appeal.—*Re* DEBTOR, *Ex p.* PETITIONING CREDITOR, [1917] 2 K. B. 60; 86 L. J. K. B. 745; 116 L. T. 581; [1917] H. B. R. 123, C. A.

1346. ——— **In whose favour exercisable—Alien enemy.**]—*Held:* a bkpcy. petition was one of the "remedies of a creditor" within Cts. (Emergency Powers) Act, 1914 (c. 78), s. 1 (7), & the ct. could not exercise the discretion given by s. 1 (3) to stay proceedings under the petition, where debtor was an alien enemy.—*Re* RADEKE, *Ex. p.* JACOBS (1915), 84 L. J. K. B. 2111; 113 L. T. 1115; 31 T. L. R. 584; [1915] H. B. R. 185, D. C.

1347. ———**As to subsequent adjournment.**]—1915 Rules, r. 178, prohibit any further adjournment of a petition, merely by consent of the parties, after the expiration of one month from the day appointed for the first hearing. It is not to be inferred from that

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petition—Before filing schedule.]—The insolvent filed his petition in the Insolvent Ct., & the usual order was passed, vesting all the insolvent's estate & effects in the official assignee from the date of the filing of the petition. Before the insolvent filed his schedule in the Insolvent Ct., he was executed for murder:—*Held:* 11 & 12 Vict. c. 21, ss. 21, 26, gave the official assignee ample powers for the ascertainment & realisation of an insolvent's estate without the aid of a schedule.—*Re* KALLEE CHURN KHETTRY, 1 Ind. Jur. O. S. 16.—**IND.**

1339 ii. ——— ——— *Petition dismissed—Reinstatement.*]—When an insolvent dies before adjudication, & his petition is dismissed, the ct. will, though the order of dismissal is of record, reinstate the petition, so as to have the insolvent's estate administered as if no dismissal had taken place.—*Re* YOUNG (1866), 11 Ir. Jur. 322.—**IR.**

t. *Death of party instituting proceedings—Jurisdiction of court.*]—Proceedings in the Insolvent Ct. do not necessarily abate by the death of the party who institutes such proceedings. There is nothing in Insolvency Act, or in the rules of the ct., which prevents the comr. from allowing the proceedings to be carried on by the representative of such deceased party, he being interested in them.—*Re* RAMSABUK MISSER, PALTU *v.* JANKI PRASAD, RAMZAN ALI *v.* JANKI PRASAD (1870), 6 B. L. R. 119. —**IND.**

provision that during the first month, an adjournment ought as a matter of course to be granted if both parties desire it. The granting or refusing of an adjournment is entirely within the registrar's discretion.—*Re* HEYL, *Ex p.* MORGAN, [1918] 1 K. B. 452 ; 87 L. J. K. B. 603 ; 118 L. T. 546 ; [1918–19] B. & C. R. 23, C. A.

1348. —— As to granting stay pending appeal —Stay previously allowed pending action.]—When petitioning creditor's debt is disputed, & the registrar has stayed proceedings for the purpose of having such validity determined, he need not further stay proceedings after a decision in favour of petitioning creditor has been given by a ct. of first instance, unless it is shown to his satisfaction that a *bonâ fide* appeal is pending.—*Re* YEATMAN, *Ex p.* YEATMAN (1880), 16 Ch. D. 283 ; 44 L. T. 260 ; 29 W. R. 457, C. A.

1349. Application for stay of proceedings—Necessity for.] — *Semble :* if the practice of staying proceedings on equitable grounds was applicable to proceedings under 1869 Act, a special application to stay proceedings must be made, & the equitable grounds could not be used as a defence to a petition for adjudication.—*Re* CLAXTON, *Ex p.* CLAXTON (1872), 7 Ch. App. 532 ; 41 L. J. Bcy. 56 ; 27 L. T. 257 ; 20 W. R. 876, L. JJ.

Annotations :—**Refd.** Newson *v.* Law Soc. (1912), 57 Sol. Jo. 80, C. A. **Mentd.** *Re* A Debtor, *Ex p.* Peak Hill Goldfield, [1909] 1 K. B. 430, C. A.

1350. Grounds for granting—New case in affidavits in reply.]—Where petitioner made out a new case in his affidavits in reply, which were filed only three days before the petition was set down for hearing, the ct. permitted the hearing to be postponed, in order that resp. might have time to answer the affidavits, but as he had given no notice of the application, he was ordered to pay the costs of the day.—*Re* JONES, *Ex p.* ROGERS (1842), 2 Mont. D. & De G. 503.

1351. —— Appeal pending—Petition founded on judgment.]—When in a bkpcy. petition the act of bkpcy. relied on is the failure to comply with a bkpcy. notice to pay a judgment debt, the mere fact that an appeal is pending from the judgment is not a sufficient ground for staying the proceedings upon the petition.—*Re* FLATAU, *Ex p.* SCOTCH WHISKY DISTILLERS, LTD. (1888), 22 Q. B. D. 83 ; 37 W. R. 42 ; 5 T. L. R. 5, C. A.

Annotations :—**Refd.** *Re* Easton, *Ex p.* Dixon (1893), 10 Morr. 111, D. C. **Mentd.** *Re* Van Laun, *Ex p.* Chatterton (1907), 76 L. J. K. B. 644, C. A. ; Boaler *v.* Power, [1910] 2 K. B. 229, C. A.

1352. —— —— —— Discretion of registrar—Interference by Court of Appeal.]—The Ct. of Appeal will not interfere with the exercise of discretion by the registrar, under 1883 Act, s. 7 (4), in adjourning the hearing of a bkpcy. petition founded on non-compliance with a bkpcy. notice in respect of a judgment debt, when an appeal is pending from the judgment, unless it is clear that the registrar could not have been right. If the appeal appears to be a *bonâ fide* one, the hearing of the bpkcy. petition ought to be adjourned. If the appeal is evidently frivolous, a receiving order ought to be made, notwithstanding its pendency.—*Re* RHODES, *Ex p.* HEYWORTH (1884), 14 Q. B. D. 49 ; 54 L. J. Q. B. 198 ; 52 L. T. 201 ; 1 Morr. 269, C. A.

Annotations :—**Consd.** *Re* Flatau, *Ex p.* Scotch Whisky Distillers (1888), 22 Q. B. D. 83, C. A. ; *Re* French, *Ex p.* French (1889), 62 L. T. 93, C. A. **Refd.** *Re* Debtor, *Ex p.* Booth's Distillery (1901), 45 Sol. Jo. 519, C. A.

1353. —— —— —— ——.]—Where a bkpcy. petition is presented by a creditor founded on the failure of debtor to pay a judgment debt, & an appeal is pending from such judgment, it is a matter of discretion for the registrar whether he will stay the proceedings or not, & the judgment debtor cannot in such case under 1883 Act, s. 7 (4), claim a stay of proceedings as of right.

Where the registrar in the exercise of his discretion refuses to stay the proceedings, the Ct. of Appeal will not interfere with his decision, unless it is clearly of opinion that the discretion was wrongly exercised.—*Re* FRENCH, *Ex p.* FRENCH (1889), 24 Q. B. D. 63 ; 62 L. T. 93 ; 38 W. R. 52 ; 6 T. L. R. 1 ; 6 Morr. 258, C. A.

1354. —— —— —— ——.]—T. obtained judgment against R. & others for £250 damages, & a stay of execution was granted upon that sum being paid into ct. Defts. having appealed but without success applied for a stay pending an appeal to the House of Lords, but the stay was refused. The costs were taxed & a bkpcy. notice founded upon the judgment debt & costs was served upon R., & a bkpcy. petition was presented against him. Remaining defts. had already filed their own petitions. An appeal to the House of Lords having been entered, the registrar granted an unconditional stay of proceedings on the petition pending the appeal & the Div. Ct. refused to interfere with his discretion. Petitioning creditor appealed by leave :—*Held :* though the ct. would be slow to interfere with the discretion of the registrar unless it were wrongly exercised, in the circumstances the creditor ought to be permitted to have all his rights against debtor, & if proceedings were stayed it ought to be upon terms that would not inflict injustice upon the creditor, & a stay would only be granted on the terms that debtor within a month paid to the creditor's solr. the taxed costs already incurred, upon the solr.'s undertaking to repay them if the appeal were successful.—*Re* RUSSELL, *Ex p.* TEMPERTON (1893), 10 T. L. R. 165 ; 38 Sol. Jo. 143, C. A.

1355. —— —— —— ——.]—On an application by pltfs. to enter final judgment under R. S. C. Ord. 14, debtor obtained leave to defend on payment of the amount claimed into ct. He appealed, & his appeal was dismissed by the Ct. of Appeal, no stay of proceedings being asked for. Pending an appeal to the House of Lords, a bkpcy. petition was presented on a bkpcy. notice founded on the judgment debt. The registrar adjourned the hearing of the petition on the ground that the appeal was *bonâ fide*, & the Ct. of Appeal refused to interfere with the exercise of his

PART III. SECT. 3, SUB-SECT. 9.

1350 i. *Grounds for granting—Proceedings in Chancery.*]—Proceedings in bkpcy. will be stayed pending proceedings in Ch.—*Re* KENNEDY (1867), 1 I. L. T. Jo. 649.—**IR.**

1350 ii. —— *Not that debtor wishes to amend schedule.*]—The hearing will not be postponed, although the insolvent serves on all his creditors a notice that he will, when his petition comes on for hearing, apply for an adjournment with a view to have omitted creditors placed on the schedule.—*Re* ANON. (1868), 2 I. L. T. Jo. 138.—**IR.**

1350 iii. —— *Prior proceedings in another province.*]—On Apr. 23, 1896, A. was adjudged insolvent under Indian Insolvency Act, 1847, c. 21, s. 9, by the Ct. for Relief of Insolvent Debtors at Bombay, at the instance of certain creditors resident in Bombay. He had already (*viz.* on Apr. 9, 1896) been adjudged an insolvent by the Insolvency Ct. at Madras. Subsequent to the order of adjudication in Bombay, & while it was still in force, the insolvent obtained his personal discharge in the Insolvent Ct. at Madras under s. 49 of the Act :—*Held :* there being no longer any ground for apprehending that the proceedings in the Madras Ct. would be discontinued, the proceedings in the Ct. at Bombay should be stayed, leaving the Bombay creditors to take such steps in Madras as they might think proper. It would not be just or equitable to allow the proceedings in both cts. to go on concurrently. As the proceedings in Madras were prior in time, & all the assets of insolvent were vested in the official assignee there, the ct. at Bombay ought to yield to the prior claim of the ct. at Madras.—*Re* ARANVAYAL SABHAPATHY MOODLIAR *Ex p.* KARAMALLI JOOSUB (1897), 1 L. R. 21 Bom. 297.—**IND**

Sect. 3.—*Procedure on petition: Sub-sects.* 9, 10, 11 & 12.]

discretion.—*Re* DEBTOR, *Ex p.* BOOTH'S DISTILLERY, LTD. (1901), 45 Sol. Jo. 519, C. A.

As to appeals, generally, *see* Part XVII., *post.*

1356. —— Action pending—Possibility of benefit to debtor not cross claim.]—Debtor had entered into a joint venture. The exors. of his co-adventurer presented a petition, & debtor applied for an adjournment pending the hearing of a Ch. action with regard to the venture:—*Held:* the possibility of debtor being entitled to a sum in future did not amount to a cross claim, & did not entitle him to a stay of the petition.—*Re* A DEBTOR (No. 983 of 1902) (1902), 47 Sol. Jo. 128, C. A.

1357. —— To enable debtor to settle—Application on first day of hearing.]—An application for an adjournment made upon the first day appointed for the hearing of the petition, to enable petitioning creditor's solr. to consult his client on an offer by debtor to settle the debt & costs, ought to be granted.—*Re* FARLEIGH (1905), 21 T. L. R. 198, D. C.

Annotation:—**Apprvd.** *Re* Heyl, *Ex p.* Morgan, [1918] 1 K. B. 452, C. A.

1358. Grounds for refusing—Failure to search file for prior petitions.]—Adjournments ought not to be granted unless registrars are satisfied that petitioners have searched the file, so as to be affected with notice of any prior petitions.—*Re* O'SHEA, *Ex p.* TRUSTEE *v.* BROWN, *Re* O'SHEA, *Ex p.* TRUSTEE *v.* ARMSTRONG (1896), 40 Sol. Jo. 686.

1359. Conditions on which granted—Security for costs—Discretion as to amount.]—Debtor, being indebted to M. in the sum of £1,413, gave M. in part payment or satisfaction two promissory notes for £250 each, one of which was payable on June 30, 1883, & the other on July 17 following. The promissory note first payable was dishonoured at maturity. On July 13, M. served debtor with a debtor's summons for the £250 due on the first note, the consideration for which was stated in the debtor's summons to be the part payment of the £1,413. Debtor failed to comply with the debtor's summons, & made no application to have it dismissed, & M. filed a petition in bkpcy. against him for non-compliance with the summons. At the date of the petition the second promissory note was overdue, & the balance of the £1,413 was due. Debtor, on being served with the petition, gave notice of his intention to dispute petitioning creditor's debt & the act of bkpcy. On Aug. 24 the petition was heard, & debtor then objected to the validity of the note, & also contended that adjudication should not be made until the validity of a cross-claim against M. had been determined in an action, which had already been commenced. The registrar ordered debtor to give security for the payment of £1,000, of which £250 was to be paid on Aug. 25, for or towards payment of such sum as might be recovered by M. in any proceedings for the £1,413 & the costs, & that on payment the bkpcy. proceedings should be stayed till the decision in such action, but that in case of default debtor should be adjudicated a bkpt. Debtor, not having paid into ct. even the first instalment, was adjudicated a bkpt. on Aug. 29. On appeal debtor contended that the registrar had no power to order security for a greater amount than the amount of the debt on which the petition was founded:—*Held:* although as a general rule security should not be required for an amount greater than that of the debt on which the petition was founded, in special circumstances security for a greater amount could be required, & the facts that the debt, on which the petition was founded, was part of an alleged larger debt of £1,413 made up of debts all connected with each other, & that when the petition was presented a larger sum was due than the debt on which the petition was founded, constituted special circumstances which justified the order.—*Re* EVANS, *Ex p.* EVANS (1883), 50 L. T. 158; 32 W. R. 281, C. A.

1360. —— Payment of costs—Undertaking to return if appeal successful.]—*Re* RUSSELL, *Ex p.* TEMPERTON, No. 1354, *ante.*

1361. Effect of payment into court during stay.]—*Re* GENTRY, No. 1072, *ante.*

SUB-SECT. 10.—SUBSTITUTION OF CREDITORS OR DEBT.

1362. Surety substituting debt—"Any other creditor."]—Petitioning creditor issued a fiat on a debt of £700, but the greater part being contracted during bkpt.'s minority & not for necessaries, the debt was reduced below £100, & was insufficient to support the fiat. Petitioning creditor had also accepted bills for the accommodation of bkpt., which having been indorsed by bkpt. to A., were proved by A. under the fiat. Petitioning creditor subsequently paid the bills:—*Held:* on indemnifying A., & on presenting a petition in the name of A. for that purpose, petitioning creditor was entitled, under 6 Geo. 4, c. 16, ss. 18 & 52, as a surety paying the debt, to substitute the debt so proved on the bills by A. for the original petitioning creditor's debt, so as to support the fiat, notwithstanding the words "any other creditor" in s. 18.—*Re* ROGERS, *Ex p.* ROGERS (1835), 4 Deac. & Ch. 623; 2 Mont. & A. 153; 4 L. J. Bcy. 19, Ct. of R.

1363. Debt of one creditor insufficient.]—Where a petitioning creditor's debt is compounded of debts due to two individuals, & one is found to be insufficient, the debt of another individual may be substituted for the debt so found insufficient.—BYERS *v.* SOUTHWELL (1839), 6 Bing. N. C. 39; 8 Scott, 238; 133 E. R. 15.

See, now, 1914 Act, s. 111.

1358 i. *Grounds for refusing—Application not capable of being granted.*]—Where in an application for voluntary surrender the schedules showed the assets to exceed the liabilities by over £20,000, & appct. applied for a postponement, to which certain creditors consented:—*Held:* as the application for sequestration could not be granted, the postponement should be refused.—*Ex p.* STEPNEY (1905), T. S. 27.—**S. AF.**

a. *Petition standing over—New petition unnecessary.*]—When a petition is ordered to stand over, a new petition is not necessary to bring the matter again before the ct. If any new fact has occurred, on which it is requisite that the ct. should adjudicate, a supplemental petition is necessary to state that fact.—*Re* GAVACAN (1842), 2 Dr. & War. 432.—**IR.**

b. *Successive adjournments—Not a ground for dismissal.*]—A creditor's petition was adjourned from time to time, & not heard until five months after it was presented:—*Held:* as the adjournments were not obtained in order to get an unfair advantage over the other creditors, the delay was not, in the circumstances, sufficient to justify a dismissal of the petition.—*Re* SOMERVILLE (1909), 28 N. Z. L. R. 1055.—**N.Z.**

PART III. SECT. 3, SUB-SECT. 10.

c. *Delay of petitioning creditor.*]—The effect of 1857 Act, s. 121, is that for five days, or any extended time allowed by the ct. for the purpose within such five days after the petition was filed, petitioning creditor has a n exclusive right to proceed to adjudication, that after the expiration of the five days, or the time so extended, & within the seven days next following, any other creditor duly qualified, in common with petitioning creditor, has the power of proceeding to adjudication.—*Re* MURDOCK (1880), 14 I. L. T. 105.—**IR.**

1364. Debt on bill not in creditor's possession.]—A creditor, who had proved under the fiat, applied to have his debt substituted for that of petitioning creditor. Petitioning creditor's debt was on a bill of exchange, which had been paid & indorsed to a bank, in whose hands it remained at the date of the fiat. The order for substitution was made with costs against petitioning creditor, who must take all the consequences of his mistake.—*Re* GOODWIN, *Ex p.* CATTLEY (1839), 4 Deac. 138; Mont. & Ch. 360, Ct. of R.

1365. After petition dismissed—Three months after act of bankruptcy.]—More than three months after the execution of an assignment for benefit of creditors two non-assenting creditors applied to rescind the order dismissing a petition founded on the execution by debtor of the deed, & asked that their names might, under 1883 Act, s. 107, be substituted for those of the original petitioning creditors:—*Held:* the ct. had no jurisdiction under s. 107 to entertain the application, the petition having been dismissed, & more than three months having elapsed since the act of bkpcy. upon which it was founded.—*Re* MAUGHAM, *Ex p.* MAUGHAM (1888), 21 Q. B. D. 21; 57 L. J. Q. B. 487, D. C.
Annotation:—**Consd.** *Re* Maund, *Ex p.* Maund, [1895] 1 Q. B. 194.

SUB-SECT. 11.—WITHDRAWAL OF PETITION.

1366. Leave to withdraw—Creditor's petition—Terms to be stated to court.]—Leave to withdraw a creditor's bkpcy. petition should not be given without the ct. being first informed of the facts of the case & the proposed terms of withdrawal, so that it may exercise its judgment as to whether the case is a proper one for allowing a withdrawal. —*Re* BEBRO, [1900] 2 Q. B. 316; 69 L. J. Q. B. 618; 82 L. T. 773; 48 W. R. 561; 7 Mans. 284, C. A.
Annotation:—**Mentd.** *Re* Sunderland, [1911] 2 K. B. 658, C. A.

SUB-SECT. 12.—AMENDMENT.

1367. Discretion of court—Formal defects—Distinction between notice & petition.]—The ct., in the exercise of its power to amend formal defects under 1883 Acts, s. 143, draws a considerable distinction between a bkpcy. notice & a petition. In the latter case the ct. will use its powers of amendment more readily than in the former, as all the preliminary steps have been complied with, & the act of bkpcy. is complete.—*Re* COLLIER, *Ex p.* DAN RYLANDS, LTD. (1891), 64 L. T. 742; 8 Morr. 80, D. C.
Annotations:—**Expld.** *Re* O. C. S., *Ex p.* The Debtor, [1904] 2 K. B. 161, C. A. **Refd.** *Re* Whitley, *Ex p.* Mirfield Commercial Co. (1891), 65 L. T. 351; *Re* Debtor (478 of 1908), [1908] 2 K. B. 684, C. A.

1368. —— To demand verification by affidavit.]—When a bkpcy. petition is amended under an order of the ct., the judge has a discretion as to requiring the amendment to be verified by affidavit, & if the alteration is an immaterial one, an affidavit will not be required.—*Re* RITSO, *Ex p.* RITSO (1883), 22 Ch. D. 529; 52 L. J. Ch. 535; 48 L. T. 376; 31 W. R. 373, C. A.
Annotation:—**Mentd.** *Re* Lennox, *Ex p.* Lennox (1885), 16 Q. B. D. 315, C. A.

1369. For what purpose granted—To join assignee supposed to have died—Applicant to pay all costs.]—Application was made that a petition which stood in the day's paper, might stand over, for the purposes of amendment, by adding another assignee as a party to it, he having been previously supposed to be dead:—*Held:* this could only be granted upon appct. paying the costs of all parties served with notice of the application.—*Re* JOHNSON, *Ex p.* STORY (1834), 4 Deac. & Ch. 504.

1370. —— To join trustee of insolvent partner.]—Judgment was obtained by a firm against O. Between the issue of the writ & the signing of judgment one of the partners filed a petition, upon which a trustee was afterwards appointed. Between the filing of the petition & the appointment of a trustee a bkpcy. notice was served upon O., & subsequently a bkpcy. petition was presented against him in the name of the firm:—*Held:* there was a complete act of bkpcy., but no receiving order could be made upon the petition as it stood, & leave should be given to amend it by making the trustee of the insolvent partner co-petitioner.—*Re* OWEN, *Ex p.* OWEN (1884), 13 Q. B. D. 113; 53 L. J. Ch. 863; 50 L. T. 514; 32 W. R. 811; 1 Morr. 93, C. A.
Annotation:—**Mentd.** *Re* Maund, *Ex p.* Maund, [1895] 1 Q. B. 194.

1371. —— To join cestui que trust—Applicant to pay all costs.]—A bkpcy. petition having been presented by a bare trustee of a debt, & dismissed on the ground that the *cestui que trust* ought to have been joined as a petitioner, leave was given by the Ct. of Appeal, though more than three months had elapsed since the presentation of the petition, to amend it by joining the *cestui que trust*, with her consent, but applt. was ordered to pay the costs of the appeal, & the

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PART III. SECT. 3, SUB-SECT. 11.

d. *Right to withdraw—Within what time.*]—A creditor is not prevented from interpleading in an action because another creditor who has issued an attachment in insolvency under 1864 Act elects to withdraw such attachment within 5 days from the return day of the writ.—WORTHINGTON *v.* TAYLOR, 10 C. L. J. 333.—**CAN.**

e. *Agreement to withdraw—Whether extortion.*]—A petitioning creditor can, after presenting the petition, agree with debtor to withdraw the petition upon being paid the whole or a part of the debt due, & such agreement does not amount to extortion, unless the creditor agrees to accept a bonus as part of the consideration for withdrawing the petition.—*Re* SOMERVILLE (1909), 28 N. Z. L. R. 1055.—**N.Z.**

f. *Leave to withdraw — Debtor's petition—Compromise.*]—The Insolvent Ct. has no power to allow an insolvent to withdraw his petition of insolvency, on the ground that he has made a compromise with his creditors.—*Re* PYARICHAND MITTER (1871), 6 B. L. R. 558. —**IND.**

g. *Withdrawal for which no statutory provision—Not equivalent to dismissal by consent.*]—A withdrawal of a petition, for which no provision is made in Insolvency Act, cannot be regarded as the legal equivalent to its dismissal by consent.—HAJI SAJAN *v.* MACLEOD (1907), I. L. R. 32 Bom. 321. —**IND.**

PART III. SECT. 3, SUB-SECT. 12.

1367 i. *Discretion of court—Defect in substance.*]—Where a petition is presented, which alleges what is not an act of bkpcy., the ct. has no power to allow an amendment, which in effect substitutes an allegation of an act of bkpcy. The defect is not a formal defect or irregularity within 1892 Act, s. 127.—POLAIN *v.* SARGOOD BROTHERS (1908), 10 W. A. L. R. 160.—**AUS.**

1369 i. *For what purpose granted—To amend defect in bankruptcy notice—Objection raised too late.*]—On the hearing of a bkpcy. petition founded on non-compliance with a bkpcy notice issued by the Comrs. of Taxation, it was objected by debtor that the notice was bad, as it did not purport to be issued by any person or corpn.:—*Held:* even if that were an informality, it would be ordered to be amended, & in any case the point was taken too late. —*Re* CARTER SMITH, *Ex p.* TAXATION COMRS. (1908), 8 S. R. N. S. W. 246.—**AUS.**

1369 ii. —— *To insert new causes of action.*]—Leave to amend a petition by inserting new causes of action should not be given at a time when by doing so the ct. would be depriving deft. of the plea of limitation.—GUNNIS & CO. *v.* MAHOMED AYYUB SAHIB (1913), I. L. R. 37 Mad. 555.—**IND.**

1369 iii. —— *To remedy omission to state creditor secured.*]—An omission to state the fact that petitioning creditor is a secured creditor & the value of his security is one that can be cured by amendment.—GUNNIS & CO. *v.* MAHOMED AYYUB SAHIB (1913), I. L. R. 37 Mad. 555.—**IND.**

Sect. 3.—*Procedure on petition: Sub-sects.* 12 & 13, *A. & B.*]

costs, if any, occasioned by the amendment.—*Re* HASTINGS, *Ex p.* DEARLE (1884), 14 Q. B. D. 184; 54 L. J. Q. B. 74; 33 W. R. 440; 1 Morr. 281, C. A.

Annotations:—**Expld. & Consd.** *Re* Gamgee, *Ex p.* Ward (1891), 60 L. J. Q. B. 574, C. A. **Distd.** *Re* Maund, *Ex p.* Maund, [1895] 1 Q. B. 194, D. C.; *Re* Tucker, *Ex p.* Tucker (1895), 73 L. T. 170. **Refd.** *Re* Arkell, *Ex p.* Arkell (1889), 6 Morr. 182. **Mentd.** *Re* Palmer, *Ex p.* Brims, [1898] 1 Q. B. 419, C. A.

1372. —— —— ——.]—At the hearing of a bkpcy. petition the objection was raised on behalf of debtor that petitioning creditor was a mere trustee for his father, & the registrar, after hearing the evidence, dismissed the petition without leave to amend:—*Held:* although the registrar was justified in coming to the conclusion he did, yet, as a matter of indulgence, leave to amend the petition by joining the father should be granted, subject to the condition that all costs thrown away by his not being joined should be paid by the father within one month, including the costs of the appeal.—*Re* ELLIS, *Ex p.* HINSHELWOOD (1887), 4 Morr. 283, C. A.

Annotation:—**Refd.** *Re* Maund, *Ex p.* Maund, [1895] 1 Q. B. 194.

See, also, Nos. 1020 *et seq., ante.*

1373. —— **To join fresh creditors—To bring up debt to statutory amount.**]—A bkpcy. petition, founded upon debts which turn out to be in the aggregate insufficient to maintain it, cannot, after the lapse of three months from the date of the act of bkpcy., be amended by the addition of fresh creditors as co-petitioners, whose debts will raise the aggregate petitioning debt to the amount required by 1883 Act, s. 6.—*Re* MAUND, *Ex p.* MAUND, [1895] 1 Q. B. 194; 64 L. J. Q. B. 183; 72 L. T. 58; 43 W. R. 207; 11 T. L. R. 126; 39 Sol. Jo. 136; 1 Mans. 514; 15 R. 159, D. C.

1374. —— **To correct particulars of debt—Liberty to take out new fiat.**]—Petitioning creditor's debt was by mistake sworn to be a joint debt. The fiat had been taken out in the name of two, & had been opened. The ct. refused liberty to amend the fiat, but gave liberty to take out a new fiat.—*Re* MORRIS, *Ex p.* RHANDS (1839), Mont. & Ch. 348; 4 Deac. 124, Ct. of R.

1375. —— **To correct misdescription of petitioning creditor—Circumstances in which leave granted.**]—Petitioning creditor, secretary of an insurance society, petitioned in his capacity as such. He was correctly described as secretary of the society in the affidavit on striking the docket & in the bond, but neither in the petition nor in the commission was he so described:—*Held:* the petition & commission might be amended, where there was the affidavit to amend by, & the necessity for amendment was created by the act of the officer.—*Re* SAVERY, *Ex p.* GUTHRIE (1822), 1 Gl. & J. 245, L. C.

1376. —— —— **Circumstances in which leave refused.**]—A debt was due from H. to A., B. & C. as exors. of R. The petition stated that bkpt. was indebted to A. only, while the affidavit of debt made by A. stated the debt to be due to himself, B. & C. as such exors. The commission stated that H. had become bkpt. "with intent to defraud & hinder A. & others, his creditors, of their just debts." Bkpt. brought an unsuccessful action impeaching the commission, but having obtained a rule for a new trial, he obtained a verdict, on the ground of the incorrectness of the petition & commission. The error in the commission & petition was known to the solr. who took out the commission, before the first trial. On a petition by A., B. & C. asking (*inter alia*) that the commission & petition might be amended:—*Held:* the order asked for must be refused.—*Re* HORROCKS, *Ex p.* FORSHAW, LEECE & BANNER (1823), 1 Gl. & J. 368, L. C.

1377. —— **To correct misdescription of debtor.**]—A trader, against whom a petition for adjudication has been filed, had only been in trade ten weeks:—*Held:* the form of petition might be altered according to the fact.—ANON. (1850), 14 L. T. O. S. 469.

1378. —— ——.]—An error in the description of debtor in his petition for adjudication, as where he described himself as an "appraiser" only, he being at the same time an "auctioneer & valuer," is a misdescription material to the merits of the case, as tending to mislead creditors, & cannot be amended, but the petition will be dismissed.—*Re* SAVORY, *Ex p.* SAVORY (1864), 11 L. T. 460.

1379. —— **To correct description of act of bankruptcy.**]—A bkpcy. petition against a trader, which alleges as an act of bkpcy. that he has departed from his dwelling-house or otherwise absented himself, must allege that he did so with intent to defeat or delay his creditors, otherwise the petition will be demurrable, & must be dismissed. Such a defect is a matter of substance, not a merely formal defect, & cannot be cured by amendment after adjudication.—*Re* SKELTON, *Ex p.* COATES (1877), 5 Ch. D. 979; 37 L. T. 43; 25 W. R. 800, C. A.

Annotations:—**Consd.** *Re* Johnson, *Ex p.* Johnson (1883), 25 Ch. D. 112, C. A.; *Re* Fiddian, Squire (1892), 66 L. T. 203, D. C.

1380. —— ——.]—In a petition for adjudication the act of bkpcy alleged was that debtors "have absented themselves from their places of business, debtors' place of business being closed & no one left in charge," but the petition did not go on to allege that debtors had absented themselves "with intent to defeat or delay their creditors." The registrar amended the petition by adding the intent, & same was served again upon debtors & a receiving order made:—*Held:* as no adjudication had taken place, the omission of the words "with intent to defeat or delay creditors" was a defect which could be remedied by amendment.—*Re* FIDDIAN, SQUIRE & Co. (1892), 66 L. T. 203; 9 Morr. 95, D. C.

1381. —— **To correct particulars as to date of act of bankruptcy.**]—A bkpcy. petition presented against debtor alleged as the act of bkpcy. committed by him that debtor within three months before the date of the petition committed the following act of bkpcy., viz. "Noncompliance with a bkpcy. notice issued out of this ct. on May 13, 1890, & duly served upon (debtor) on the 13th day of the month." The petition having been dismissed on the ground that the act of bkpcy. was not sufficiently alleged upon the face of the petition:—*Held:* the objection was a purely technical one, which the registrar ought to have dealt with by amendment, & the petition

1379 i. —— *To correct description of act of bankruptcy.*]—On a creditor's petition to adjudicate debtor a bkpt. the ct. gave leave to amend the petition by inserting in lieu of the words "a return of *nulla bona*" the words "that there were not sufficient goods of the said S." [debtor] "whereon to levy distress," & directed that the petition as amended should be served on debtor:—*Held:* this was merely a technical amendment by which no injustice could have been caused to debtor, & a fresh affidavit of verification was not necessary.—*Re* SOMERVILLE (1909), 28 N. Z. L. R. 1055.—**N.Z.**

1379 ii. —— ——.]—The omission to state the intention to defeat or delay creditors either in the petition or in the affidavit is a substantial defect incurable by amendment.—GUNNIS & Co. *v.* MAHOMED AYYUB SAHIB (1913), I. L. R. 37 Mad. 555.—**IND.**

must go back to the registrar with a direction to amend & to hear the case on its merits.—*Re* LORRIMAR, *Ex p.* CONSTABLE (1890), 62 L. T. 943; 6 T. L. R. 391; 7 Morr. 235, D. C.

Annotation:—**Consd.** *Re* Dunhill, *Ex p.* Dunhill, [1894] 2 Q. B. 234.

1382. ——.]—A bkpcy. petition is defective, if it does not state the date on which the alleged act of bkpcy. was committed in accordance with 1886 & 1890 Rules, r. 143, but the defect is an informality, of which the ct. may allow amendment under 1883 Act, s. 143 (1).—*Re* DUNHILL, *Ex p.* DUNHILL, [1894] 2 Q. B. 234; 63 L. J. Q. B. 686; 1 Mans. 242; 10 R. 349, D. C.

1383. —— **To correct defect in attestation.**]—A bkpcy. petition not properly attested ought, if possible, to be amended at the hearing.—*Re* A DEBTOR (No. 3 of 1902), *Ex p.* PETITIONING CREDITORS *v.* THE DEBTOR (1902), 86 L. T. 688; *sub nom. Re* DEAN, *Ex p.* BLAIN & BREFFIT, 18 T. L. R. 606, D. C.

SUB-SECT. 13.—CONSOLIDATION AND TRANSFER.

A. Consolidation.

1384. Partnership — Separate adjudications — Followed by joint adjudication.]—After two separate adjudications of bkpcy. had been made against two partners on their own petitions, a joint adjudication was obtained against both on the petition of a joint creditor:—*Held:* an order consolidating the separate petitions with the joint petition, was irregular, & must be discharged.—*Re* POWELL, *Ex p.* HAINES (1858), 3 De G. & J. 58; 27 L. J. Bcy. 33; 32 L. T. O. S. 201; 4 Jur. N. S. 1256; 6 W. R. 642, C. A.

See, now, 1914 Act, ss. 110, 116.

1385. —— **Separate petition—Joint petition.**]—A petition to annul or impound a separate fiat issued against one of two partners in favour of a joint one is quite of course.—*Re* COPE, *Ex p.* PEMBERTON (1840), 1 Mont. D. & De G. 190, Ct. of R.

Annotation:—**Refd.** *Re* O'Reardon (1873), 9 Ch. App. 74, L. C. & L. J.

1386. —— —— ——.]—An adjudication of bkpcy. was made upon a petition presented against two partners in trade. A petition had been previously presented by the same creditor against one of the partners separately, & some proceedings had been taken under it, but no adjudication had been made:—*Held:* (1) there was power to order the proceedings under the separate petition to be consolidated with those under the joint petition; (2) bkpt. had no *locus standi* to oppose the consolidation.—*Re* HELLIWELL, *Ex p.* MACKENZIE (1875), L. R. 20 Eq. 758; 44 L. J. Bcy. 117; 33 L. T. 59.

1387. —— **Separate petitions filed in same court.**]—*Held:* 1849 Act, s. 98, applied to a case where the second petition was against all the members of the firm.

Where, under the sect., an order of annexation had been made of a joint to a prior separate petition for adjudication, & assignees had been chosen under the separate adjudication, joint creditors as well as separate creditors voting in the choice, the ct. refused to discharge the annexing order or to annul the separate in favour of the joint adjudication.—*Re* DALES, *Ex p.* GREEN (1858), 3 De G. & J. 50; 27 L. J. Bcy. 32; 44 E. R. 1187, L. JJ.

Annotation:—**Refd.** *Re* Davies, *Re* Davies & Cooper, *Ex p.* Denison & Carrick (1859), 1 L. T. 245.

B. Transfer.

1388. Convenience of creditors.] — On an affidavit that the major part of the creditors, & the witnesses to prove the requisites of the bkpcy., as well as one of bkpts., resided in the counties of Durham & Northumberland & that all the effects of bkpts. were also in one or other of those counties:—*Held:* the fiat might be directed to comrs. at Hexham in Northumberland instead of being directed to a London Comr.—*Re* HALL, *Ex p.* BOLAN (1832), 2 Deac. & Ch. 331, Ct. of R.

1389. ——.]—Where thirty-four creditors resided at Bristol, & only twenty-four at Newport, whose debts did not amount to £150, & no proceedings had been taken under the fiat:—*Held:* the fiat should be directed to comrs. at Bristol, instead of Newport.—*Re* JOHNSTON (1837), 2 Deac. 290, Ct. of R.

1390. ——.]—Motion by petitioning creditor, who lived at Manchester, to have the fiat sent to Manchester instead of Evesham in Worcestershire, to which latter place it had been directed. The creditors principally lived elsewhere than at Evesham. The motion, as asked, was refused.—*Re* FITZ (1837), 1 Jur. 288.

1391. ——.]—A town fiat was ordered to be issued, instead of a country fiat, on the ground that twenty-eight out of thirty creditors resided in London; & petitioning creditor was permitted to recoup himself the additional expenses of bkpt.'s attendance out of the estate.—*Re* GRIGG, *Ex p.* REES (1838), 3 Deac. 381; 3 Mont. & A. 684; Mont. & Ch. 39, L. C.

1392. ——.]—Where bkpt. resided at Bridge End, the majority of the creditors residing at Bristol, & the nearest list of comrs. was the Cardiff list, which met more than thirty miles from bkpt's. residence, the ct. granted an order to move the fiat to the Bristol comrs., it being more convenient to hold meetings in Bristol.—*Re* EVANS, *Ex p.* EVANS (1838), 7 L. J. Bcy. 22.

1393. ——.]—Venue of fiat not changed from Newcastle-on-Tyne to Manchester although more than two-thirds in number & value of creditors resided at Manchester & petitioning creditor & witnesses to prove the act of bkpcy. also resided there & the act of bkpcy. was there committed.—*Re* STOREY (1839), Mont. & Ch. 362, Ct. of R.

1394. ——.]—A fiat was direct to Birmingham instead of Sheffield or Daventry, in which districts bkpt. had business, in the peculiar circumstances, it being shown that Birmingham was

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1383 i. —— *To correct defect in attestation — Amendment by court.*] — The omission to have a petition attested by a solr., who was present at the signing, is an immaterial irregularity, & the mere use of the word "shall" in 1892 Act, s. 31, cannot prevent the ct. causing the omission to be rectified under s. 166 by allowing the solr. to attest the petition.—*Re* HARRISON (1904), 23 N. Z. L. R. 864.—**N.Z.**

1383 ii. —— —— *Cured by subsequent affidavit.*]—*Re* PAWSON (1910), 29 N. Z. L. R 920.—**N.Z.**

h. —— *To correct defective affidavit of verification — Supplemental affidavit.*]—Four creditors joined in a petition for the adjudication of a debtor as a bkpt. In the petition it was stated "that none of your petitioners have any security for their respective debts." An affidavit verifying the petition was severally sworn by the four petitioners, & each petitioner swore that debtor was justly & truly indebted to him in the sum named in the petition:—*Held:* if the affidavit did not contain a sufficient verification of the statement in the petition that none of the creditors were secured the ct. had power to allow, & ought to allow, an amendment by the filing of a supplemental affidavit.—BURTON *v.* TAYLOR (1909), 29 N. Z. L.R. 149.—**N.Z.**

k. *Supplemental petition—To bring new facts before the court.*] — When a petition has been ordered to stand over & any new fact has occurred on which it is requisite that the ct. should adjudicate, a supplemental petition is necessary to state the fact.—*Re* GAVACAN (1842), 2 Dr. & War. 432.—**IR.**

Sect. 3.—*Procedure on petition: Sub-sect.* 13, *B.*]

central between the two places where bkpt. carried on his business, & nearer likewise to the residence of the major part in number & value of the creditors.—*Re* HAINES (1839), 4 Deac. 47; Mont. & Ch. 72, Ct. of R.

1395. ——.]—The non-existence of creditors at the place to which a country fiat is issued, is not a sufficient reason for its removal.—*Re* BINKS (1839), Mont. & Ch. 143, Ct. of R.

1396. ——.]—Bkpt. carried on business of a silk throwster at Ilminster, it was alleged that the debts of the creditors who resided in London amounted to £18,000, that all silk bought by bkpt. had been purchased in London, that only one creditor of any consequence resided at Ilminster, & that the fiat would be better executed in London: —*Held:* the venue should not be changed from Ilminster to London, as it did not appear that any effects to be administered were in London, but on the contrary it must be presumed that they were to be found where bkpt. carried on business.—*Ex p.* KNOWLES (1839), 4 Deac. 213, Ct. of R.

1397. ——.]—An application to remove a fiat from Norfolk to London, on the ground that the debts amounted to £14,000 & creditors to the amount of £10,000 were anxious for the removal, was refused.—*Re* SMITH-WRIGHT (1839), Mont. & Ch. 144, Ct. of R.

1398. ——.]—A London creditor applied that a fiat against a Cheltenham bkpt. might be issued to the Ct. of Bkpcy. in London, Cheltenham being one hundred & twenty miles from London, & petitioning creditor, the witnesses to prove the act of bkpcy., & the majority in value of the creditors residing in London:—*Held:* the application should be granted, bkpt.'s expenses to attend meeting to surrender to be paid by petitioning creditor.—ANON. (1839), Mont. & Ch. 142, Ct. of R.

1399. ——.]—An application that a Birmingham fiat against a trader residing at Birmingham should be issued to London, all the creditors but one being in London & offering to pay bkpt.'s expenses, was refused.

The general rule is, that a fiat must issue to the place where the trader resides, from which there must be an urgent reason to deviate. The excuse in this case does not appear to me to be sufficient, although my inclination is to prefer a London to a country fiat (SIR J. CROSS).—ANON. (1839), Mont. & Ch. 142, Ct. of R.

1400. ——.]—A London fiat will not be issued against a country trader because petitioning creditor resides in London, where £1,300 out of £2,000 creditors also reside, & the proof of the act of bkpcy. is more easy & less expensive in London. —*Re* JONES, *Ex p.* RAWLINSON (1839), 3 Deac. 535; Mont. & Ch. 59.

1401. ——.]—A fiat was directed to London, instead of country, comrs., the debts amounting to £1,400, & creditors to the amount of £1,300 residing in London.—*Re* BAKER (1840), 10 L. J. Bcy. 32; 4 Jur. 1018.

1402. ——.]—Upon proof that the debts of bkpt., a draper at Cheltenham, amounted to £6,930, & that only two creditors to the amount of £1,060 resided at or near Cheltenham, that twenty-two creditors, whose debts amounted to £2,700 resided in London, that one creditor to the amount of £2,628 resided in Bedford, & that the other creditors, thirteen in number, & whose debts amounted to about £700, resided principally in the counties of Nottingham, Warwick, Stafford & Lancaster, & that all the witnesses to support the fiat resided in London:—*Held:* the fiat should be directed to London.—*Re* WILD, *Ex p.* LYCETT (1840), 4 Deac. 272; Mont. & Ch. 642, L. C.

1403. ——.]—Three persons carried on business at L. in Carmarthenshire, two residing there, & managing the business, & the third, a dormant partner, residing in London. All the partnership property was at L. A fiat was sued out by the son of the dormant partner against the firm, & the fiat was transmitted to the Ct. of Bkpcy. in London. On the petition of some of the creditors of the firm, the fiat was removed to Bristol.—*Re* GRYLLS (1848), 17 L. J. Bcy. 7; 10 L. T. O. S. 422.

1404. ——.]—A comr. of the London Ct. of Bkpcy. made an order for the transfer of a petition for adjudication & all proceedings thereunder from a country district to London. Bkpt. resided & had his property in the country district, but the great majority in value of his creditors lived in London, & elsewhere out of the country district:—*Held:* the order was properly within 1849 Act, s. 90.—*Re* SHAW, *Ex p.* SEWELL (1853), 3 De G. M. & G. 508; 22 L. J. Bcy. 29; 21 L. T. O. S. 27; 17 Jur. 333; 43 E. R. 199, L. JJ.

Annotation:—**Refd.** *Re* Private Arrangement, *Ex p.* Devas (1861), 3 L. T. 866.

1405. ——.]—A trader became bkpt. upon his own petition in London. The great majority of the creditors resided in & about Hull, & no London creditor had proved under the petition. At the instance of the assignees & of the country creditors: —*Held:* the prosecution of the petition should be transferred to the ct. for the Leeds district.—*Re* BAKER, *Ex p.* BAKER'S ASSIGNEES (1858), 32 L. T. O. S. 200.

1406. ——.]—Bkpcy. proceedings had been commenced at London & Brighton. The largest creditors were in London, but the majority resided at Brighton, their debts, however, not being disputed. The trustee resided in London:—*Held:* the proceedings should be transferred to London. —*Re* LINTON (1892), 8 T. L. R. 377, C. A.

1407. —— **What evidence required.**]— The ct. will not order the transfer of proceedings under an adjudication of bkpcy. under 1861 Act, s. 88, except upon evidence of a grave & preponderating majority of the creditors desiring it.

Where the first meeting of the creditors under the bkpcy. had been held, & the choice of assignees adjourned, the ct. would not, in the circumstances, interfere until the choice, when the creditors might have an opportunity of expressing their opinion as to the desirability of the proposed transfer.—*Re* SYME, *Ex p.* ROYAL BANK OF LIVERPOOL (1861), 5 L. T. 696.

1408. Inquiries more conveniently pursued.]— The fact of there being inquiries necessary, which cannot be so well pursued in the country as in London, is sufficient to remove the fiat to London, though no case of improper behaviour is established

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PART III. SECT. 3, SUB-SECT. 13.—B.

1408 i. *Proceedings more efficiently or conveniently carried on.*]—The Ct. of Bkpcy. has not jurisdiction to make an order under Local Bkpcy. (Ireland) Act, 1888, s. 15 for the transfer of proceedings from a local ct. to the Ct. of Bkpcy., or *vice versâ*, without evidence that the proceedings can be more "efficiently or conveniently" carried on in the ct., to which it is proposed to transfer them.—*Re* HILL (1905), 39 I. L. T. 109.—IR.

1. *Proceedings commenced under earlier Act.*]—All estates brought under 1883 Act should be dealt with by that Act, & any application to transfer proceedings in any particular estate so as to deal with them under 1892 Act should be upon special

against the comrs. in the country.—*Re* BURRELL, *Ex p.* GRANT (1833), 2 L. J. Bcy. 86.

1409. Examination of bankers' books.]—On an application to change the venue of a fiat from Bristol to London:—*Held:* as bankers' books required to be examined, & it would be very inconvenient to the estate to have the expense of bringing them & their books to London, the application should be refused.—*Re* MOSES, *Ex p.* BRETT (1839), Mont. & Ch. 70, Ct. of R.

1410. Commissioners not available.] — Where there were only two comrs. who could by any probability, & that with some inconvenience, be procured to act at Pontypool, & the debts amounted to £60,000 & only four of the creditors resided in the neighbourhood of Pontypool:—*Held:* the venue of the fiat should be changed from Pontypool to Bristol.—*Re* GEACH (1839), 4 Deac. 57; Mont. & Ch. 145, L. C.

1411. Refusal of commissioners to act.]—The venue was changed where the comrs. refuse to act.—*Re* TODD (1840), 4 Jur. 91, Ct. of R.

1412. Alleged fraudulent deposit of goods in another district.]—The venue of a fiat was changed from Southampton to London, nearly all the creditors residing in London, the act of bkpcy. being committed there, & an alleged fraudulent deposit of goods in London, petitioning creditor & the assignees paying the additional expenses of bkpt.—*Re* JAMES (1839), 4 Deac. 81; Mont. & Ch. 349; 8 L. J. Bcy. 51, Ct. of R.

1413. Collusion.]—Application to have the venue changed to Bristol. The fiat had been directed to A., a small town twenty miles from Swansea, where bkpt. had carried on business. One-third in number & value of bkpt.'s creditors resided in Bristol, the whole of the debts owing by bkpt. at A. amounted to no more than the sum of £25, & the rest of the creditors were scattered throughout sixteen other places in England, Scotland & Ireland. The application was refused, on the ground that it raised a suspicion in the mind of the ct., that there was some collusion between petitioning creditor & bkpt., & that they wished to work the fiat away from bkpt.'s place of business, & behind the backs of his neighbours. On a further application to the Lord Chancellor, supported by the affidavit of the town agent of the solr. to the fiat, stating that he did not believe that his client would countenance such collusion between petitioning creditor & bkpt. the application was granted.—*Re* MOOR (1840), 4 Jur. 107.

1414. ——.]—Where an order for a London fiat had been obtained at the instance of petitioning creditor, instead of one directed to the place where bkpt. had carried on his business, & where the greater number of his creditors resided, & it afterwards appeared to the ct., that there was reason to suspect that the venue had been changed to serve some secret purpose of bkpt., & that petitioning creditor was colluding with bkpt. to accomplish such object, the London fiat was annulled, & a country fiat directed to issue.—*Re* IRVING, *Ex p.* MILLER (1841), 2 Mont. D. & De G. 237, Ct. of R.

1415. ——.]—The circumstances that the majority of the creditors, & a large proportion of the debtors to the estate, reside within the jurisdiction of a district ct., within which the trading took place, & out of which bkpt. removed shortly before the bkpcy. with a view, it was stated, of having a friendly fiat issued against him in a ct. where his conduct would not be easily investigated, that other bkpcies. with which the one in question was connected, were in course of prosecution in the district ct. & that many of the creditors were unable to afford the expense of a journey to London:—*Held:* insufficient grounds for transferring the fiat from London to the district ct.—*Re* GARBETT, *Ex p.* DOWNES (1847), De G. 390, Ct. of R.

1416. To set aside cognovit to preferred creditor.]—Application to remove the fiat from Shepton Mallet to London, the object of the fiat being to set aside a *cognovit* to a preferred creditor. Petitioners were the only creditors whose debt was large enough to constitute a good petitioning creditor's debt, & the witnesses to prove the act of bkpcy. resided in London:—*Held:* as the validity of the *cognovit* must be ascertained before the country comrs., & proved by persons who most likely resided in bkpt.'s neighbourhood, the application must be refused.—*Re* MANSFIELD, *Ex p.* WAINWRIGHT (1839), 4 Deac. 56; Mont. & Ch. 145, Ct. of R.

1417. Debtor absconding from usual residence.]—On the application of petitioning creditor, supported by his affidavit that he had obtained a list of the creditors from bkpt.'s wife, by which it appeared that all of them except one resided in London, that bkpt. was a hawker, & that he & his wife had absconded from their usual residence, & that all the witnesses to prove the requisites to support the fiat also resided in London:—*Held:* the fiat should be directed to the Ct. of Bkpcy. in London instead of to comrs. in Dorsetshire in the very special circumstances.—*Re* GRAHAM, *Ex p.* MARTIN (1839), 4 Deac. 212; Mont. & Ch. 639, Ct. of R.

1418. Intent to elude creditors.]—The ct. will order the transfer of a petition, & the proceedings thereunder, to a district ct., where there are grounds for believing that the proceedings were instituted by bkpt. in the London ct. with an intent to elude his creditors.—*Re* BARNARD (1863), 1 New Rep. 231.

1419. Application for — How made.] — An application for transfer from London should be made to the bankruptcy judge in chambers.—*Re* WILLIAMS, *Ex p.* CHIEF OFFICIAL RECEIVER (1888), 5 Morr. 103.

1420. —— At whose instance—At what stage.]—The ct. will, at the instance of the solr. for the official assignee where no creditors' assignee is chosen, & at the sitting for bkpt. to pass his last examination & apply for his order of discharge, order a transfer of the proceedings from the ct. in London to a country district ct. within the jurisdiction of which bkpt. resided & traded, & where sixty-nine out of seventy-three of his creditors resided, only two creditors being resident in London.—*Re* TURNER, *Ex p.* TURNER (1865), 11 L. T. 719.

1421. —— On whom notice must be served.]—Upon an application for transfer of proceedings, notice should be served on bkpt. & the official receiver, notwithstanding that a trustee may have

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grounds. There must therefore be a separate application with respect to any estate proposed to be so transferred.—*Re* BANKRUPTCY ACTS OF 1883 & 1892 (1893), 11 N. Z. L. R. 142.—**N.Z.**

m. *Who may appeal against order.*]—Where an order transferring proceedings from a local ct. to the Ct. of Bkpcy. is made without evidence sufficient to give jurisdiction, any party interested in the proceedings may appeal at once to the Ct. of Appeal without moving in the Ct. of Bkpcy. to have the order discharged.—*Re* HILL (1905), 39 I. L. T. 109.—**IR.**

n. ——.]—Bkpt. is a competent applt. from an order transferring proceedings from a local ct. to the Ct. of Bkpcy. as being a party interested in such proceedings.—*Re* HILL (1905), 39 I. L. T. 109.—**IR.**

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been appointed.—*Re* YAPP, *Ex p.* TRUSTEE (1886), 55 L. T. 820.

1422. —— ——.]—Notice of an application to transfer the proceedings in a bkpcy. from a county ct. to the High Ct., or *vice versâ*, must be served upon the official receiver.—*Re* JACK (1887), 18 Q. B. D. 682; 35 W. R. 735; 4 Morr. 150.

1423. —— **Effect of delay in making.**]—The ct. will not, at the instance of creditors, under 1849 Act, s. 90, transfer a petition from the London to a country district, unless the party making the application comes promptly after the adjudication, notwithstanding the majority of the creditors reside in the district to which it is sought to transfer the petition.—*Re* BAKER, *Ex p.* JACK (1858), 32 L. T. O. S. 180.

1424. Whether appeal lies—Against refusal of certificate.]—The refusal of the judge of a county ct. to grant a certificate under 1883 Rules, r. 16, that in his opinion the proceedings under a bkpcy. petition would be more advantageously conducted in another ct., is an order from which the appeal lies, if the judge has refused to exercise his discretion in the matter. In such a case the Ct. of Appeal, if it is of opinion that the certificate ought to have been granted, will not refer the matter back to the county ct., but will itself grant the certificate.—*Re* WALKER, *Ex p.* SOANES (1884), 13 Q. B. D. 484; 1 Morr. 193, D. C.

Annotation:—**Refd.** *Re* Nicholson, *Ex p.* Nicholson (1886), 3 Morr. 46.

SUB-SECT. 14.—COSTS.

1425. Jurisdiction of court — Unsuccessful petition.]—*Held:* the ct. had no jurisdiction to order a debtor to pay any part of petitioning creditor's costs of an unsuccessful bkpcy. petition.—*Re* A DEBTOR (No. 1103 of 1909), [1910] 1 K. B. 313; 79 L. J. K. B. 263; 101 L. T. 841; 54 Sol. Jo. 217; 17 Mans. 6, C. A.

See, now, 1915 Rules, r. 187 (1).

1426. —— **Petition not served.**]—An application was made to the registrar of a county ct. to allow out of bkpt.'s estate the costs of petitioning creditor incidental to a petition filed, of which service could not be effected owing to debtor being in Paris, a receiving order being in the meantime made against debtor on his own petition:—*Held:* there was no jurisdiction to make an order as sought, the want of service of the petition being fatal.—*Re* DE BERNICEY (1911), 131 L. T. Jo. 130, D. C.

1427. Discretion of court—Formal objection.]—Where resp. took a formal objection to a petition & it was for that cause ordered to stand over:—*Held:* the costs of the day were in the discretion of the ct.—*Re* WILKS & ECROYD, *Ex p.* THOMPSON (1834), 3 Deac. & Ch. 612; 1 Mont. & A. 324; 3 L. J. Bcy. 47, 97, Ct. of R.

See, now, 1915 Rules, r. 72.

1428. Must be asked for.]—The general rule in bkpcy. is that if petitioner do not pray his costs, he cannot have them.—*Re* GOODCHILD, *Ex p.* ATKINSON (1818), Buck, 215.

1429. Of petitioning creditor—Subsequent resolution for liquidation.]—A bkpcy. petition was presented against debtor. Before the hearing he filed a liquidation petition. The hearing of the bkpcy. petition was several times adjourned, to await the result of the proceedings under the liquidation petition. Ultimately a liquidation was resolved upon, & the bkpcy. petition was then dismissed:—*Held:* petitioning creditor was entitled to be paid in priority, out of the estate, the costs of his petition, including therein the costs of & incident to a debtor's summons on which the petition was founded, & the costs of the adjournments of the hearing.—*Re* BUNNETT, *Ex p.* JEAVOUS (1876), 3 Ch. D. 320; 34 L. T. 804; 24 W. R. 851; *sub nom. Re* BURNETT, *Ex p.* JEAVONS, 45 L. J. Bcy. 128.

1430. —— **Assenting to appropriation of assets otherwise than to his expenses.**]—Although the money first received under a fiat is by 6 Geo. 4, c. 16, required to be appropriated in discharge of the expenses incurred by petitioning creditor, yet, where he assents to a different appropriation, he is estopped from afterwards contending that the directions of the Act have not been complied with. —HORNIDGE *v.* EYLAND (1835), 2 Scott, 357.

1431. Improper petition.]—An attorney was ordered to pay the costs of an improper petition in bkpcy.—*Ex p.* CUTHBERT (1815), 1 Madd. 78; 56 E. R. 30.

See, now, 1914 Act, s. 109 (1).

1432. Expense of rendering witness competent.]—A petitioning creditor is entitled to be repaid out of the estate a sum paid to a creditor to render him a competent witness to support the fiat.—*Re* TILSON, *Ex p.* FORTH (1835), 2 Mont. & A. 381, Ct. of R.

1433. Of petitioning creditor who is solicitor.]—In taxing the costs of a petitioning creditor, who acts as his own solr., the analogy of an attorney suing in his own right is to be followed rather than that of a trustee.—*Re* WEST, *Ex p.* CHAMBERLAYNE (1850), 4 De G. & Sm. 17; 19 L. J. Bcy. 10; 15 L. T. O. S. 165; 14 Jur. 997; 64 E. R. 715.

1434. Two petitioners — Priority.]—If two creditors present separate petitions the costs of the creditor, upon whose petition the adjudication is founded, will be paid in priority to the costs of

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PART III. SECT. 3, SUB-SECT. 14.

1431 i. *Improper petition.*]—Where a petition has been presented by a person who had not proved his debt but has bkpt. in execution, & by the petition impugns the commission for frauds committed before the commission issued, it will be dismissed with costs. —*Re* DOYLE, 1 Ir. L. Rec. 1st ser. 373. —**IR.**

1434 i. *Two petitions—Trader's petition filed before creditor's petition—Priority.*]—A trader filed a petition to be declared a bkpt. Afterwards a creditor filed another. The creditor got priority, & costs of the petition filed by the trader were not given him. —*Re* DALY (1861), 13 Ir. Jur. 418.—**IR.**

1434 ii. —— *Trader's petition filed after creditor's petition.*]—Where a debtor files a petition to be adjudicated a bkpt. between the filing & hearing of a creditor's petition, he is not entitled to costs, unless he can show that his action was in some way for the benefit of his creditors.—*Re* GRINDLEY (1891), 11 N. Z. L. R. 10.—**N.Z.**

1434 iii.—— ——.]—Where a creditors' petition is justifiable, & is the reason why debtor is induced to petition, petitioning creditors will be entitled to costs up to the time they had notice of debtor's filing.—*Re* GRINDLEY (1891), 11 N. Z. L. R. 10.—**N.Z.**

o. *Several petitions.*]—The rule in bkpcy., that no costs are given against bkpt. on his petition, will be guarded against abuse after two petitions for the same object, dismissed by a direction in the order dismissing the second petition, that the assignees retain the costs of opposing the application out of the funds in their hands, & that the secretary of bkpts. should receive no further petition on the subject of the petition from petitioner, until such costs have been recouped to the estate of bkpt.—*Re* BRISCOE, *Ex p.* BRISCOE (1828), 1 Mol. 420.—**IR.**

p. *Debtor partners—Appearing separately.*]—Upon a petition for the sequestration of a partnership estate the partners appeared separately, but raised the same defences:—*Held:* one set of costs only should be allowed debtors.—*Re* THOMAS & COWIE (1883), 9 V. L. R. 2.—**AUS.**

q. *Costs of filing—Debtor's petition.*]—Where a debtor has been adjudicated bkpt. on his own petition, he is entitled to a refund of the cost of filing, including the amount allowed for his solr.'s costs. If debtor should have borrowed money to enable him to file, the sum borrowed should be refunded to the lender.—*Re* BENNETT (1893), 12 N. Z. L. R. 332.—**N.Z.**

the other creditors.—*Re* SPRINGALL, *Ex p.* PAGE (1871), 25 L. T. 716.

Annotation :—**Mentd.** *Re* Johnson, *Ex p.* Royle (1875), 33 L. T. 39.

See, now, 1915 Rules, rr. 117, 187 (2).

1435. In county court—Solicitor attending as witness.]—A solr. having been summoned as a witness before the registrar of a county ct. in a bkpcy. proceeding, & having received only his travelling expenses, brought an action against the official receiver, by whom he was summoned, for the amount allowed by C. C. R. 1889 appendix to a professional witness :—*Held :* he was entitled to recover.—CHAMBERLAIN *v.* STONEHAM (1889), 24 Q. B. D. 113 ; 59 L. J. Q. B. 95 ; 61 L. T. 560 ; 38 W. R. 107 ; 6 T. L. R. 21, D. C.

1436. Of rehearing.]—The assets remaining after payment of the actual expenses incurred in realising any of the assets of debtor, are liable, subject to any order of the ct. to the payment of the taxed costs of petitioning creditor. The "taxed costs of petitioning creditor" mentioned in 1886 Rules, r. 125, include as a rule the costs of a rehearing by the registrar & the Ct. of Appeal.

More than a year elapsed between the date of a receiving order & an application for a rehearing, & in the meantime the trustee incurred considerable costs in tracing & getting in bkpt.'s assets & in successful litigation for that purpose. The assets were insufficient to pay in full the bill of costs of the solrs. properly employed by the trustee in the above matters, & also petitioning creditor's costs of the rehearing in the ct. below & on appeal :—*Held :* no sufficient reason was shown for varying the order of priorities prescribed by the above rule.—*Re* BRIGHT, *Ex p.* WINGFIELD & BLEW, [1903] 1 K. B. 735 ; 72 L. J. K. B. 287 ; 10 Mans. 31.

See, now, 1915 Rules, r. 117.

See also, Part IV., Sect. 5, *post.*

1437. Solicitor's disbursements—Payment of deposit.]—The £5 deposit paid into ct. under 1886 Rules, r. 147, on the presentation of a bkpcy. petition is properly entered as a disbursement in a solr.'s bill of costs.—*Re* GRANT, BULCRAIG & Co., [1906] 1 Ch. 124 ; 75 L. J. Ch. 106 ; 93 L. T. 760 ; 54 W. R. 165 ; 22 T. L. R. 96 ; 50 Sol. Jo. 96.

1438. —— Counsel's fees—Settling petition.]—The ct. will not, on motion, entertain the question of the reasonableness of certain items in a bill of costs. If those items are taxed off by the registrar, in pursuance of the usual practice, the special exceptions should have been mentioned at the hearing. *Semble :* the fee to counsel for settling a petition, is reasonable, & should be mentioned. —*Re* GRAY (1835), 4 L. J. Bcy. 76.

See, now, 1915 Rules, r. 149.

1439. Set-off.]—Costs payable by a debtor on failing to set aside a bkpcy. notice, & costs payable by the creditor on the dismissal with costs of his bkpcy. petition based on such notice, may be set off unless such costs payable by the debtor form part of the petitioning creditor's debt.—*Re* A DEBTOR, *Ex p.* PETITIONING CREDITORS, [1907] 2 K. B. 896 ; 97 L. T. 644 ; 51 Sol. Jo. 705.

See, also, Nos. 1132 *et seq., ante.*

1440. ——.]—A creditor obtained judgment against the separate estate of a married woman, who was a trader. He presented a bkpcy. petition against her based on his judgment debt, which was dismissed with costs, & an order made in the Bkpcy. Ct. for their payment was not complied with. On a judgment summons under Debtors Act, 1869 (c. 62) :—*Held :* debtor could not set off his judgment debt against the taxed costs.—*Re* DRUMMOND, *Ex p.* ASHMORE, [1909] 2 K. B. 622 ; 78 L. J. K. B. 935 ; 25 T. L. R. 706 ; 53 Sol. Jo. 651 ; 16 Mans. 200.

1441. Security for costs—Petition for rehearing by person resident abroad.]—Where a party, who upon an original hearing of a petition was represented by resp., petitioned for a rehearing describing himself as resident abroad he was required to give security for costs.—*Re* HIGGINSON, *Ex p.* HINDS, *Ex p.* HIGGINSON (1850), 3 De G. & Sm. 613 ; 14 L. T. O. S. 449 ; 14 Jur. 286 ; 64 E. R. 629.

1442. Stay of proceedings pending appeal—Payment—Undertaking to return.]—*Re* RUSSELL, *Ex p.* TEMPERTON, No. 1354, *ante.*

Costs, generally, see Part XVI., *post.*

Part IV.—Receiving Order.

SECT. 1.—IN GENERAL.

1443. Jurisdiction of court—Not affected by abortive liquidation proceedings under 1869 Act.]—*Held :* the fact that liquidation proceedings under 1869 Act were pending when 1883 Act came into operation, & that those proceedings afterwards came to an end by reason of the creditors failing to pass any resolution, did not affect the power of the ct. to make a receiving order on a bkpcy. petition presented under 1883 Act.—*Re* PRATT, *Ex p.* PRATT (1884), 12 Q. B. D. 334 ; 53 L. J. Ch. 613 ; 50 L. T. 294 ; 32 W. R. 420 ; 1 Morr. 27, C. A.

Annotations :—**Consd. & Expld.** *Re* May, *Ex p.* May (1884), 12 Q. B. D. 497, C. A. **Consd.** *Re* Pulborough Parish School Board Election, Bourke *v.* Nutt, [1894] 1 Q. B. 725, C. A.

1444. —— To refuse joint order—Joint petition by debtors neither partners nor joint traders.]—Where debtors, who are neither partners nor joint traders, join in presenting a bkpcy. petition, the ct. has jurisdiction, notwithstanding 1883 Act, s. 8, to refuse to make a joint receiving order.—*Re* BOND (1888), 21 Q. B. D. 17 ; 57 L. J. Q. B. 501 ; 58 L. T. 887 ; 36 W. R. 700 ; 5 Morr. 146.

1445. —— Where jurisdiction to commit—On judgment summons for alimony—Wife not judgment creditor.]—An order was made in the Divorce Ct. for payment of alimony. The payments having fallen into arrear, a judgment summons was issued by the wife against her husband, & with the consent of the wife & in the absence of the husband, a receiving order was made in lieu of an order for committal :—*Held :* the wife was not a judgment creditor within 1883 Act, s. 103 (5), & a receiving order could not be made.—*Re* OTWAY, *Ex p.* OTWAY (1888), 58 L. T. 885 ; 36 W. R. 698 ; 4 T. L. R. 489 ; 5 Morr. 115.

1446. —— —— Discretion where committal could not have been made—Debtor unable to pay.]—A judgment creditor applied in a county ct. for the committal of the judgment debtor, on the ground that he had means to satisfy the debt, but

1441 i. *Security for costs—Debtor's petition in insolvency alleged as act of bankruptcy.*]—When a creditor, making the filing of a petition in insolvency the act of bkpcy., presents a petition in bkpcy., & the insolvent is declared bkpt., the ct. need not direct petitioning creditor to lodge a sum for costs.—*Re* CRAIG (1868), 2 I. L. T. Jo. 689.—IR.

had not done so. The county ct. judge after hearing the evidence from which it appeared that debtor had assigned the whole of his property on the morning of the day when judgment was given against him:—*Held:* the judgment debtor had no means of satisfying the debt & he refused to commit; but on the application of the judgment creditor the judge made a receiving order in lieu of a committal order. On a summons for a prohibition on the ground that the judge, having no power to make a committal order had no jurisdiction to make a receiving order, as such receiving order could only be made "in lieu of" a committal order, & could not be made where a committal order could not be made:—*Held:* the judge had a discretion to make, & had properly made, the receiving order "in lieu of" a committal order, although he could not have made a committal order in consequence of the inability of the judgment debtor to satisfy the debt.—R. *v.* SUSSEX COUNTY COURT JUDGE (1888). 59 L. T. 32.

Annotation:—**Distd.** *Re* Debtor, *Ex p.* Debtor, [1905] 1 K. B. 374, D. C.

1447. ——— ——— Foreigner.]—Where there is jurisdiction to commit a judgment debtor under Debtors Act, 1869 (c. 62), s. 5, there is jurisdiction under 1883 Act, s. 103 (5), to make a receiving order against him in lieu of committing him, even although he is a foreigner.—*Re* CLARK, *Ex p.* CLARK, [1898] 1 Q. B. 20; 66 L. J. Q. B. 875; 77 L. T 417; 46 W. R. 103; 14 T. L. R. 7; 42 Sol. Jo. 15, C. A.

Annotation:—**Refd.** Blount *v.* Whitely (1898), 79 L. T. 635, C. A.

See, further, Nos. 193 *et seq., ante.*

1448. ——— ——— Only on such evidence as would have justified committal.]—The ct. has no jurisdiction to make a receiving order in bkpcy. under 1883 Act, s. 103 (5), unless it has before it evidence as to means, on which it might exercise its jurisdiction under Debtors Act, 1869, s. 5.—*Re* A DEBTOR, *Ex p.* THE DEBTOR, [1905] 1 K. B. 374; 74 L. J. K. B. 362; 91 L. T. 321; 12 Mans. 17; *sub nom. Re* A DEBTOR, *Ex p.* BAKER, LTD., 53 W. R. 29; 48 Sol. Jo. 688, D. C.

1449. ——— ——— Evidence that debtor could pay.]—Debtor, as co-resp. to a husband's petition in the Divorce Ct., was ordered to pay petitioner's costs of the suit, which were subsequently taxed at £110 7*s.* 10*d.* Debtor was then ordered to pay the £110 7*s.* 10*d.* by a specified date to petitioner's solrs., but did not comply with the order, whereupon the solrs. issued against him a debtor's summons under Debtors Act, 1869 (c. 62), at the hearing of which there was evidence that he had means to pay:—*Held:* there was jurisdiction under 1883 Act, s. 103, to make a receiving order against debtor.—*Re* HALLMAN, *Ex p.* ELLIS & COLLIER, [1909] 2 K. B. 430; 78 L. J. K. B. 1009; 100 L. T. 861; 25 T. L. R. 607; 53 Sol. Jo. 544; 16 Mans. 274.

Annotation:—**Mentd.** Rayment *v.* Rayment & Stuart, Chapman *v.* Chapman & Buist [1910] P. 271.

1450. ——— Petition presented in wrong court.]—If a bkpcy. petition is by inadvertence presented in a wrong bkpcy. ct., the ct. to which it is presented has jurisdiction to make a receiving order.—*Re* BRIGHTMORE, *Ex p.* MAY (1884), 14 Q. B. D. 37; 51 L. T. 710; 33 W. R. 598; 1 Morr. 253, D. C.

Annotations:—**Apprvd.** *Re* French, *Ex p.* French (1889), 24 Q. B. D. 63, C. A. **Mentd.** *Re* Arkell, *Ex p.* Arkell (1889), 6 Morr. 182, D. C.

1451. ——— To allow service of order out of jurisdiction.]—The Bkpcy. Ct. has no power to allow service out of the jurisdiction of a receiving order.—*Re* WENDT, *Ex p.* OFFICIAL RECEIVER (1889), 22 Q. B. D. 733; 61 L. T. 286; 37 W. R. 721; 6 Morr. 127, C. A.

1452. Duty of court—To exercise discretion—On transfer of proceedings—Order in lieu of committal.]—Where a county ct. judge, not having jurisdiction in bkpcy., at the hearing of a judgment summons for a committal, is of opinion that a receiving order should be made in lieu of a committal & orders the matter to be transferred to the Bkpcy. Ct. under 1885 Rules, r. 268 (1), the Bkpcy. Ct. in such case is not bound to adopt the opinion of the county ct. judge, & to make a receiving order as a matter of course, but must exercise its own judicial discretion at the hearing.—*Re* ANDREWS, *Ex p.* ANDREWS (1885), 15 Q. B. D. 335; 54 L. J. Q. B. 572; 1 T. L. R. 661; 2 Morr. 244.

See, now, 1914 Act, s. 107 (4), & 1915 Rules, r. 377.

1453. ——— To inquire into consideration for judgment—On allegation of debtor.]—If on the hearing of a petition by a judgment creditor for a receiving order facts are alleged by debtor, of which evidence is tendered, & which, if proved, would show that, notwithstanding the judgment, there is, by reason of fraud or otherwise, no real debt, the ct. ought not to make a receiving order without first inquiring into the truth of debtor's allegations.—*Re* LENNOX, *Ex p.* LENNOX (1885), 16 Q. B. D. 315; 55 L. J. Q. B. 45; 54 L. T. 452; 34 W. R. 51; 2 T. L. R. 60; 2 Morr. 271, C. A.

Annotations:—**Consd.** *Re* Saville, *Ex p.* Beyfus (1887), 3 T. L. R. 791, C. A. **Expld.** *Re* Flatau, *Ex p.* Scotch Whisky Distillers (1888), 22 Q. B. D. 83, C. A. **Extd.** *Re* Fraser, *Ex p.* Central Bank of London, [1892] 2 Q. B. 633, C. A. **Distd.** *Re* Easton, *Ex p.* Dixon (1893), 10 Morr. 111. **Apld.** *Re* Hawkins, *Ex p.* Troup, [1895] 1 Q. B. 404, C. A. **Distd.** *Re* Debtor (1915), 113 L. T. 704, D. C. **Refd.** *Re* A Debtor, *Ex p.* Petitioning Creditor, [1917] 2 K. B. 60, C. A. **Mentd.** *Re* Russell, *Ex p.* Guest (1888), 37 W. R. 21; *Re* Vitoria, *Ex p.* Vitoria, [1894] 2 Q. B. 387, C. A.; *Re* G. E. B., [1903] 2 K. B. 340, C. A.; *Re* Van Laun, *Ex p.* Chatterton, [1907] 2 K. B. 23, C. A.; *Re* Newey, *Ex p.* Whiteman (1912), 107 L. T. 832, D. C.

See, generally, Nos. 1457, 1529, *post,* & Part VIII., Sect. 7, sub-sect. 1, *post.*

1454. Jurisdiction of registrar—Adjournment asked for.]—The registrar has jurisdiction under 1914 Act, s. 102 (2) (*a*), to make a receiving order at the first hearing of a petition, even though both parties ask for an adjournment, nor is any inference to the contrary to be drawn from 1915 Rules, r. 178.—*Re* HEYL, *Ex p.* MORGAN, [1918] 1 K. B. 452; 87 L. J. K. B. 603; 118 L. T. 546; [1918-19] B. & C. R. 23, C. A.

1455. Effect of refusal of order—Jurisdiction of court—To order bankrupt to sign examination.]—The ct. has no jurisdiction to make an order on bkpt., after his petition has been dismissed, to sign an examination taken pending the proceedings in bkpcy.—*Re* SPILLER (1870), 18 W. R. 295, Ct. of R.

1456. ——— ——— To substitute fresh petitioning creditors.]—A creditor's petition in bkpcy. founded on the execution by debtor of a deed of assignment for the benefit of creditors was dismissed, on the ground that petitioning creditors had assented to the deed. More than three months after the

PART IV. SECT. 1.

1452 i. *Duty of court—To exercise discretion.*]—Where debtor has committed an act of insolvency, the ct. has a discretion, & is not bound, to sequestrate his estate. *Semble:* special circumstances may justify the ct. in refusing or delaying sequestration, & an act of insolvency may justify sequestration even in a case in which debtor's assets exceed his liabilities.—DE WAARD *v.* ANDREW & THIENHAUS, LTD. (1907), T. S 727.—S. AF

1452 ii. ——— ———.]—Petitioning creditor is considered as applying for the receiving order, not merely for his own benefit, but also for the benefit of debtor's creditors generally.—CAPE TOWN TOWN COUNCIL *v.* BOOSE'S TRUSTEES (1908), 25 S. C. 608.—S. AF.

execution of the deed two non-assenting creditors applied to rescind the order dismissing the petition, & asked that their names might, under 1883 Act, s. 107, be substituted for those of the original petitioning creditors:—*Held:* the ct. had no jurisdiction under s. 107 to entertain the application, the petition having been dismissed & more than three months having elapsed since the act of bkpcy. upon which it was founded.—*Re* MAUGHAM, *Ex p.* MAUGHAM (1888), 21 Q. B. D. 21; 57 L. J. Q. B. 487, D. C.

Annotation:—**Apld.** *Re* Maund, *Ex p.* Maund, [1895] 1 Q. B. 194, D. C.

1457. —— Whether operating as res judicata.]—Upon the hearing in a county ct. of a bkpcy. petition against a judgment debtor, founded on his non-compliance with a bkpcy. notice served upon him by the judgment creditor, the registrar inquired into the consideration of the debt for which judgment had been obtained, &, being of opinion that it did not constitute a good petitioning creditor's debt, refused to make a receiving order:—*Held:* the decision of the registrar did not operate as *res judicata* with respect to the sufficiency of the petitioning creditor's debt, & did not prevent the creditor from obtaining another receiving order in respect of the same judgment debt.—*Re* VITORIA, *Ex p.* VITORIA, [1894] 2 Q. B. 387; 63 L. J. Q. B. 795; 71 L. T. 48; 42 W. R. 529; 10 T. L. R. 491; 38 Sol. Jo. 532; 1 Mans. 236; 9 R. 536, C. A.

Annotations:—**Apprvd.** King *v.* Henderson, [1898] A. C. 720, P. C. **Reid.** *Re* A Debtor, *Ex p.* Petitioning Creditor, [1917] 2 K. B. 60, C. A. **Mentd.** *Re* Larard, *Ex p.* Yeomans & Heap (1896), 3 Mans, 317, C. A.

1458. —— ——.]—The judgment of the registrar dismissing a petition does not constitute *res judicata* & is not admissible in evidence in further proceedings between the parties, though the fact of his decision is admissible.—KING *v.* HENDERSON, [1898] A. C. 720; 67 L. J. P. C. 134; 79 L. T. 37; 47 W. R. 157; 14 T. L. R. 490; 5 Mans. 308, P. C.

Annotation:—**Mentd.** *Re* Wilson, *Ex p.* Jones (1916), 85 L. J. K. B. 1408, C. A.

1459. Grounds for granting order—Discovery of property after sheriff has returned nulla bona.]—Where pltf. has obtained judgment & issued execution, & the sheriff has made a return of *nulla bona* to the writ, the ct. will not make a receiving order against deft. on the ground that since the sheriff's return, he has been found to be possessed of a patent, the value of which has not been set out in evidence.—*Ex p.* SMITH, SMITH *v.* CARTER (1888), 52 J. P. 615, D. C

SECT. 2.—GROUNDS FOR REFUSAL OF RECEIVING ORDER.

SUB-SECT. 1.—IN GENERAL.

1460. Petition by firm—Trustee in liquidation of partner not a party.]—After one of two partners had filed a liquidation petition & a receiver had been appointed, a judgment was recovered in an action previously commenced in the names of the two partners against O., a debtor of the firm. A bkpcy. notice in the names of the two partners was then served on O.; he failed to comply with it within the seven days limited for the purpose, & a bkpcy. petition was presented against him in the names of the two partners. Before the petition came on to be heard, the creditors of the partner who had filed the liquidation petition had resolved on a liquidation by arrangement, & had appointed a trustee of his property:—*Held:* though there was a good act of bkpcy., a receiving order could not properly be made against O., unless the trustee in the liquidation was joined as a co-petitioner.—*Re* OWEN, *Ex p.* OWEN (1884), 13 Q. B. D. 113; 53 L. J. Ch. 863; 50 L. T. 514; 32 W. R. 811; 1 Morr. 93, C. A.

Annotation:—**Distd.** *Re* Maund, *Ex p.* Maund, [1895] 1 Q. B. 194, D. C.

1461. Assignment to trustees for creditors—With assent of large majority of creditors.]—The fact that shortly before the presentation of a bkpcy. petition against debtor he has, with the assent of a large majority of his creditors, executed a deed assigning the whole of his property to trustees appointed by the creditors to be administered by them as in bkpcy., is not, within 1883 Act, s. 7 (3), a "sufficient cause" for refusing to make a receiving order on the petition.—*Re* DIXON, *Ex p.* DIXON (1884), 13 Q. B. D. 118; 53 L. J. Ch. 769; 50 L. T. 414; 32 W. R. 837; 1 Morr. 98, C. A.

1459 i. *Grounds for granting order—What matters necessary to be considered.*]—Before passing an order of adjudication under Provincial Insolvency Act (III. of 1907), it is not for a ct. to decide whether the debts stated in the petition for insolvency are real, whether petitioner has not concealed any property of his from his lists of assets or whether he is unable to pay his debts & similar questions. The only things that are necessary to be decided before adjudication, are whether the credior or debtor is entitled to present the petition, whether the required notices have been served & whether debtor has committed the alleged act of insolvency.—JEER *v.* RENGASAMI (1913), I. L. R. 36 Mad. 402.—**IND.**

PART IV. SECT. 2, SUB-SECT. 1.

a. *Abuse of process of court.*]—The ct. has power to refuse to make an order of adjudication not only on non-compliance of matters stated in Provincial Insolvency Act (III. of 1907), s. 14 (1), but also on other grounds, *e.g.*, prevention of abuse of process of the ct., unnecessary harassing of debtor by the creditor.—JEER *v.* RENGASAMI (1913), I. L. R. 36 Mad. 402.—**IND.**

b. ——.]—Where a petition is presented by a creditor with the main object of distributing the assets of debtor amongst his creditors, & to get his own debt paid, it is immaterial whether petitioning creditor has any ulterior motive in the proceedings. But when the real intention of the creditor is for some other object, a petition is an abuse of the process of the ct.—*Re* SMART & WALKER, *Ex p.* HILL (1894), 20 V. L. R. 97.—**AUS.**

c. ——.]—It is neither fraud nor an abuse of process to petition for a sequestration order with an indirect motive, *i.e.*, for a purpose other than the equal distribution of testator's assets, *e.g.*, to exclude appt. from a partnership. *Secus* if such order would in the circumstances be unsuitable, & enable petitioner fraudulently to defeat the rights of others whether legal or equitable.—KING *v.* HENDERSON, [1898] A. C. 720, P. C.—**AUS.**

d. ——.]—P., who had a personal grudge against M., bought a debt owing by M. to a third person with a view to making M. insolvent & thereby depriving M., a municipal councillor, of his seat as councillor. After the purchase of the debt, demand for payment having been made & not complied with, P. took proceedings to sequestrate the estate of M. Upon the return of the order *nisi* it was objected that the proceedings were an abuse of the process of the ct.:—*Held:* P. was entitled to take such proceedings & that they were not an abuse of the process of the ct.—*Re* MORISSY, *Ex p.* PERKINS (1899), 24 V. L. R. 776.—**AUS.**

e. *Assignment to trustees for creditors—With assent of large majority of creditors.*]—Debtor executed a deed of assignment to G. in trust for the benefit of his creditors. Petitioner prayed for the adjudication of debtor as a bkpt., as he thought the estate would be better administered by the official assignee than under the deed. He was supported by one other creditor. The deed had been executed by fifty-one creditors, their total claims amounting to upwards of £3,000. Of those claims, it was admitted that two required serious investigation. Debtor had employed an accountant to keep his books, & personal misconduct was not charged, & petitioner admitted that he had had many dealings with debtor, & had found him to be honest. There was in the opinion of the ct., nothing to show that debtor had any fraudulent intention when the debt due to the creditor was incurred, debtor at that time being unaware of his actual position:—*Held:* as it was for the benefit of the general body of creditors that debtor's estate should be administered under the deed, the petition should be dismissed.—*Re* KATAVICH, *Ex p.* BOGLICH (1911), 30 N. Z. L. R. 449.—**N. Z.**

Sect. 2.—Grounds for refusal of receiving order: Subsect. 1.]

Annotations :—**Consd.** *Re* Watson, *Ex p.* Oram (1885), 15 Q. B. D. 399, C. A. **Refd.** *Re* Webber, *Ex p.* Webber (1889), 24 Q. B. D. 313, C. A.

1462. —— Even though beneficial.]—The fact that debtor has, shortly before the presentation of a bkpcy. petition against him, entered into an arrangement with his creditors, to which petitioner has not assented, is not, however beneficial to the creditors the terms of the arrangement may be, a "sufficient cause" for dismissing the petition. —*Re* WATSON, *Ex p.* ORAM (1885), 15 Q. B. D. 399; 52 L. T. 785; 33 W. R. 890; 1 T. L. R. 553; 2 Morr. 199, C. A.

1463. Petition wilfully presented in wrong court.]—If a petition is wilfully presented in a wrong ct., that is a ground for dismissing it.—*Re* BRIGHTMORE, *Ex p.* MAY (1884), 14 Q. B. D. 37; 51 L. T. 710; 33 W. R. 598; 1 Morr. 253, D. C.

Annotations :—**Mentd.** *Re* Arkell, *Ex p.* Arkell (1889), 6 Morr. 182, D. C.; *Re* French, *Ex p.* French (1889), 24 Q. B. D. 63, C. A.

1464. No other creditor in England.]—The fact that debtor has no other creditor in England will not necessarily be a sufficient reason for refusing to make a receiving order.—*Re* HECQUARD, *Ex p.* HECQUARD (1889), 24 Q. B. D. 71; 38 W. R. 148; 6 T. L. R. 32; 6 Morr. 89, C. A.

Annotations :—**Apld.** *Re* Leonard, *Ex p.* Leonard, [1896] 1 Q. B. 473, C. A. **Consd.** *Re* Betts, *Ex p.* Betts, [1897] 1 Q. B. 50, C. A. **Mentd.** Alexander *v.* Tracey & Tracey (1915), 79 J. P. 458, D. C.

1465. Debtor firm bankrupt abroad — Firm with head office abroad & branch in England—Partners resident in England.]—A firm, having its head offices in Paris, & a branch establishment in England, was declared bkpt. in Paris under the law of France, & a syndic was appointed to administer the estate. Subsequently a bkpcy. petition was presented against them in England, & an order was made appointing an *interim* receiver. The syndic applied to the ct. to discharge this order & to stay all further proceedings under the petition. There was no evidence as to the domicil of the members of the firm, but two of them resided in England, where the firm had large assets :—*Held :* the jurisdiction of the ct. being undoubted, & there being assets within the jurisdiction, the receiving order was rightly made.—*Re* ARTOLA HERMANOS, *Ex p.* ANDRÉ CHÂLE (1890), 24 Q. B. D. 640; 59 L. J. Q. B. 254; 62 L. T. 781; 6 T. L. R. 271; 7 Morr. 80, C. A.

Annotations :—**Consd.** *Re* Anderson, [1911] 1 K. B. 896. **Mentd.** *Re* Queensland Mercantile & Agency Co., *Ex p.* Australasian Investment Co., *Ex p.* Union Bank of Australia (1891), 66 L. T. 433, C. A.

1466. Property locked up in chancery suit.]—The fact that considerable property, to which debtors claim to be entitled, is locked up in a Ch. suit is not a sufficient ground for dismissing a petition presented against them for non-compliance with a bkpcy. notice.—*Re* WHITLEY, *Ex p.* MIRFIELD COMMERCIAL CO., LTD. (1891), 65 L. T. 351; 7 T. L. R. 508; 8 Morr. 149, D. C.

Annotation :—**Mentd.** *Re* Midgley (1913), 108 L. T. 45, D. C.

1467. Adjudication destroying only asset available.]—Debtor, against whom a bkpcy. petition was presented, was entitled to a life income of £1,500 a year, subject to its forfeiture in the event of his being made a bkpt. Debtor, who had no other property, was at the time negotiating with his creditors for the purpose of securing payment to them of a composition on their debts out of the £1,500 a year :—*Held :* as an adjudication in bkpcy. would destroy the only asset available for the payment of the creditors, the ct. would refuse to make a receiving order.—*Re* OTWAY, *Ex p.* OTWAY, [1895] 1 Q. B. 812; 64 L. J. Q. B. 521; 72 L. T. 452; 2 Mans. 174; 14 R. 389, C. A.

Annotations :—**Expld. & Distd.** *Re* Leonard, *Ex p.* Leonard, [1896] 1 Q. B. 473, C. A.; *Re* Birkin (1896), 3 Mans. 291, C. A. **Distd.** *Re* De Murrieta, *Ex p.* South American & Mexican Co. (1896), 12 T. L. R. 238, C. A.; *Re* Scott, *Ex p.* Paris-Orleans Ry. Co. (1913), 58 Sol. Jo. 11, C. A. **Mentd.** *Re* Shaw, *Ex p.* Gill (1901), 83 L. T. 754, C. A.; *Re* Sunderland, [1911] 2 K. B. 658, C. A.; *Re* Hay (1913), 110 L. T. 47, D. C.

1468. —— No probability of any other asset.]—A receiving order ought not to be refused, merely because the chief asset is one determinable on bkpcy., unless there is no probability of there being any other asset.—*Re* BIRKIN (1896), 3 Mans. 291, C. A.

Annotations :—**Apld.** *Re* Somers, *Ex p.* Union Credit Bank (1897), 4 Mans. 227, D. C. **Refd.** *Re* Scott, *Ex p.* Paris-Orleans Ry. Co. (1913), 58 Sol. Jo. 11, C. A. **Mentd.** *Re* Jubb, *Ex p.* Burman & Greenwood, [1897] 1 Q. B. 641.

1469. —— Salary of judicial office—Debtor bound to resign if adjudicated bankrupt.]—The fact that debtor, against whom a bkpcy. petition is presented, states that he has no assets other than the salary of a judicial office, which he will be obliged to resign in the event of an adjudication being made against him, will not preclude the ct. from making a receiving order.—*Re* LEONARD, *Ex p.* LEONARD, [1896] 1 Q. B. 473; 65 L. J. Q. B. 393; 74 L. T. 183; 44 W. R. 438; 12 T. L. R. 257; 40 Sol. Jo. 338; 3 Mans. 43, C. A.

Annotation :—**Apld.** *Re* Birkin (1896), 3 Mans. 291, C. A.

1470. No assets immediately available—Possibility of debtor acquiring property.]—The fact that there are no assets immediately available is not a sufficient cause for dismissing a creditor's petition, if it is possible that debtor might acquire property before his discharge.—*Re* DE MURRIETA, *Ex p.* SOUTH AMERICAN & MEXICAN CO. (1896), 12 T. L. R. 238; *sub nom. Re* MURRIETA, *Ex p.* SOUTH AMERICAN & MEXICAN CO., 3 Mans. 35; *sub nom. Re* MURIETTA, *Ex p.* SOUTH AMERICAN & MEXICAN CO., 40 Sol. Jo. 317, C. A.

Annotation :—**Distd.** *Re* Betts, *Ex p.* The Debtor (1896), 3 Mans. 287, C. A.

1471. No assets—No reasonable prospect of assets—Effect of order merely to heap up costs.]—The ct. in the exercise of its discretion will not make a receiving order, if satisfied that there are no assets & no reasonable prospect of assets & that the order will only result in a heaping-up of costs. —*Re* BETTS, *Ex p.* BETTS, [1897] 1 Q. B. 50; 66 L. J. Q. B. 14; 75 L. T. 292; 45 W. R. 98; 13 T. L. R. 23; 41 Sol. Jo. 50; 3 Mans. 287, C. A.

Annotations :—**Distd.** *Re* Birkin (1896), 3 Mans. 291, C. A.; *Re* Jubb, *Ex p.* Burman & Greenwood, [1897] 1 Q. B. 641, D. C.; *Re* Somers, *Ex p.* Union Credit Bank (1897), 4 Mans. 227, D. C.; *Re* Belton (1913), 108 L. T. 344, D. C.; *Re* Scott, *Ex p.* Paris-Orleans Ry. Co. (1913), 58 Sol. Jo. 11, C. A.

1472. —— —— Circumstances of debtor.]—If there are no assets & from the circumstances of debtor, *e.g.*, where debtor was a barmaid, there is no probability of assets, a receiving order will be refused as oppressive.—*Re* SOMERS, *Ex p.* UNION CREDIT BANK (1897), 4 Mans. 227, D. C.

1473. —— —— Assets assigned to creditors by unimpeachable deed.]—Where debtor has assigned all his assets to a trustee, for the benefit of creditors, by a deed which has become unimpeachable by lapse of time, the ct. will not refuse to make a receiving

1471 i. *No assets—No reasonable prospect of assets.*]—If the ct. is satisfied that debtor cannot legally hold property, or if it is convinced apart from debtor's statements, by admissions, or from the circumstances of the case, that there are not, & cannot be, any assets, an order to sequestrate ought not to be made, as it would be useless & oppressive.—*Re* MCCUTCHEON, *Ex p.* HATTY (1900), 26 V. L. R. 175.—**AUS.**

order unless clearly convinced, not only that there are, but also that there will be, no assets in the bkpcy.—*Re* SCOTT, *Ex p.* PARIS-ORLEANS RY. CO. (1913), 58 Sol. Jo. 11, C. A.

Annotation :—**Apld.** *Re* Hay (1913), 110 L. T. 47, D. C.

1474. —— Possibility of existence of assets—Order vesting income but not corpus in wife.]—The Bkpcy. Ct. will not refuse to make a receiving order where there is a possibility of the existence of assets available for division among the creditors, & an order vesting the dividends & income, but not the *corpus*, of debtor's property in his wife is not sufficient ground for such refusal.—*Re* BELTON (1913), 108 L. T. 344 ; 29 T. L. R. 313 ; 57 Sol. Jo. 343, D. C.

1475. —— —— Contingent interest under existing will of petitioning creditor.]—In 1894, petitioning creditor, a lunatic not so found, was placed in a lunatic asylum, from which time debtor received £400 a year out of her income, paying thereout £50 a year for her maintenance. In 1912, a receiver of her estate was appointed, & in 1917, the master's certificate was issued, upon which debtor was ordered to pay £1,543 & £95 costs, & subsequently a petition in bkpcy. was presented founded on non-compliance with a bkpcy. notice. Debtor had made over certain furniture to his son, in whose house he lived, & he had a contingent interest under an existing will of petitioning creditor. The county ct. registrar dismissed the petition on the ground that there was no reasonable probability of any assets being recovered :—*Held :* the registrar was wrong, & there must be a receiving order.—*Re* DEBTOR, *Ex p.* PETITIONING CREDITOR (1917), 144 L. T. Jo. 127, D. C.

1476. —— —— Sufficiency of evidence of.]—Debtor's evidence on the probability of there not being any asset other than one determinable on bkpcy. is not sufficient to justify the refusal of a receiving order.—*Re* BIRKIN (1896), 3 Mans. 291, C. A.

Annotations :—**Consd.** *Re* Somers, *Ex p.* Union Credit Bank (1897), 4 Mans. 227, D. C. **Mentd.** *Re* Jubb, *Ex p.* Burman & Greenwood, [1897] 1 Q. B. 641, D. C. ; *Re* Scott, *Ex p.* Paris-Orleans Ry. Co. (1913), 58 Sol. Jo. 11, C. A.

1477. —— —— ——.]—Debtor's own affidavit that there is no prospect of assets is not enough. The fact that debtor is an undischarged bkpt. is very material evidence that a receiving order will be futile.—*Re* BETTS, *Ex p.* BETTS, [1897] 1 Q. B. 50 ; 66 L. J. Q. B. 14 ; 75 L. T. 292 ; 45 W. R. 98 ; 13 T. L. R. 23 ; 41 Sol. Jo. 50 ; 3 Mans. 287, C. A.

Annotations :—**Folld.** *Re* Somers, *Ex p.* Union Credit Bank (1897), 4 Mans. 227, D. C. **Distd.** *Re* Scott, *Ex p.* Paris-Orleans Ry. Co. (1913), 58 Sol. Jo. 11, C. A. **Mentd.** *Re* Birkin (1896), 3 Mans. 291, C. A. ; *Re* Jubb, *Ex p.* Burman & Greenwood, [1897] 1 Q. B. 641, D. C. ; *Re* Belton (1913), 108 L. T. 344, D. C.

1478. Assets likely to be absorbed by costs.]—The fact that the assets of debtor are likely to be absorbed in the costs of the bkpcy. is not "sufficient cause" for refusing to make a receiving order.—*Re* JUBB, *Ex p.* BURMAN & GREENWOOD, [1897] 1 Q. B. 641 ; 66 L. J. Q. B. 452 ; 76 L. T. 329 ; 45 W. R. 479 ; 41 Sol. Jo. 408 ; 4 Mans. 30, D. C.

Annotation :—**Refd.** *Re* Somers, *Ex p.* Union Credit Bank (1897), 4 Mans. 227.

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f. —— *Possibility of debtor paying in full.*]—Where an insolvency petition is presented by a debtor, whose debts amount to Rs. 500 & such petition fulfils the requirements of Provincial Insolvency Act, 1907, s. 11, it is not a valid ground for dismissing the petition that there may exist some reason for supposing that debtor may not after all be unable to pay his debts in full, unless there are circumstances indicating that the presentation of the petition was fraudulent & an abuse of the process of the ct.—TRILOKI NATH *v.* BADRI DASS (1914), I. L. R. 36 All. 250.—**IND.**

1478 i. *Assets likely to be absorbed by costs.*]—Although an act of insolvency was proved, the ct. refused to make absolute a rule *nisi* provisionally sequestrating debtor's estate where the estate was so small in value that nothing would have been available for distribution among creditors after payment of the costs of administration.—SMITH *v.* SMITH, [1918] C. P. D. 331.—**S. AF.**

g. *Consent of all parties.*] —Where the ct. is satisfied that all parties concerned desire to take the matter out of the hands of the ct., it will dismiss the petition, even though there is no ground arising out of the facts of the case why the petition should be dismissed.—*Re* PYARICHAND MITTER (1871), 6 B. L. R. 558.—**IND.**

h. *Creditor omitted from schedule.*] —A petition will be dismissed when a creditor, to whom a debt is due on foot of a bill of exchange, has been omitted from the schedule.—*Re* ANON. (1868), 2 I. L. T. Jo. 138.—**IR.**

j. *Protection order granted under 20 & 21 Vict. c. 60.*] —After an order for protection, under the arrangement clauses of the above Act has been made, the ct. has no jurisdiction to dismiss the petition, except for the causes mentioned in s. 353.—*Re* CRAIG (1858), 8 I. Ch. R. 393 ; Drury *temp.* Nap. 394 ; 4 Ir. Jur. 101.—**IR.**

k. *Omission of evidence—Capable of rectification.*] —A petition should never be dismissed where, through inadvertence or otherwise, an omission has been made in the evidence which can be at once rectified without injury to either party, & which when rectified will enable a right decision to be arrived at.—*Re* EWING, *Ex p.* MORGAN (1905), 24 N. Z. L. R. 808.—**N.Z.**

l. *Sequestration not in interests of creditors generally.*]—There having been a return of *nulla bona* to a writ of execution against resp., his estate was provisionally sequestrated at the instance of the judgment creditor. The sequestration of the estate would not have been in the interests of the creditors generally, & there was sufficient property to satisfy the judgment creditor :—*Held :* the ct. should discharge the provisional order.—MICHAELSON *v.* LOWENSTEIN (1906), T. S. 12. —**S. AF.**

m. *Sequestration not in interests of creditor applying.*]—Where the sequestration of the private estate of a partner by a private creditor was opposed by partnership creditors, on the ground that the private creditor would obtain no benefit from the sequestration, which would merely hamper them in enforcing their claims : —*Held :* the private creditor was entitled to an order of sequestration.—LATIB *v.* MAHOMED (1914), T. P. D. 584.—**S. AF.**

n. *Majority of creditors wishing to grant time to debtor.*]—A judgment creditor, on whose writ a return of *nulla bona* has been made, is entitled, under Law 13 of 1895, to demand the sequestration of his debtor's estate, unless good cause is shown to the contrary, & the mere fact that it is probable that such creditor will not benefit by the sequestration, & that the other creditors, or a majority of them, are of opinion that it is desirable to grant an indefinite extension of time to debtor, is not such good cause, & will not justify the ct. in refusing to grant a sequestration order.—PELUNSKY & CO. *v.* BEILES (1908), T. S. 370. —**S. AF.**

o. *Notice of intention to apply for voluntary surrender.*]—An order for the compulsory sequestration of a debtor's estate granted, notwithstanding that debtor had given notice of his intention to apply for the voluntary surrender of his estate.—NELSON & CO. *v.* WHITING (1885), 4 E. D. C. 322.—**S. AF.**

p. ——.]—The fact that insolvent has published notice of intention to surrender his estate does not prevent the ct. from granting the compulsory sequestration of such estate.—OLIVIER & HAVENGA *v.* MOFSOWITZ (1912), O. P. D. 49.—**S. AF.**

q. ——.]—The fact that insolvent has placed a bondholder in possession of his estate is sufficient to justify the other creditors anticipating an application for voluntary surrender. So also is the fact that insolvent's schedules do not reflect the position of his estate as represented by him shortly prior to the filing of such schedules.—HETZ *v.* CLEGHORN & CO. (1913), T. P. D. 98.—**S. AF.**

r. ——.]—The ct. will permit a creditor to anticipate an application for the voluntary surrender of an estate as insolvent, where a large majority of the creditors consider such course to be in the interest of all the creditors.—MOOSA *v.* FOYER (1913), T. P. D. 6.—**S. AF.**

s. *Settlement with creditor demanding assignment.*]—M., a creditor of deft., made a demand upon him to assign his estate, for the benefit of his creditors, under Insolvent Act, 1869, s. 14. No petition against the demand was presented within five days, as required by the Act, but after that time deft. settled his debt with M., who took no further proceedings :—*Held :* the estate of deft. was nevertheless subject to compulsory liquidation, & the demand of M. enured to the benefit of the other creditors of deft.—DEVER *v.* MORRIS (1873), 1 Pug. 270.—**CAN.**

Sect. 2.—Grounds for refusal of receiving order: Subsects. 1 & 2.]

1479. Return of chattel after act of bankruptcy —Founded on judgment in detinue.]—Pltf., who has obtained a judgment in detinue, is deemed to have abandoned his property in the detained chattel, if he issues a bkpcy. notice on his judgment & founds a bkpcy. petition on the non-compliance therewith, & the return of the chattel after the completion of the act of bkpcy. does not deprive him of his right to a receiving order.—*Re* A DEBTOR (No. 9 of 1907), *Ex p.* PETITIONING CREDITOR (1907), 97 L. T. 140; 23 T. L. R. 618, D. C.

1480. Mere possibility of proceedings being rendered futile.]—A creditor, who was a mtgee., presented a bkpcy. petition against the incumbent of a benefice, having withdrawn it on a payment by debtor's relatives, presented another petition for the balance, & it was also withdrawn on their making another payment. The creditor then presented another petition for the remaining balance & debtor gave evidence that he believed there would be a surplus. A receiving order was made against debtor:—*Held:* (1) the circumstances did not show that there was any extortion, & the possibility of the bishop appointing a sequestrator of the benefice did not prove that the bkpcy. proceedings would be futile; (2) the receiving order must be affirmed.—*Re* HAY (1913), 110 L. T. 47; 30 T. L. R. 131, D. C.

1481. Certificate under Irish 1857 & 1872 Acts.]—A certificate given to "an arranging debtor" in Ireland under the above Acts does not release debtor from his debts in England, & does not prevent a receiving order being made against him in England in respect of his English debts.—*Re* NELSON, *Ex p.* DARE & DOLPHIN, [1918] 1 K. B. 459; 87 L. J. K. B. 628; 118 L. T. 549; [1918–19] B. & C. R. 1; *sub nom. Re* DEBTOR (No. 333 OF 1917), *Ex p.* DEBTOR, 34 T. L. R. 277; 62 Sol. Jo. 348, C. A.

1482. Non-compliance by one of several petitioning creditors with Registration of Business Names Act, 1916 (c. 58), s. 8.]—A receiving order was made against debtor on the petition of three creditors, & he appealed against it, on the ground that S., one of the petitioning creditors, had not complied with the above Act. S. had in fact commenced business under an assumed name on Feb. 22, 1919, & was not registered under the Act until June 2, 1919. His debt was based on a bill of exchange for three months dated Feb. 26, 1919, & owing in respect of his business. The petition was dated July 28, 1919:—*Held:* as the contract under which S.'s debt arose was made within fourteen days from the commencement of his business, he was not in default under s. 8 (1) of the Act at the time of making it, & the contract was enforceable & his debt was good.—*Re* A DEBTOR (No. 5 OF 1919) (1919), 54 L. Jo. 444; 148 L. T. Jo. 178, D. C.

Effect of refusal of receiving order.]—*See* Nos. 1455 *et seq.*, *ante*.

1483. Two petitions against same debtor—Second petition heard first—Dismissal of first petition.]—Where two bkpcy. petitions are presented against same debtor, & the ct. exercises its discretion under 1870 Rules, r. 48, to hear the second petition first, & makes an adjudication on the second petition, then the ct. must, after the expiration of the time allowed for an appeal against the adjudication, dismiss the first petition.—*Re* WHITE, *Ex p.* MASON (1880), 14 Ch. D. 71; 49 L. J. Bcy. 56; 42 L. T. 884; 28 W. R. 749, C. A.

SUB-SECT. 2.—CONDUCT OF CREDITOR.

Creditor conniving at or instigating or being party to act of bankruptcy.]—*See* Part III., Sect. 1, subsect. 3, B., *ante*.

1484. Contract by creditor to sue out commission —Whether legal.]—A creditor may legally contract to sue out a commission of bkpcy. against his debtor, in consideration that a friend of debtor, will give petitioning creditor 5*s.* in the pound for his debt.—FRY *v.* MALCOLM (1813), 5 Taunt. 117; 2 Rose, 129; 128 E. R. 631.

1485. Petition presented to put pressure on debtor.]—Bkpcy. petitions should not be presented with the object of putting pressure on debtors.—*Re* O'SHEA, *Ex p.* TRUSTEE *v.* BROWN, *Re* O'SHEA, *Ex p.* TRUSTEE *v.* ARMSTRONG (1896), 40 Sol. Jo. 686.

1486. Taking bill of exchange or promissory note for debt after service of bankruptcy notice—No receiving order—During currency of note.]—Where a judgment creditor has, within seven days after service of a bkpcy. notice, accepted a promissory note from debtor for the amount of the debt, he cannot, during the currency of the note, obtain a receiving order, the note being, until dishonour, conditional payment of the debt.—*Re* MATTHEW, *Ex p.* MATTHEW (1884), 12 Q. B. D. 506; 51 L. T. 179; 32 W. R. 813; 1 Morr. 47, C. A.

1487. ——— While bill of exchange outstanding in third party's hands.]—If a creditor, who has obtained judgment against his debtor, takes a bill of exchange for the amount due, his right to obtain a receiving order against debtor on a bkpcy. notice founded on the judgment debt is suspended so long as the bill is not overdue or even after it has become due, so long as the bill is outstanding at the time of the notice in the hands of a third person to whom it has been indorsed for value by the creditor.—*Re* DEBTOR, *Ex p.* DEBTOR, [1908] 1 K. B. 344; 77 L. J. K. B. 409; 98 L. T. 652; 52 Sol. Jo. 174; 15 Mans. 1, C. A.

1488. Taking secret consideration—For agreeing to adjournment.]—As a consideration for his consenting to various adjournments of the hearing of the petition, debtor gave to petitioning creditor, at different times, a sum of £25 in cash, & two promissory notes for £200 & £50 respectively, & the creditor after the presentation of the petition also obtained security for the debt & costs & for the payment of the said promissory notes:—*Held:* (1) the registrar was wrong in making a receiving order against debtor, & such order must be discharged; (2) the evidence put forward in the case disclosed conduct of petitioning creditor, who was a solr., & also conduct of the solr. to debtor, of such a nature that it became the duty of the ct. to give directions in order that the matter might be thoroughly investigated by the Law Society.—*Re* ATKINSON, *Ex p.* ATKINSON (1892), 9 Morr. 193, C. A.

Annotations:—**Consd.** *Re* Bebro, [1900] 2 Q. B. 316, C. A. I think the true view is that taken by FRY, L.J., where he says "In my opinion the moment the ct. sees the petition is made a means of extorting money, a petitioner should not be able to get a receiving order" (WEBSTER, M. R.).

PART IV. SECT. 2, SUB-SECT. 2.

t. Fraudulent or oppressive conduct.]—If, on an application for sequestration against debtor, the ct. is satisfied that there is fraud or oppression, *e.g.*, that in the circumstances the remedy would be unsuitable & would enable the person obtaining it fraudulently to defeat the rights of others, whether legal or equitable, no order should be made. The burden of proof with regard to these matters rests upon resp.—*Re* MCCUTCHEON, *Ex p.* HATTY (1900), 26 V. L. R. 175.—**AUS.**

Refd. *Re* Otway, *Ex p.* Otway, [1895] 1 Q. B. 812, C. A.; *Re* Hay (1913), 110 L. T. 47, D. C.

1489. —— ——.]—Petitioning creditor endeavoured to obtain £25 from debtor as a condition for agreeing to an adjournment of the petition:—*Held:* as petitioning creditor had made the petition a means of endeavouring to extort money from debtor, no receiving order ought to be made on it.—*Re* OTWAY, *Ex p.* OTWAY, [1895] 1 Q. B. 812; 64 L. J. Q. B. 521; 72 L. T. 452; 2 Mans. 174; 14 R. 389, C. A.

Annotations:—**Distd.** *Re* De Murrieta, *Ex p.* South American & Mexican Co. (1896), 12 T. L. R. 238, C. A. **Expld.** *Re* Birkin (1896), 3 Mans. 291, C. A. **Consd.** *Re* Leonard, *Ex p.* Leonard, [1896] 1 Q. B. 473, C. A. **Refd.** *Re* Shaw, *Ex p.* Gill (1901), 83 L. T. 754, C. A.; *Re* Scott, *Ex p.* Paris-Orleans Ry. Co. (1913), 58 Sol. Jo. 11, C. A. **Mentd.** *Re* Sunderland, [1911] 2 K. B. 658, C. A.; *Re* Hay (1913), 110 L. T. 47, D. C.

1490. —— **For withdrawing previous petition.**]—In May 1899, petitioner filed a bkpcy. petition against G. in respect of a sum of £112 2*s.* 4*d.*, being the amount of a judgment recovered against debtor in respect of the balance due to petitioner on a promissory note for £154. Prior to the adjourned hearing of petition petitioner agreed with debtor for the dismissal of the petition & the delivery up of the promissory note on the terms that debtor should pay him £50 in cash & should give him a new promissory note for £100 (being the balance of the old debt & costs plus a bonus of £20) payable as to £60 by six consecutive instalments of £10 each, the first to become due on Aug. 1, 1899, & payable as to the balance of £40 on Feb. 1, 1900. The petition was dismissed & the original promissory note given up. In Nov. 1899, petitioner obtained judgment against debtor for the sum of £90, being the balance of the sum of £100 secured by the second promissory note, & placed upon the file a second petition in respect of such judgment debt:—*Held:* petitioner's conduct in withdrawing his first petition on the above terms amounted to such an abuse of the process of the ct. as disentitled him to a receiving order.—*Re* G., *Ex p.* B. (1900), 44 Sol. Jo. 345, C. A.

Annotation:—**Consd.** *Re* Bebro, [1900] 2 Q. B. 316, C. A.

1491. —— —— **Creditor must be shown to have abused process.**]—At the request of debtor, petitioning creditor withdrew his petition, on debtor paying the costs of the bkpcy. proceedings, & giving him a bill of exchange at two months for £130, in lieu of a judgment debt & costs amounting to £124 16*s.* 8*d.*:—*Held:* there had been no extortion.

Although the fact that the arrangement is suggested by debtor himself does not prevent it from being extortionate, it must be proved to the satisfaction of the ct., that the creditor has abused the process of the ct. by obtaining a larger sum than he could have obtained, before a receiving order can be refused.—*Re* BEBRO, [1900] 2 Q. B. 316; 69 L. J. Q. B. 618; 82 L. T. 773; 48 W. R. 561; 7 Mans. 284; *sub nom. Re* M. B., *Ex p.* G., 44 Sol. Jo. 501, C. A.

Annotation:—**Mentd.** *Re* Sunderland, [1911] 2 K. B. 658, C. A.

1492. —— **For agreeing to composition—Arrangement abortive—Petition presented jointly with another creditor not party to secret arrangement.**]—Debtor called a meeting of his creditors, who agreed to accept a composition. Subsequently a creditor, who had not been present, called on debtor & said that he would not assent to the composition unless given a promissory note for the balance of the debt due to him. Debtor declined to accede to such suggestion. The composition having fallen through, debtor executed a deed of assignment for the benefit of his creditors. The creditor & another creditor, who was in no way connected with the proposed secret arrangement, presented a petition against debtor, the debt of neither of them alone being £50:—*Held:* there was "sufficient cause" for declining to make a receiving order.—*Re* SHAW, *Ex p.* GILL (1901), 83 L. T. 754; 49 W. R. 264; 45 Sol. Jo. 218, C. A.

Annotations:—**Folld.** *Re* Goldberg (1904), 21 T. L. R. 2. **Distd.** *Re* Brindley, *Ex p.* Taylor (1905), 75 L. J. K. B. 46. **Expld. & Distd.** *Re* Sunderland, [1911] 2 K. B. 658, C. A.

1493. —— **By threats.**]—Debtor, who had assigned the whole of his property to a trustee for the benefit of his creditors, called a meeting of his creditors, who agreed to accept an offer by debtor & his relatives to pay 10*s.* in the pound. Subsequently debtor informed them that he could not arrange to carry out the composition of 10*s.*, but that his relatives offered to purchase his estate for a sum sufficient to pay 7*s.* 6*d.* in the pound. The majority of the creditors accepted this, but one creditor wrote demanding an immediate cash payment of 7*s.* 6*d.* in the pound & bills for 2*s.* 6*d.* endorsed by a relative of debtor, & said that if this were not done, he would present a bkpcy. petition. These terms were declined, & a bkpcy. petition was presented:—*Held:* as petitioning creditor had endeavoured to obtain a secret advantage over the other creditors, with a threat, if debtor did not concede it, to present a bkpcy. petition, there was "sufficient cause" for declining to make a receiving order.—*Re* A DEBTOR (No. 20 OF 1904), *Ex p.* THE DEBTOR (1904), 91 L. T. 664; 53 W. R. 223; *sub nom. Re* GOLDBERG, 21 T. L. R. 2, D. C.; *affd.* 21 T. L. R. 139, C. A.

Annotations:—**Distd.** *Re* Brindley, *Ex p.* Taylor (1905), 75 L. J. K. B. 46, D. C. **Expld. & Distd.** *Re* Sunderland, [1911] 2 K. B. 658, C. A.

1494. Openly insisting on special terms—Before assenting to composition.]—Debtor having executed a deed of assignment to a trustee for the benefit of his creditors, a creditor wrote to the trustee's solr. & debtor that he would not entertain any proposal except payment in full of part of his debt, as to which he had special ground for complaint, but for the rest would be prepared to consider any plan in the interest of debtor which should be acceptable to the other creditors. Pressure on behalf of debtor was brought to bear on the creditor to induce him to assent to the deed, but he persistently declined except on the terms he had mentioned, & his terms being refused he presented a bkpcy. petition against debtor. There was no evidence of any attempt on his part to obtain a preference over the other creditors by any improper means, nor of any intention that the terms he insisted on should not be disclosed to them. The deed contained a clause empowering the trustee by direction of a committee of inspection to pay in full non-assenting creditors:—*Held:* petitioning creditor had done nothing to disentitle him to a receiving order.—*Re* BRINDLEY, *Ex p.* TAYLOR & CO. (1905), 75 L. J. K. B. 46; 94 L. T. 116; 22 T. L. R. 115; 12 Mans. 387; *sub nom. Re* DEBTOR, *Ex p.* PETITIONING CREDITOR, 50 Sol. Jo. 96, D. C.; *revsd.* without affecting this point, *Re* BRINDLEY, *Ex p.* TAYLOR, SONS & CO., [1906] 1 K. B. 377, C. A.

Annotation:—**Mentd.** *Re* Walker (1910), 26 T. L. R. 260.

1494 i. *Openly insisting on special terms—Attempt to obtain preferential treatment.*]— An endeavour to obtain an unfair advantage over other creditors by a threat to make debtor bkpt., if the demand of the particular creditor is not conceded, taints a petition in bkpcy. against debtor by such creditor, & the ct. will dismiss the petition.—*Re* EGGERS (1912), 31 N. Z. L. R. 1123.—**N.Z.**

Sect. 2.—Grounds for refusal of receiving order: Sub-sect. 2. Sects. 3, 4 & 5.]

1495. —— ——.]—Debtor, hopelessly insolvent & about to call a meeting of his creditors, took delivery on credit of goods of considerable value from petitioning creditors. At the meeting petitioning creditors refused to assent to an assignment for the benefit of creditors, unless the goods were returned to them or their value allowed, but, after a resolution for an assignment had been passed, they took part in the nomination of the committee of inspection. On receiving a form of assent to the assignment they telephoned to the accountant who had charge of debtor's affairs repeating their demand for a return of the goods or payment of their value under a threat of legal proceedings. On refusal, they commenced an action against debtor & obtained final judgment against him, &, on his failure to comply with a bkpcy. notice, filed a petition against him founded on his non-compliance with the bkpcy. notice:—*Held:* petitioning creditors had not either by any improper conduct or by any assent to the assignment precluded themselves from taking proceedings in bkpcy., & "sufficient cause" had not been shown why a receiving order should not be made.—*Re* SUNDERLAND, [1911] 2 K. B. 658; 80 L. J. K. B. 825; 105 L. T. 233; 27 T. L. R. 454; 55 Sol. Jo. 568; 18 Mans. 123, C. A.

Annotation:—**Mentd.** *Re* Sleath, *Ex p.* Lotus Shoe Co. (1913), 109 L. T. 222, D. C.

1496. Failure to realise security held from principal debtor—Debtor surety.]—A receiving order may be made against debtor who is a surety, although the creditor is the holder of a security from the principal debtor which has not been realised.—*Re* HODGES, *Ex p.* MATTHEWS (1896), 3 Mans. 329, C. A.

1497. One of two joint petitioning creditors estopped.]—Where a joint petition in respect of several debts is presented by two creditors, of whom one is & the other is not estopped from relying on the act of bkpcy. on which the petition is founded, a receiving order may be made, if the debt due to the creditor who is not estopped is sufficient.—*Re* JONES BROTHERS, *Ex p.* ASSOCIATED NEWSPAPERS, LTD., [1912] 3 K. B. 234; 81 L. J. K. B. 1178; 19 Mans. 349, D. C.

1498. Assent to deed of arrangement—Deed void for want of registration.]—Debtor executed a deed of arrangement by an attorney. The attorney also purported to make the affidavit which must be made "by debtor" under 1914 (Deeds) Act, s. 5 (1). Petitioning creditor assented in writing to the deed. Debtor began an action in the K. B. Div. against the trustee under the deed, & petitioning creditor shortly afterwards presented a petition in bkpcy. against debtor, & obtained a receiving order:—*Held:* the deed being void & a nullity by reason of the above sub-sect. (1) petitioning creditor was not estopped by his assent to the deed from petitioning, & he had not by his conduct prevented debtor from paying his debt; (2) the petition was not an abuse of the process of the ct., & the receiving order was rightly made.—*Re* WILSON, *Ex p.* JONES (1916), 85 L. J. K. B. 1408; 114 L. T. 969; [1916] H. B. R. 70, C. A.

1499. Purchase of debt by petitioning creditor—For purpose of founding petition—Whether abuse of process.]—A. was secretary to a death club, & as such received sums of money & paid all claims owing to members. Certain mistakes having occurred in A.'s accounts, A. agreed to refund all sums missing, & in addition A. paid by bills £45 each to B. & C., members of the club, for claims which they were entitled to have paid by the club. A. absconded, & his whereabouts was unknown. B. purchased *bonâ fide* for £15 C.'s debt of £45, so as to enable him to take proceedings in bkpcy. against A. B. presented a petition, & a receiving order was obtained:—*Held:* as B.'s purchase of C.'s debt was made perfectly *bonâ fide*, it was valid & not an abuse of the bkpcy. laws, & the receiving order was well founded.—*Re* BAKER, *Ex p.* BAKER (1887), 58 L. T. 233; 36 W. R. 558; 5 MORT. 5, D. C.

Effect of refusal of receiving order.]—*See* Nos. 1455 *et seq.*, *ante*.

SECT. 3.—FORM AND DATE OF RECEIVING ORDER.

1500. Order against firm with infant partner—"Other than."]—If an act of bkpcy. is committed by a firm, of which one partner is an infant, a receiving order cannot be made against the firm simply, but may be made against the firm "other than" the infant partner.—LOVELL & CHRISTMAS *v.* BEAUCHAMP, [1894] A. C. 607; 63 L. J. Q. B. 802; 71 L. T. 587; 43 W. R. 129; 1 Mans. 467; 11 R. 45; *sub nom. Re* BEAUCHAMP BROTHERS, *Ex p.* BEAUCHAMP, 10 T. L. R. 682, H. L.; *varying, Re* BEAUCHAMP BROTHERS, *Ex p.* BEAUCHAMP, [1894] 1 Q. B. 1, C. A.

Annotations:—**Reid.** *Re* Farnham (1895), 3 Mans. 109, C. A.; *Re* Low, *Ex p.* Gibson (1895), 72 L. T. 450, C. A.; *Re* Handford, *Ex p.* Handford (1899), 68 L. J. Q. B. 386 C. A.

1498 i. *Agreement to assignment for creditors—Not binding till signed.*]—At a meeting of creditors of G., the creditors present agreed to sign a deed of assignment of G.'s assets for the payment of his debts. Subsequently a large creditor, H., who had been a party to the resolution, refused to sign the deed. G. was clearly insolvent:—*Held:* until it was signed, the agreement as to the assignment was inchoate, & in consequence of H.'s refusal the assignment had not become effective, & creditors of G. were entitled to claim that the estate should be sequestrated.—GOURLAY, CAVANAGH & CO. *v.* GROMER (1903), 20 S. C. 612.—**S. AF.**

a. *Agreement to accept compromise—Without consideration.*]—An agreement by a creditor with his debtor to accept a compromise, no consideration appearing for such agreement, & debtor not having been induced thereby to change his position, will not prevent the creditor from sequestrating his debtor's estate as insolvent.—HANSEN & SCHRADER *v.* QUIRK (1885), 5 E. D. C. 35.—**S. AF.**

b. *Delay in prosecuting petition.*]—The effect of 1857 Act, s. 121, is that if neither petitioner nor any other creditor shall within seven days after the expiration of five days, after the petition was filed, or within such extended time as may be granted by the ct. within such seven days, proceed to adjudication, the petition will be dismissed.—*Re* MURDOCK (1880), 14 I. L. T. 105.—**IR.**

1499 i. *Purchase of claim by petitioning creditor—For purpose of founding petition—Whether abuse of process.*]—*A bonâ fide* purchase for value by a creditor of a claim for the express purpose of increasing his demand to an amount sufficient to issue a writ of attachment under 1875 Act, s. 9, is valid.—CARRIER *v.* ALLIN (1877), 2 A. R. 15.—**CAN.**

PART IV. SECT. 3.

c. *Deemed to be made—When pronounced.*]—A vesting order is made when it is given by the ct., & not at the time it is drawn up, signed, & sealed.—*Re* BODRY (1870), 5 B. L. R. 309.—**IND.**

d. *Date of order.*]—At the hearing of an order *nisi* for sequestration, after the close of petitioner's case, the ct. allowed an amendment of an error in a date in the order *nisi*, as the amendment could not in any way prejudice resp.—*Re* VAGG (1886–7), 13 V. L. R. 172.—**AUS.**

e. *Christian name of bankrupt inserted.*]—A commission will be rectified by inserting the christian name of bkpt. in full, instead of the initial letter, & resealed.—*Ex p.* FOTTRELL (1828), 2 Mol. 116.—**IR.**

f. *Failure to show indebtedness.*]—Where an order *nisi* did not show that resp. was indebted to petitioner before the order *nisi* was obtained, or at all, it was discharged, as such a defect could not be amended. *Semble:* the omissions, which can be supplied, are omissions of words accidentally dropped out of paragraph.—*Re* BENGLASE (1889), 15 V. L. R. 434.—**AUS.**

1501. "Receiving order" written on judgment summons—Signed by judge's initials.]—Upon the hearing of a judgment summons, the judge wrote upon the summons "Receiving Order" & signed this with his initials, but no formal order was ever drawn up, & nothing further was done:—*Held:* a receiving order had been made, when the order was made by the judge.—BLOUNT *v.* WHITELY (1898), 79 L. T. 635; 6 Mans. 48, C. A.

See, also, No. 1561, *post.*

1502. Date of act of bankruptcy described as "on or about."]—A receiving order recited an act of bkpcy. as having been committed "on or about" Aug. 31:—*Held:* such an order should state with certainty the date of the act of bkpcy.—*Re* HERMAN, *Ex p.* PHARAOH & Co., [1915] H. B. R. 41, C. A.

1503. Order granted on appeal—Dated on date of application to court below.]—When a receiving order is granted on appeal, it is dated as if it had been made on the date of the application to the ct. below.—*Re* RAATZ, *Ex p.* CARLHIAN (1897), 76 L. T. 330; 45 W. R. 480; 41 Sol. Jo. 408; 4 Mans. 50, D. C.

Annotation:—**Refd.** *Re* Teale, *Ex p.* Blackburn, [1912] 2 K. B. 367, D. C.

1504. —— Antedated to date on which it should have been made.]—The Ct. of Appeal made a receiving order & antedated it to the date on which it ought to have been made.—*Re* O'SHEA (1911), cited [1912] 2 K. B. at p. 372, C. A.

Annotation:—**Consd.** *Re* Teale, *Ex p.* Blackburn, [1912] 2 K. B. 367, D. C.

1505. —— ——.]—Where on appeal from the dismissal of a bkpcy. petition a receiving order is made, the order, in accordance with the usual practice of the ct., is antedated as of the date when the petition was wrongly dismissed.—*Re* TEALE, *Ex p.* BLACKBURN, [1912] 2 K. B. 367; 81 L. J. K. B. 1243; 106 L. T. 893; 28 T. L. R. 415; 56 Sol. Jo. 553; 19 Mans. 327, D. C.

SECT. 4.—**AMENDMENT OF RECEIVING ORDER.**

1506. Date of order—Granted on debtor's petition—After dismissal of creditor's petition—Petitioning creditor reinstated to rights.]—On Jan. 3, 1890, a bkpcy. petition was dismissed, but on Jan. 9, a receiving order was made against debtor on his own petition upon which he was adjudicated bkpt. The creditor appealed against the order dismissing his petition on the ground that by the wrong decision of the registrar he had been deprived of his costs & had been prevented from having carriage of the proceedings:—*Held:* the order dismissing the petition of the creditor must be set aside, & a proper order in the circumstances would be to direct that the receiving order made against debtor should be amended as if dated Jan. 3, such receiving order to be deemed to be made on the petition of the creditor, & the order must be re-gazetted.—*Re* HAYNES, *Ex p.* KIBBLE (1890), 7 Morr. 50, D. C.

Annotation:—**Folld.** *Re* Johns, *Ex p.* Spears (1893), 10 Morr. 190, D. C.

1507. —— —— —— ——.]—A creditor's petition was wrongly dismissed on Dec. 12, 1892. On Dec. 14, a receiving order was made against debtor on his own petition, upon which he was adjudicated bkpt. On appeal from the order dismissing the creditor's petition:—*Held:* the proper order would be to direct that the receiving order made against debtor should be amended as if dated Dec. 12, 1892, such receiving order to be deemed to be made on the petition of the creditor.—*Re* JOHNS, *Ex p.* SPEARS (1893), 10 Morr. 190, D. C.

1508. Order made against firm—Infant partner not excepted.]—If an act of bkpcy. is committed by a firm with an infant partner & a receiving order be made against the firm simply, the proceedings may be amended under 1883 Act, s. 105.—LOVELL & CHRISTMAS *v.* BEAUCHAMP, [1894] A. C. 607; 63 L. J. Q. B. 802; 71 L. T. 587; 43 W. R. 129; 1 Mans. 467; 11 R. 45; *sub nom. Re* BEAUCHAMP BROTHERS, *Ex p.* BEAUCHAMP, 10 T. L. R. 682, H. L.

Annotations:—**Refd.** *Re* Low, *Ex p.* Gibson (1895), 72 L. T. 450, C. A.; *Re* Farnham (1896), 3 Mans. 109, C. A. **Mentd.** *Re* Handford, *Ex p.* Handford (1899), 68 L. J. Q. B. 386, C. A.; Leslie *v.* Sheill, [1914] 3 K. B. 607, C. A.

1509. Order against one partner—Insertion of other partner's name—Without service on such partner.]—A. & B. traded under the firm name of A. A receiving order was made against A.:—*Held:* the registrar had no jurisdiction to amend the order by inserting the name of B., without service upon B.—*Re* DEBTOR (No. 3 OF 1912), *Ex p.* THE DEBTOR (1912), 1 L. J. C. C. 29, D. C.

1510. Order on two acts of bankruptcy—One act struck out—Third party interested.]—A receiving order was made against debtor on a petition alleging two acts of bkpcy., one of which was the giving of a bill of sale. The grantee of the bill of sale was not a party to the bkpcy. proceedings in the county ct., & had no opportunity of disputing the allegation of fraud:—*Held:* the receiving order ought to be amended by striking out all reference to the particular act of bkpcy. complained of by the grantee, & the trustee should within fourteen days give notice of motion in the county ct. to set aside the bill of sale.—*Re* A DEBTOR, *Ex p.* PERSON AGGRIEVED *v.* PETITIONING CREDITORS & OFFICIAL RECEIVER (1912), 106 L. T. 344, D. C.

SECT. 5.—**APPEALS FROM AND APPLICATIONS TO RESCIND OR SET ASIDE RECEIVING ORDER**

1511. Jurisdiction of court & registrar—All creditors consenting—Circumstances to be considered.]—The ct. has jurisdiction to rescind a receiving order, even though no scheme of arrangement or composition has been proposed by debtor under 1883 Act, s. 18. But the exercise of the jurisdiction is a matter of discretion, & the order will not be rescinded as a matter of course because all the creditors consent to the rescission.

The ct. will consider all the circumstances of the case, the interests of the general body of creditors, & the interests of the public.—*Re* HESTER, *Ex p.* HESTER (1889), 22 Q. B. D. 632; 60 L. T. 943; 5 T. L. R. 326; 6 Morr. 85, C. A.

Annotations:—**Folld.** *Re* Flatau, *Ex p.* Official Receiver, [1893] 2 Q. B. 219, C. A. **Consd.** *Re* Izod, *Ex p.* Official Receiver, [1898] 1 Q. B. 241, C. A. **Apld.** *Re* Telescriptor Syndicate, [1903] 2 Ch. 174. **Refd.** *Re* Burnett, *Ex p.* Official Receiver (1894), 1 Mans. 89; *Re* A Debtor, *Ex p.* Official Receiver (1901), 84 L. T. 666, C. A.

1512. —— —— ——.]—Where application is made in bkpcy. to rescind a receiving order, the ct. refuses to act upon the mere assent of the creditors in the matter, & considers not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality & to the interests of the public at large. The mere consent

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PART IV. SECT. 5.

1511 i. *Jurisdiction of Court.*]—Jurisdiction of the Judge in Insolvency under Insolvent Act, 1869, s. 20, to entertain a petition to set aside a writ of attachment.—LANG *v.* FOREMAN (1872), 8 N. S. R. 546.—**CAN.**

1511 ii. ——.] — CENTRAL MOTOR ENGINEERING CO. *v.* GALBRAITH, [1918] S. C. 755.—**SCOT.**

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of the creditors is but an element in the case. The ct. has to exercise a discretion. It is bound to regard not merely the interests of the creditors; it has a duty with regard to the commercial morality of the country (BUCKLEY, J.).—*Re* TELESCRIPTOR SYNDICATE LTD., [1903] 2 Ch. 174; 72 L. J. Ch. 480; 88 L. T. 389; 51 W. R. 409; 19 T. L. R. 271; 10 Mans. 213.

1513. —— —— All unsecured debts paid by debtor's father.]—Debtor presented a bkpcy. petition, & a receiving order was made. Debtor's father, who was a partly secured creditor, immediately afterwards paid all the unsecured creditors in full. The only other creditor was fully secured. Debtor then applied to the ct. to rescind the receiving order & to allow him to withdraw his petition. The application was assented to by the fully secured creditor & by the father:—*Held:* the judge had jurisdiction to rescind the order.—*Re* WEMYSS, *Ex p.* WEMYSS (1884), 13 Q. B. D. 244; 53 L. J. Q. B. 496; 32 W. R. 1002; 1 Morr. 157, D. C.

Annotations:—**Refd.** *Re* Leslie, *Ex p.* Leslie (1887), 18 Q. B. D. 619; *Re* Dixon & Cardus, *Ex p.* Dixon & Cardus (1888), 59 L. T. 776, D. C.; *Re* Hester, *Ex p.* Hester (1889), 22 Q. B. D. 632, C. A.

1514. —— —— Proceedings under order stayed.]—When a receiving order has been made the ct., even though the proceedings under it have been stayed, has a discretion as to its rescission, & will not rescind the order merely upon the consent of petitioning creditor, nor without a full investigation of all the circumstances including the conduct of debtor.—*Re* FLATAU, *Ex p.* OFFICIAL RECEIVER, [1893] 2 Q. B. 219; 62 L. J. Q. B. 569; 68 L. T. 740; 41 W. R. 529; 37 Sol. Jo. 479; 10 Morr. 151; 4 R. 414, C. A.

Annotations:—**Folld.** *Re* Izod, *Ex p.* Official Receiver, [1898] 1 Q. B. 241, C. A. **Apld.** *Re* Telescriptor Syndicate, [1903] 2 Ch. 174. **Refd.** *Re* A Debtor, *Ex p.* Official Receiver (1901), 84 L. T. 666, C. A.

1515. —— All debts paid in full—Where satisfied safe to rescind.]—A receiving order may be rescinded, if all the debts have been paid in full. The ct. will carefully consider all the facts, & will not rescind an order, unless it is satisfied it is safe to do so.—*Re* PERKINS, *Ex p.* PERKINS (1890), 7 Morr. 78, C. A.

1516. —— No misconduct—For benefit of creditors—Rescission before public examination.]—Although an adjudication of bkpcy. can only be annulled where debtor ought not to have been adjudged bkpt., or where the debts of bkpt. are paid in full, the ct. has jurisdiction to rescind a receiving order upon other grounds even before the public examination of debtor & without any scheme of arrangement, but the jurisdiction will only be exercised in exceptional circumstances, where there has been no misconduct by debtor & where it was for the benefit of the creditors.—*Re* IZOD, *Ex p.* OFFICIAL RECEIVER, [1898] 1 Q. B. 241; 67 L. J. Q. B. 111; 77 L. T. 640; 46 W. R. 304; 14 T. L. R. 115; 42 Sol. Jo. 117; 4 Mans. 343, C. A.

Annotation:—**Expld.** *Re* A Debtor (No. 446 of 1918) (1919), 64 Sol. Jo. 147, C. A.

1517. —— As to sufficiency of consents.]—The registrar before rescinding the appointment of a receiver is not bound to be satisfied that the consent of all the creditors has been obtained, but he must exercise his discretion as to the sufficiency of the consent obtained in each case.—*Re* CARR, *Ex p.* CARR (1886), 35 W. R. 150; 3 T. L. R. 120, C. A.

Annotation:—**Consd. & Expld.** *Re* Hester, *Ex p.* Hester (1889), 22 Q. B. D. 632, C. A.

1518. —— —— Circumstances to be considered.]—A receiving order had been made against debtor, who was not a trader, & since the making of the order, a friend had bought up his unsecured debts & released them & had paid off the deficiency in value of one secured creditor. The two other secured creditors had agreed to rely only on their securities. The registrar refused to rescind the receiving order:—*Held:* the registrar had a discretion & had to take into consideration all the circumstances of the case.—*Re* DAVIDSON, *Ex p.* DAVIDSON, [1894] W. N. 210, C. A.

Annotation:—**Folld.** *Re* Izod, *Ex p.* Official Receiver, [1898] 1 Q. B. 241, C. A.

1519. —— Application opposed by official receiver.]—A receiving order having been made against debtor, his public examination was adjourned, & the creditors accepted a scheme under which they received less than the full amount of their debts. On an application to have the receiving order discharged, made by debtor with the concurrence of all the creditors, the official receiver appeared & objected to the discharge of the order until after the public examination had been held, on the ground that he was not satisfied with debtor's conduct:—*Held:* the county ct. judge had a discretion to refuse the discharge.—*Re* LESLIE, *Ex p.* LESLIE (1887), 18 Q. B. D. 619; 56 L. T. 569; 35 W. R. 395; 4 Morr. 75, D. C.

Annotations:—**Expld.** *Re* A Debtor (No. 446 of 1918) (1919), 64 Sol. Jo. 147, C. A. **Refd.** *Re* Izod, *Ex p.* Official Receiver, [1898] 1 Q. B. 241, C. A. **Mentd.** *Re* Hester, *Ex p.* Hester (1889), 22 Q. B. D. 632, C. A.

1520. —— ——.]—The registrar in bkpcy. has a general discretion to rescind a receiving order, where he is satisfied on the evidence before him that it ought not to have been made, & that there is money available for the payment of all the debts in full, & it is not a judicial exercise of such discretion for him to hold that he is bound by the opposition of the official receiver to refuse to rescind without holding a public examination of debtor.

Although the opinion of the official receiver is an element which may go a long way to influence the registrar in exercising his discretion, still he must exercise it (LORD STERNDALE, M.R.)—*Re* A DEBTOR (No. 446 OF 1918) (1919), 64 Sol. Jo. 147, C. A.

1521. Who may appeal or apply—Trustee under composition deed.]—A receiving order having been made against debtor under 1883 Act, applt., the trustee of a deed of arrangement made by such debtor for the benefit of creditors, sought to appeal as being a person aggrieved within s. 104. Applt. contended that he was aggrieved, because, if the order stood, the bkpcy. being within three months from the date of the execution of the deed, the deed as an act of bkpcy. would be void & his title under it would be defeated:—*Held:* (1) the question upon which the case depends was whether the deed was properly registered, & if it were not, it would be void, & applt. would not be entitled to intervene, but if it were, then the opposite conclusion would follow; (2) on the facts the deed was properly registered, & applt., as the

1521 i. *Who may appeal or apply—Not bankrupt — To relieve himself of effect of non-surrender.*]—The power of the Lord Chancellor to extend the time for bkpt. surrendering himself, being limited by statute, an order for an extension of time without regard to that limitation is not mandatory *per se*, but if the creditors & bkpt. acquiesce, it shall not be open for the latter to take advantage of that defect to nullify the proceeding in order to shield himself from the consequences to which his misconduct might render him liable under a regular commission.—*Ex p.* FITZHENRY (1827), 1 Mol. 35.—**IR.**

trustee under a valid & duly registered deed, was entitled to appeal.

The registration would not prevent the deed from being an act of bkpcy., & being subject to be defeated by a valid bkpcy.; but the deed being good, except if defeated by such a bkpcy., it entitles the trustee to intervene for the purpose of showing that the bkpcy. ought not to stand, & that the receiving order ought to be set aside (LORD ESHER, M.R.).—*Re* BATTEN, *Ex p.* MILNE (1889), 22 Q. B. D. 685; 58 L. J. Q. B. 333; 37 W. R. 499; 5 T. L. R. 423; 6 Morr. 110, C. A.

Annotations:—**Mentd.** *Re* Samson & Schreiber's Contract & Vendor & Purchaser Act, 1874 (1895), 39 Sol. Jo. 504; Maskelyne & Cooke *v.* Smith, [1903] 1 K. B. 671, C. A.

1522. —— Executor of deceased partner—Receiver in partnership action—Receiving order against firm.]—A receiving order was made against a firm, founded on a judgment against the firm, in which there was only one surviving partner. The exor. of a deceased partner, & the receiver in a partnership action which was pending having appealed:—*Held:* neither was a person aggrieved.—*Re* JAMESON & SANDYS, *Ex p.* CRESSWELL & JAMESON (1891), 8 Morr. 278, C. A.

Annotation:—**Mentd.** *Re* Wenham, *Ex p.* Battams (1900), 69 L. J. Q. B. 803, C. A.

1523. —— Curator bonis of Scotch estate.]—A., who resided in London, & was considerably indebted there, became of unsound mind & H. was appointed committee of his estate. H. filed a declaration of insolvency by leave of the lords justices in lunacy. Soon afterwards certain English creditors filed a bkpcy. petition against A., grounded on the declaration of insolvency. A receiving order was then made against A., on a petition filed on his behalf by H., & H. was duly appointed trustee in the bkpcy. R., a *curator bonis* appointed in Scotland over A.'s Scottish estate prior to the lunacy proceedings in England applied that the receiving order might be rescinded on his paying into ct. a sum sufficient to pay all A.'s debts & costs:—*Held:* R. had no *locus standi*.—*Re* AYTOUN, *Ex p.* DUNHAM (1901), 36 L. J. N. C. 407.

1524. —— Third party—After bankrupt's submission to commission.]—Petitioning creditor's debt being of above six years' standing, cannot be objected to by a third party, where bkpt. has submitted to the commission.—QUANTOCK *v.* ENGLAND (1770), 5 Burr. 2628; 2 Wm. Bl. 702; 98 E. R. 382.

Annotations:—**Distd.** Bickerdike *v.* Bollman (1786), 1 Term Rep. 405. **Consd.** *Ex p.* Dewdney (1809), 15 Ves. 479, L. C. **Apld.** Jellis *v.* Mountford (1821), 4 B. & Ald. 256. **Refd.** Mayor *v.* Pyne (1825), 3 Bing. 285.

See, now, 1914 Act, s. 137 (2).

1525. Application—To what court.]—An order dismissing a bkpcy. petition was made by the registrar of a county ct.:—*Held:* the power given to the ct. by 1883 Act, s. 104, "to review, rescind, or vary any order made by it" was only given to the ct., by which the order was in fact made, & the county ct. judge had no jurisdiction to review, rescind, or vary the registrar's order.—*Re* MAUGHAM, *Ex p.* MAUGHAM (1888), 21 Q. B. D. 21; 57 L. J. Q. B. 487, D. C.

Annotation:—**Mentd.** *Re* Maund, *Ex p.* Maund, [1895] 1 Q. B. 194, D. C.

1526. —— By way of appeal.]—Where on an appeal from a receiving order it was stated that petitioning creditor had been settled with, & with his assent debtor applied that the receiving order might be set aside, the ct. refused to rescind the receiving order & directed that the case should go back to the registrar for his decision.—*Re* ASHBURY, *Ex p.* ASHBURY (1889), 6 Morr. 256, C. A.

Annotation:—**Refd.** *Re* Norris, *Ex p.* Norris (1890), 7 Morr. 8, C. A.

1527. —— ——.]—A receiving order rightly made will not be rescinded on appeal, on the ground that petitioning creditor consents. The proper course is for debtor to apply to the registrar for rescission.—*Re* NORRIS, *Ex p.* NORRIS (1890), 7 Morr. 8, C. A.

1528. —— —— When rehearing ordered.]—On the hearing of a judgment summons in the county ct., a receiving order was made against debtor under 1883 Act, s. 103 (5), & the proceedings were thereupon transferred under 1886 Rules, r. 360 (1), to the London Bkpcy. Ct., as being the ct. to which a bkpcy. petition against debtor would properly be presented. Debtor paid the debt, & appealed to the Divisional Ct. in Bkpcy. to rescind the receiving order:—*Held:* in the circumstances the proper course for debtor to pursue was to apply to the county ct. judge for a rehearing.—*Re* HUGHES, *Ex p.* HUGHES (1887), 4 Morr. 73; *subsequent proceedings*, 4 Morr. 236, D. C.

1529. —— —— In special circumstances—Refusal of registrar to inquire into judgment debt.]—On Mar. 3, 1888, a receiving order was made in the county ct. against debtor, who had failed to comply with the terms of a bkpcy. notice requiring him to pay a judgment debt, but a compromise having been subsequently agreed upon between petitioning creditors & debtor, application was made by debtor, with the consent of petitioning creditors, to the Divisional Ct. in Bkpcy. to rescind the receiving order on the terms of such compromise:—*Held:* in the circumstances the ct. would allow debtor to proceed with the case in the form of an appeal from the order of the county ct., it being alleged that the registrar had wrongly refused to allow debtor to go behind the judgment & inquire into the consideration of the judgment debt, upon which the bkpcy. notice had been founded.—*Re* SHURLY, *Ex p.* SHURLY (1888), 5 Morr. 158.

See, also, Nos. 1453, 1457, *ante*, & Part VIII., Sect. 7, sub-sect. 1, *post*.

1530. Service of notice of appeal or application—On official receiver—Suspension of order to allow official receiver to object.]—Notice of an application by debtor to rescind a receiving order should be served on the official receiver. Where an application was made with the consent of

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1524 i. —— *Not third party.*]—A third party cannot object to the regularity of the proceedings taken against a debtor under Insolvent Act, 1869.—CLEMENTSON *v.* HAMMOND (1871), N. B. Dig., p. 227.—**CAN.**

1525 i. *Application—Must be made promptly.*]—A sequestration order had been made against applt. based upon failure to comply with a bkpcy. notice calling upon him to pay the amount due on a judgment against him. An application made by applt. two years afterwards, to discharge the sequestration order, in which he sought to go behind the judgment & show that no debt existed, was refused by the registrar:—*Held:* in the absence of any suggestion of fraud or collusion, & the question of indebtedness having been fought out in the action, the registrar properly dismissed the application.—DELPH SING *v.* WOOD (1918), 25 C. L. R. 497.—**AUS.**

1525 ii. —— ——.]—An application to set aside a writ of attachment for a substantial insufficiency in the affidavit must be made within five days from the issue of the writ.—CARRIER *v.* ALLIN (1877), 2 A. R. 15.—**CAN.**

1525 iii. —— *Whether formal petition necessary.*]—Rehearing of bkpcy. petitions is quite of course. It is sometimes on a formal petition, but when the form has not been observed, the ct. will not put the parties to the expense of obtaining the signature of counsel to a petition.—*Re* BURTON, *Ex p.* SCALLAN, *Ex p.* JONES (1827), 1 Mol. 63.—**IR.**

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petitioning creditor & the order was discharged, it was directed not to be drawn up for four days, & the official receiver was ordered to be notified, so that he might have an opportunity of being heard. —*Re* FLETCHER, *Ex p.* FLETCHER (1887), 4 Morr. 113, D. C.

Annotation :—**Refd.** *Re* Webber, *Ex p.* Webber (1889), 24 Q. B. D. 313, C. A.

1531. —— —— **On stay of proceedings pending an appeal.**]—Where on the making of a receiving order, a stay is granted pending an appeal, on the ground that no receiving order ought to have been made, service of notice of appeal need not be made on the official receiver, nor need he be brought before the ct. in any way.—*Re* HARRIS, *Ex p.* HARRIS (1889), 38 W. R. 195 ; 6 T. L. R. 59, C. A.

Annotation :—**Overd.** *Re* Webber, *Ex p.* Webber (1889), 24 Q. B. D. 313, C. A.

1532. —— —— **Within time limit for service on petitioning creditor.**]—Notice of an appeal against a receiving order, whether to a Divisional Ct. in Bkpcy. or to the Ct. of Appeal, must in every case, whether proceedings under the order have or have not been stayed, be served on the official receiver within the time limited by the rules for service on petitioning creditor.—*Re* WEBBER, *Ex p.* WEBBER (1889), 24 Q. B. D. 313 ; 59 L. J. Q. B. 581 ; 62 L. T. 485 ; 38 W. R. 195 ; 6 T. L. R. 125 ; 6 Morr. 313, C. A.

Annotation :—**Refd.** *Re* Sleath, *Ex p.* Lotus Shoe Co. (1913), 109 L. T. 222.

1533. —— —— —— **Extension of time in special circumstances.**]—Notice of appeal to the Ct. of Appeal, or to the Divisional Ct. in Bkpcy., against the making of a receiving order must in every case, whether proceedings under the order have been stayed or not, be served upon the official receiver within the time limited by the rules for service on petitioning creditor. But in special circumstances the ct. may extend the time for appealing, in order that the official receiver may be served, or may hear the appeal *de bene esse*, & if there appears to be any substance in the appeal, may then adjourn the matter for the purpose of serving the official receiver.—*Re* SLEATH, *Ex p.* LOTUS SHOE CO. (1913), 109 L. T. 222, D. C.

1534. —— **On debtor—On appeal by petitioning creditor.**]—When debtor gives no notice of his intention to show cause against a bkpcy. petition, & the petition is heard in his absence, & the ct. refuses to make an adjudication, if petitioning creditor desires to appeal against the refusal he must serve notice of the appeal on debtor.—*Re* WHALLEY, *Ex p.* WARBURG (1883), 24 Ch. D. 364 ; 53 L. J. Ch. 336 ; 49 L. T. 243, C. A.

1535. Hearing of appeal—What objections debtor may take.]—If, on the hearing of a bkpcy. petition, the act of bkpcy. alleged is not strictly proved, but debtor appears & does not raise the objection, & a receiving order is made, he cannot on an appeal from that order raise the objection.—*Re* PRATT, *Ex p.* PRATT (1884), 12 Q. B. D. 334 ; 53 L. J. Ch. 613 ; 50 L. T. 294 ; 32 W. R. 420 ; 1 Morr. 27, C. A.

Annotations :—**Distd.** *Re* May, *Ex p.* May (1884), 12 Q. B. D. 497, C. A. **Mentd.** *Re* Pulborough School Board Election Bourke *v.* Nutt, [1894] 1 Q. B. 725, C. A.

1536. —— **What debtor must show—Order made in lieu of committal.**]—Where a receiving order in lieu of a committal is made under 1883 Act, s. 103 (5) :—*Qu. :* whether it is necessary that the consent of the creditors should be shown, if debtor pays the judgment creditor & applies to rescind.—*Re* HUGHES, *Ex p.* HUGHES (1887), 4 Morr. 236, D. C.

1537. Grounds for granting—In general.]—In rescinding a receiving order the ct. will be guided by 1883 Act, s. 35, as to the annulment of an adjudication in bkpcy.—*Re* HESTER, *Ex p.* HESTER (1889), 22 Q. B. D. 632 ; 60 L. T. 943, D. C. ; *affd.* on another point, 22 Q. B. D. 637, C. A.

Annotations :—**Dbtd.** *Re* Izod, *Ex p.* Official Receiver, [1898] 1 Q. B. 241, C. A. **Mentd.** *Re* Flatau, *Ex p.* Official Receiver, [1893] 2 Q. B. 219, C. A. ; *Re* Burnett, *Ex p.* Official Receiver (1894), 1 Mans. 89 ; *Re* A Debtor, *Ex p.* Official Receiver (1901), 84 L. T. 666, C. A. ; *Re* Telescriptor Syndicate, [1903] 2 Ch. 174.

1538. —— ——.]—The principles which, under 1883 Act, ss. 35, 36, govern the annulment of an adjudication in bkpcy. are also applicable to the annulment of a receiving order.—*Re* DENNIS, *Ex p.* DENNIS, [1895] 2 Q. B. 630 ; 65 L. J. Q. B. 48 ; 73 L. T. 413 ; 44 W. R. 170 ; 11 T. L. R. 597 ; 39 Sol. Jo. 762 ; 2 Mans. 392 ; 15 R. 637.

1539. —— **Informal scheme of arrangement.**]—A receiving order was made against debtors, & a scheme put forward by them, which the creditors were willing to accept. Debtors thereupon, with the assent of the creditors, applied to rescind the receiving order :—*Held :* the registrar was right in refusing to rescind the receiving order, & if debtors were desirous of substituting a scheme, they must proceed in the manner provided by 1883 Act, s. 18.—*Re* DIXON & CARDUS, *Ex p.* DIXON & CARDUS (1888), 37 W. R. 161 ; 5 Morr. 291, C. A.

1537 i. *Grounds for granting—Order obtained by fraud.*]—An insolvency order may be set aside, if it was obtained by fraud or in the absence of jurisdiction on the part of the ct. making the order. A ct. has inherent power to set aside an insolvency order obtained from it by a fraudulent misrepresentation of the residence of the judgment debtor, such order being one without jurisdiction.—SARAT CHANDRA MUKHERJI *v.* MAHOMED HOSSEIN (1904), 8 C. W. N. 468.—**IND.**

1537 ii. —— *Mistake of law.*]—*Held :* under 3 & 4 Vict. c. 107, s. 85, the Insolvent Ct. had not jurisdiction to order that an insolvent be reheard upon the matter of his petition & schedule before an assistant-barrister, who, in adjudicating upon the case, pursuant to 14 & 15 Vict. c. 57, s. 119, had fallen into a mistake of law.—*Re* G. —— (1853), 2 I. Ch. R. 361 ; 3 Ir. Jur. 136, 279.—**IR.**

1537 iii. —— *Deed not for benefit of creditors generally.*]—Where a petitioning creditor had, prior to obtaining an order *nisi* for sequestration on the ground of the execution of a creditor's deed, been refused inspection of the deed, & upon its production in ct. it proved to be not for the benefit of the creditors generally, the ct. discharged the order *nisi* without costs.—*Re* HASLAM (1877), 3 V. L. R. 10.—**AUS.**

1537 iv. —— *Subsequent assignments by debtor.*]—Where an attachment is issued under 37 Vict. c. 7 (C. S. c. 38), & deft. afterwards makes an assignment in insolvency, the attachment will be dissolved.—BULLOCK *v.* RING (1876), 3 Pug. 252.—**CAN.**

1537 v. —— *Delay.*]—*Held :* c. 42, C. S., s. 50, which provided that in case pltf. delayed without consent in taking any proceeding in the cause the attachment might be dissolved, unless good cause shown for the delay, applied although the property attached had been restored to deft. on his giving a bond.—SUSSEX BOOT & SHOE CO. *v.* BREAN (1878), 2 P. & B. 330.—**CAN.**

1537 vi. —— *Not invalidity of judgment.*]—On an order *nisi* for sequestration, the act of insolvency relied on being the non-satisfaction of an execution, it is not competent to debtor to impeach the judgment upon which the execution issued.—*Re* MORRIS (1871), 2 V. L. R. 2.—**AUS.**

1537 vii. —— *Private estate of partner sequestrated—Partner abroad & not summoned to show cause.*]—Before the private estates of the individual partners of a firm can be compulsorily sequestrated, the individual partners must be summoned to show cause.

The estate of a partnership carrying on business in Cape Colony was voluntarily surrendered on petition of two of the partners. On the petition of a creditor a judge's order was made sequestrating the private estates of the several partners of the firm. One of these partners resided in England : —*Held :* inasmuch as this partner had not been summoned to show cause why his private estate should not be sequestrated, the order for its sequestration must be set aside.—*Re* BENJAMIN (1875), Buch. 117.—**S. AF.**

Annotations :—**Expld.** *Re* Hester, *Ex p.* Hester (1889), 22 Q. B. D. 632, C. A. **Refd.** *Re* Burnett, *Ex p.* Official Receiver (1894), 1 Mans. 89 ; *Re* Izod, *Ex p.* Official Receiver, [1898] 1 Q. B. 241, C. A.

1540. —— Garnishee order nisi served on debtor.]—A receiving order founded upon non-compliance with a bkpcy. notice, will not be set aside, because debtor in the course of the seven days during which the notice was pending has been served with a garnishee order *nisi* requiring him to pay the debt to a judgment creditor of the creditor who has served the notice.—*Re* DENNIS, *Ex p.* DENNIS (1888), 60 L. T. 348 ; 37 W. R. 263 ; 5 T. L. R. 119, C. A.

Annotation :—**Distd.** *Re* A Debtor, *Ex p.* The Debtor, [1908] 1 K. B. 344, C. A.

1541. —— Defect in petition—Date of act of bankruptcy not duly given.]—*Held :* a defect in a petition, in not duly stating the date of the act of bkpcy., was not a ground for setting aside the receiving order.—*Re* DUNHILL, *Ex p.* DUNHILL, [1894] 2 Q. B. 234 ; 63 L. J. Q. B. 686 ; 1 Mans. 242 ; 10 R. 349, D. C.

1542. —— Consent of creditors — Official receiver satisfied that no delinquency.]—A receiving order having been made against a retail trader on his own petition, his father paid the creditors a composition of 10*s.* in the pound, which was more than could have been realised in the bkpcy., in consideration of which the creditors released their debts & withdrew their proofs. Debtor than applied for a rescission of the receiving order with the consent of the official receiver, who, after holding a preliminary investigation, came to the conclusion that there had been no delinquency on the part of debtor, & did not desire a public examination. The registrar rescinded the receiving order :—*Held :* (1) the registrar had jurisdiction to rescind the receiving order, & in the circumstances his discretion had been rightly exercised. —*Re* IZOD, *Ex p.* OFFICIAL RECEIVER, [1898] 1 Q. B. 241 ; 67 L. J. Q. B. 111 ; 77 L. T. 640 ; 46 W. R. 304 ; 14 T. L. R. 115 ; 42 Sol. Jo. 117 ; 4 Mans. 343, C. A.

Annotation :—**Consd.** *Re* Debtor (No. 446 of 1918) (1919), 64 Sol. Jo. 147, C. A.

1543. —— Successive orders obtained to avoid committal.]—Debtor, with the intention of evading committal orders made against him upon judgment summonses, presented his own bkpcy. petition, upon which a receiving order was made. He had previously at short intervals & with the same object presented two other bkpcy. petitions, upon which receiving orders had been made, & was an undischarged bkpt. under three bkpcies :—*Held :* the receiving order founded upon the petition must be rescinded.—*Re* BETTS, *Ex p.* OFFICIAL RECEIVER, [1901] 2 K. B. 39 ; 70 L. J. K. B. 511 ; 84 L. T. 427 ; 49 W. R. 447 ; 17 T. L. R. 383 ; 45 Sol. Jo. 381 ; 8 Mans. 227, D. C.

Annotation :—**Mentd.** *Re* Hancock, *Ex p.* Hillearys (1904), 52 W. R. 547, C. A.

1544. —— Ignorance of proceedings through absence abroad—Benefit of creditors.]—A receiving order will not be rescinded on the ground that debtor, through absence abroad, was ignorant of the bkpcy. proceedings. The rescission must be for the benefit of the creditors.—*Re* BETTY, *Ex p.* BETTY (1902), 46 Sol. Jo. 431, C. A.

1545. —— Public policy—Misappropriation by solicitor.]—Where a receiving order is made against solrs. on a debt contracted with money of their clients, the ct. will not on public grounds interfere when the receiving order is properly made at the time when it was made.—*Re* DEBTOR (No. 35 OF 1917), [1917] H. B. R. 84, C. A.

1546. Debtor's position—Pending rescission—Right to control of estate—With consent of creditors.]—*Re* CARR, *Ex p.* CARR, No. 1580, *post.*

1547. —— Application refused—Reference to registrar.]—On Dec. 30, 1886, judgment for £33 was recovered against debtor, & in Jan., 1887, a judgment summons was issued. On Feb. 11, a receiving order, in lieu of a committal, was made against debtor under 1883 Act, s. 103 (5). Debtor thereupon paid the debt, & the judgment creditor consented to the receiving order being rescinded, but on application being made for that purpose, the county ct. judge held that debtor had not shown that the consent of the creditors to such rescission had been obtained & he declined to make any order :—*Held :* debtor was entitled to have the matter referred to the registrar to report whether a majority of the creditors did assent or not.—*Re* HUGHES, *Ex p.* HUGHES (1887), 4 Morr. 73, D. C.

1548. —— Application granted—Payment of funds out of court—Creditor untraceable.]—A receiving order was annulled, on payment into ct. by debtor of a sum sufficient to pay in full those of his creditors for the payment of whose debts he could not produce receipts. After six years, no proof or claim having been made in the meantime by the creditors in question, debtor applied that the sum in ct. might be paid out to him :—*Held :* (1) Stat. Limitations did not apply, & he was not entitled to the order ; (2) the sum in ct. might be paid out to debtor, on the ct. being satisfied that there was practically no possibility of the creditors or their personal representatives being found, & on reasonable security being given by debtor for the repayment into ct. of the money, if at any time the creditors or their personal representatives should appear & make a claim.—*Re* DENNIS, *Ex p.* DENNIS, [1895] 2 Q. B. 630 ; 65 L. J. Q. B. 48 ; 73 L. T. 413 ; 44 W. R. 170 ; 11 T. L. R. 597 ; 39 Sol. Jo. 762 ; 2 Mans. 392 ; 15 R. 637.

1549. —— On failing to appear on receiving notice of appeal from refusal of order.]—If debtor, having been duly served with notice of appeal from the refusal of a receiving order, does not appear, a receiving order may be made against him without further notice.—*Re* SELWOOD, *Ex p.* DASH (1894), 1 Mans. 66, D. C.

1550. Appeals—From order rescinding receiving order—Order for summary administration.]—A petitioning creditor appealed against the rescission of a receiving order, where an order for summary administration had been made. No leave to appeal had been given, but the ct. allowed the appeal to be heard.—*Re* CLARKE, *Ex p.* BAYNES (1887), 4 Morr. 80, D. C.

1551. —— —— Duty of appellate court.]—A very strong case is required to induce the Ct. of Appeal

1541 i. —— *Defect in petition.*]—An affidavit was made by a bank agent "for & on behalf of the bank," & thereon a sequestration of the estates of the acceptor of a bill of exchange held by him as agent was obtained. On a petition the sequestration was recalled, as being obtained on an incompetent affidavit.—CAMPBELL *v.* MYLES (1853), 1 W. R. 483.—**SCOT.**

1541 ii. —— ——.]—Where an order *nisi* for the sequestration of an estate is correct, the ct. will not entertain a preliminary objection to the signature to the petition.—*Re* RITCHIE (1882), 8 V. L. R. 1.—**AUS.**

1541 iii. —— —— *Creditor not stating that he holds security.*]—If a petitioning creditor seeking the sequestration of his debtor's estate holds a security for his debt & does not so state in his petition & in the rule *nisi*, the rule will be discharged, although he has before the hearing given notice of his security with an estimate of its value, & signified his willingness to give it up.—*Re* M'NAMARA (1884), 10 V. L. R. 184. —**AUS.**

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to interfere with the exercise of the registrar's discretion in regard to rescinding a receiving order. The ct. must consider the consequences of rescinding the order not only on the existing creditors but also to the future creditors.—*Re* DAVIDSON, *Ex p.* DAVIDSON, [1894] W. N. 210, C. A.

Annotation :—**Apld.** *Re* Izod, *Ex p.* Official Receiver, [1898] 1 Q. B. 241, C. A.

1552. —— From order affirming receiving order —To House of Lords without leave of Court of Appeal.]—No appeal lies to the House of Lords from an order of the Ct. of Appeal affirming a receiving order, where that ct. refuses leave to appeal.—CHATTERTON *v.* CITY OF LONDON BREWERY CO., LTD., [1915] A. C. 631 ; 84 L. J. K. B. 667 ; 112 L. T. 1005 ; 59 Sol. Jo. 301 ; [1915] H. B. R. 112, H. L.

See, generally, Part XVII., *post.*

1553. Costs—Of petitioning creditor supporting unsuccessful appeal against order.]—Where petitioning creditor supports the unsuccessful appeal of debtor from a receiving order, he will not get his costs.—*Re* DEBTOR (No. 35 OF 1917), [1917] H. B. R. 84, C. A.

See, generally, Part XVI., *post.*

SECT. 6.—**EFFECT OF RECEIVING ORDER.**

1554. In general.]—A receiving order is not equivalent to an adjudication of bkpcy. ; it does not divest debtor of his property, nor make him a bkpt., nor place him under the disabilities of an adjudicated bkpt. (LINDLEY, L.J.).—RHODES *v.* DAWSON (1886), 16 Q. B. D. 548 ; 55 L. J. Q. B. 134 ; 34 W. R. 240, C. A.

Annotations :—**Apld.** *Re* Smith, *Ex p.* Mason, [1893] 1 Q. B. 323. The case shows that his estate is unaltered by the making of the receiving order. The same premises continue to be vested in him that were vested in him before the making of the receiving order (VAUGHAN WILLIAMS, J.). **Consd.** *Re* Berry, Duffield *v.* Williams, [1896] 1 Ch. 939. **Refd.** Paterson *v.* Gaslight & Coke Co. (1896), 65 L. J. Ch. 443. **Mentd.** Cook *v.* Whellock (1890), 24 Q. B. D. 658, C. A. ; *Re* Sartoris's Estate, Sartoris *v.* Sartoris, [1892] 1 Ch. 11, C. A. ; B. *v.* B. & F. (1902), 18 T. L. R. 380 ; Blackett *v.* Blackett & Frail, [1902] P. 170, C. A. ; *Re* Teale, *Ex p.* Blackburn (1912), 106 L. T. 893, D. C.

1555. On payments made to attorney of debtor.]—If bkpt., previous to his bkpcy., has given a power of attorney to another, to receive sums of money due to him, in consideration of engagements entered into by such person on account of bkpt., money received under such power, after the bkpcy., may be recovered by the assignees.—HOVILL *v.* LETHWAITE (1804), 5 Esp. 158, N. P.

1556. On bill of sale given by debtor.]—W., as a security to L. for money payable on a certain day, bargained & sold goods to L. by indenture, with a covenant for payment by W. to L. at the day, & a proviso that if such payment were made, the indenture should cease, but in case of default, L. should hold the goods to his own use for ever. Default was made, & L. took possession. Afterwards W. became an insolvent within Judgments Act, 1838 (c. 110), & went to prison, &, after the commencement of W.'s imprisonment, L. sold the goods :—*Held :* such sale was not void as against the assignees, for L. had not thereby availed himself of the bill of sale after the commencement of W.'s imprisonment, within s. 61 of the Act.—HUNT *v.* ROBINS (1842), 3 Q. B. 300 ; 2 Gal. & Dav. 646 ; 11 L. J. Q. B. 228 ; 6 Jur. 460 ; 114 E. R. 521.

Annotations :—**Consd.** Hardy *v.* Tingey (1850), 5 Exch. 294. **Apld.** Simpson *v.* Wood (1852), 7 Exch. 349.

1557. ——.]—A bill of sale as to personal property was given by an insolvent to a creditor more than a year before his insolvency, but possession was not taken by the creditor till one month prior to the insolvency :—*Held :* the creditor must be restrained from proceeding to sell the property, & could only avail himself of the bill of sale under the insolvency.—PARROTT *v.* CONGREVE (1849), 16 Sim. 579 ; 18 L. J. Ch. 279 ; 13 L. T. O. S. 64 ; 13 Jur. 398 ; 60 E. R. 999.

1558. ——.]—A., by deed, in consideration of certain prior advances & of a further sum agreed to be advanced, bargained, sold, & assigned all his household furniture & other personal effects to deft., to hold absolutely as his own property, with a proviso that if A. should pay the money due on a day therein named, the deed should be void. The deed further provided that, on default made in payment on the day named, deft. should take possession, hold, & enjoy the property, & should, at his discretion, sell & retain the proceeds in trust to pay himself the sums due, & to pay the surplus, if any, to A. A. made default in payment on the day specified, & deft. took possession of the goods. A. afterwards filed his petition for protection under 7 & 8 Vict. c. 96, & deft., after A. had filed his petition, sold the goods included in the deed. In an action by the assignees against deft., for the proceeds of the sale :—*Held :* as the bill of sale was absolute before the filing of the petition, deft. had not "availed himself" of it under 7 & 8 Vict. c. 96, s. 21, by the sale after the filing of the petition, & the assignees were not entitled to recover.—SIMPSON *v.* WOOD (1852), 7 Exch. 349 ; 21 L. J. Ex. 152 ; 155 E. R. 982.

Annotation :—**Mentd.** Congreve *v.* Evetts (1854), 10 Exch. 298.

1559. —— Licence to seize after-acquired property.]—Where a bill of sale given to secure a debt contains, together with an assignment of existing property, words which amount to a licence to seize after-acquired property, but which do not amount to an equitable assignment of the latter, such licence is co-extensive with the debt, & cannot be exercised after the debt has been barred by the bkpcy. of debtor.—THOMPSON *v.* COHEN (1872), L. R. 7 Q. B. 527 ; 41 L. J. Q. B. 221 ; 26 L. T. 693 ; 36 J. P. 822.

Annotations :—**Apprvd.** Collyer *v.* Isaacs (1881), 19 Ch. D. 342, C. A. **Mentd.** *Re* Lind, Industrial Finance Syndicate *v.* Lind, [1915] 1 Ch. 744.

1560. On payment to avoid arrest under committal order—Made before receiving order.]—If debtor, after a receiving order, pays money to avoid arrest under a committal order made prior to the receiving order, the amount so paid can be recovered by his trustee.—*Re* RYLEY, *Ex p.* OFFICIAL RECEIVER (1885), 15 Q. B. D. 329 ; 54 L. J. Q. B. 420 ; 33 W. R. 656 ; 1 T. L. R. 468 ; 2 Morr. 171.

Annotations :—**Consd.** Mitchell *v.* Simpson (1889), 23 Q. B. D. 373. **Foll.** *Re* Simes, Simes *v.* Newbery (1890), 62 L. T. 721. **Dbtd.** Iles *v.* T. (1892), 36 Sol. Jo. 502. **Refd.** *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A. **Mentd.** Bailey *v.* Plant (1900), 2 W. C. C. 160.

1561. Protection of debtor—From date on which order pronounced.]—A receiving order must be considered to have been made on the day on which it was pronounced, & as from that date debtor is protected by the order.—*Re* MANNING (1885), 30 Ch. D. 480 ; 55 L. J. Ch. 613 ; 54 L. T. 33 ; 34 W. R. 111, C. A.

Annotations :—**Consd.** Blount *v.* Whitely (1898), 79 L. T. 635, C. A. **Mentd.** Iles *v.* T. (1892), 36 Sol. Jo. 502 ; *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A.

See, also, No. 1501, *ante.*

1562. —— Against commitment order by Mayor's Court—For failure to pay instalment of judgment

debt.]—After a commitment order had been issued by the Mayor's Ct. in London against a judgment debtor for default in payment of an instalment of the judgment debt, a receiving order was made against him under 1883 Act, s. 9 :—*Held :* the commitment order was not a process for contempt of ct., but to enforce payment of a debt provable in the bkpcy., & after the making of the receiving order debtor was privileged from arrest.—*Re* RYLEY, *Ex p.* OFFICIAL RECEIVER (1885), 15 Q. B. D. 329 ; 54 L. J. Q. B. 420 ; 33 W. R. 656 ; 1 T. L. R. 468 ; 2 Morr. 171.

Annotations :—**Expld.** Mitchell *v.* Simpson (1889), 23 Q. B. D. 373. **Folld.** *Re* Simes, Simes *v.* Newbery (1890), 62 L. T. 721. **Dbtd.** Iles *v.* T. (1892), 36 Sol. Jo. 502. **Refd.** *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A. ; Bailey *v.* Plant (1900), 2 B. W. C. C. 160 ; R. *v.* Birmingham County Ct. Judge (1902), 71 L. J. K. B. 881.

1563. —— Against attachment—Defaulting trustee.]—By an order made on Apr. 5, 1889, deft. was directed, as trustee, to pay two sums of cash, which he was alleged to have misapplied, into ct. on or before May 6, 1889, but he failed to comply with that order. On May 13 a receiving order was made against him on his own petition, & he was adjudicated a bkpt. Pltfs. moved for liberty to issue a writ of attachment against deft., the notice of motion being dated Apr. 22, 1890 :—*Held :* the property & person of debtor were protected by 1883 Act, s. 9, & the ct. had no jurisdiction to direct a writ of attachment to issue against him.—*Re* SIMES, SIMES *v.* NEWBERY (1890), 62 L. T. 721 ; 38 W. R. 570.

Annotations :—**N.F.** *Re* Edye (1890), 63 L. T. 762 ; Iles *v.* T. (1892), 36 Sol. Jo. 502 ; *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1.

1564. —— —— ——.]—The ct. has discretion to order the attachment of a defaulting trustee, against whom a receiving order has been made.—ILES *v.* T. (1892), 36 Sol. Jo. 502.

1565. —— —— ——.]—The remedy against the property or person of debtor prohibited by 1883 Act, s. 9, is in respect of a debt, & intended to enforce payment of that debt, but the remedy by committal or attachment under Debtors Act, 1869 (c. 62), is punishment for an offence. The prohibition contained in 1883 Act does not take away the jurisdiction of the ct. to order, under 1869 Act, s. 4 (3), the committal or attachment of a defaulting trustee, against whom a receiving order in bkpcy. had been made.—*Re* SMITH, HANDS *v.* ANDREWS, [1893] 2 Ch. 1 ; 62 L. J. Ch. 336 ; 68 L. T. 337 ; 57 J. P. 516 ; 41 W. R. 289 ; 9 T. L. R. 238 ; 37 Sol. Jo. 247 ; 2 R. 360, C. A.

Annotations :—**Folld.** *Re* Berwick, Berwick *v.* Lane (1899), 81 L. T. 722 ; *Re* Edgcome, *Ex p.* Edgcome, [1902] 2 K. B. 403, C. A. **Apprvd.** Church's Trustee *v.* Hibbard, [1902] 2 Ch. 784, C. A. **Consd.** *Re* Bourne, Davey *v.* Bourne, [1906] 1 Ch. 697, C. A.

1566. —— Against order under Debtors Act, 1869 (c. 62), s. 5.]—An order for payment of a judgment debt by instalments cannot be made against debtor under the above sect., when a receiving order has been made for the protection of his estate, & the debt is provable in the bkpcy. —*Re* NUTHALL, FORD *v.* NUTHALL (1891), 64

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1563 i. *Protection of debtor—Against attachment.*]—Pltf. failed to pay costs to deft., who obtained a rule for an attachment, having sequestrated his estate & registered in the sheriff's book the order for sequestration :—*Held :* the attachment was a civil process for the recovery of a debt, & further proceedings must be stayed by Insolvent Act (5 Vict. No. 17), s. 30. —SHACK YIN *v.* LON FOOK (1885), 6 N. S. W. L. R. 90.—**AUS.**

1563 ii. ——.]—Resp., who had obtained a verdict against applt. in an action for defamation & breach of contract, & had signed judgment for the amount of the damages & costs, presented a petition in bkpcy. for the sequestration of applt.'s estate, &, an order having been made for sequestration, proved as a creditor for the full amount of the judgment. She then procured the arrest of applt. on a writ of *capias ad satisfaciendum* for the amount of the damages recovered on the count of defamation :—*Held :* resp. had irrevocably determined her election as to the form of remedy for the satisfaction of the judgment debt, & was debarred from afterwards, while the bkpcy. was still pending, having recourse to execution against the body of debtor.—FERRIS *v.* MARTIN (1905), 2 C. L. R. 525.—**AUS.**

1563 iii. ——.]—Every mode by which a creditor can arrest bkpt. for a debt, whether in law or in equity, comes within the protection of Bkpcy. Acts, & bkpt. pending his examination is protected from an arrest, made by virtue of an attachment issued for a contempt in not lodging money in ct. pursuant to a decree.—*Re* M'WILLIAMS (1803), 1 Sch. & Lef. 169, 175.—**IR.**

1563 iv. —— *Defaulting trustee.*]—The insolvency of a person, who is in the position of a trustee who has not accounted for money he once had & still ought to have, & who has been ordered to pay such money into ct., does not operate as a stay upon process of attachment issued against him for non-compliance with the order for payment into ct.

Insolvency Act, 1890 (No. 1102), ss. 76, 113, do not apply to cases where the process is or may be of a punitive or disciplinary character, but only to judgments for, or process for the enforcement of, the payment of money as a debt by the insolvent to a creditor.—PETERSON *v.* MCLENNAN, [1906] V. L. R. 94.—**AUS.**

a. —— *Against arrest.*]—Bkpt., travelling from London to Dublin, learned at Liverpool that a commission had issued against him. He proceeded to Dublin to surrender on Mar. 21, but, finding that he was not bound to do so until the 24th, deferred it until that day ; meantime he was arrested : —*Held :* not entitled to a discharge under 6 Will. 4, c. 14, s. 136, as being on his way to surrender.—*Re* WALL (1849), 12 I. Eq. R. 285 ; 1 Ir. Jur. 1. —**IR.**

b. —— ——.]—After judgment in an action of slander, deft. became insolvent :—*Semble :* Defamation Act (11 Vict. No. 13), s. 14, did not repeal Insolvent Act (5 Vict. No. 17), s. 30, & deft. could not be arrested.—*Ex p.* GEE (1867), 6 N. S. W. S. C. R. 355.—**AUS.**

c. —— ——.]—After notice to his creditors amongst whom was petitioner, the holder of a decree against S., the District Munsif passed an order declaring S. insolvent, & a receiver was appointed. Petitioner applied to the ct. for the arrest of the insolvent in execution of his decree :—*Held :* in the circumstances the insolvent could not be arrested.—PANANGUPALLI SEETHARAMAYA *v.* NANDURI EAMACHENDRUDU (1905), I. L. R. 28 Mad. 152. —**IND.**

d. —— —— *Debts incurred recklessly.*]—A judgment-debtor applied to be declared an insolvent :—*Held :* the bad faith, the reckless contracting of debts, the unfair preference of creditors, the transfer, removal, or concealment of property, the making false statements in the application, were all dealt with in Civil Procedure Code s. 351, & were intended to confine the category of acts of misconduct that would debar appct. from obtaining the relief & protection he asked.—SALAMAT ALI *v.* MINAHAN (1882), I. L. R. 4 All. 337.—**IND.**

e. —— —— *Discharge from custody.*]—A judgment debtor, who had been arrested under a writ of *ca. sa.* issued out of the District Ct., sequestrated his estate as bkpt. & applied for his discharge out of custody :—*Held :* notwithstanding the debt had been incurred by fraud, debtor was entitled to an unconditional discharge from custody.—*Re* HUNTINGDON (1904), 5 S. R. N. S. W. 48.—**AUS.**

f. —— —— ——.]—Deft., who was in custody on execution at the suit of pltf., at the time of 5 Vict. c. 43, coming into operation, & who has since been declared a bkpt. under the Act, & duly surrendered, is entitled to his discharge from custody, under s. 24.—REYNOLDS *v.* HANFORD (1843), 2 Kerr, 114.—**CAN.**

g. —— —— ——.]—A trustee was ordered to pay trust funds into ct., &, not having complied with the order, was committed for contempt of ct. The trustee was not charged with any fraudulent or dishonourable conduct in his dealings with the trust funds :—*Held :* his contempt was purged by his filing a bkpcy. petition.—MOLYNEAUX *v.* WILSON (1894), 15 N. S. W. Eq. 109.—**AUS.**

h. *On creditors.*]—After sequestration, nothing can be done by any of the creditors to the prejudice of the general body.—WALKER *v.* SYFRET (1911), App. D. 141.—**S. AF.**

k. *On rights of parties dealing with debtor—During pendency of appeal from judgment quashing attachment.*]—After public notice has been given of the issue of a writ of attachment in insolvency, the public is held to know of the incapacity of the insolvent to dispose of his estate, & this, even during the pendency of an appeal from a judgment quashing the attachment. —MALLETTE *v.* WHYTE (1868), 12 L. C. J. 229.—**CAN.**

Sect. 6.—Effect of receiving order. Sects. 7 & 8. Part V. Sect. 1.]

L. T. 241 ; 55 J. P. 565 ; 7 T. L. R. 373 ; 8 Morr. 106, C. A.

Annotation :—**Refd.** *Re* Edgcome, *Ex p.* Edgcome (1902), 87 L. T. 108, C. A.

See, further, Part XXII., *post.*

1567. —— Against commitment under Distress for Rates Act, 1849 (c. 14).]—A commitment under the above Act is a punitive order, & not a legal process to enforce payment, & the Bkpcy. Ct. has no power to discharge debtor from prison on the ground that whilst in prison a receiving order has been made against him.—*Re* EDGCOME, *Ex p.* EDGCOME, [1902] 2 K. B. 403 ; 71 L. J. K. B. 722 ; 87 L. T. 108 ; 50 W. R. 678 ; 18 T. L. R. 734 ; 46 Sol. Jo. 649 ; 9 Mans. 227, C. A.

Annotation :—**Mentd.** Church's Trustee *v.* Hibbard (1902), 87 L. T. 412, C. A.

Power to restrain proceedings in High Court—Power of county court sitting in bankruptcy.]—*See* cases in Part I., Sect. 4, sub-sect. 3, *ante.*

1568. On debtor's rights—Under deed containing clause of forfeiture in event of bankruptcy.]—A will contained a condition determining a life interest on its "vesting in or becoming payable to some other person" :—*Held :* the life interest was forfeited on a receiving order being made against the life tenant, for by that order the life interest became payable to, although it did not vest in, the official receiver.—*Re* SARTORIS' ESTATE, SARTORIS *v.* SARTORIS, [1892] 1 Ch. 11 ; 61 L. J. Ch. 1 ; 65 L. T. 544 ; 40 W. R. 82 ; 8 T. L. R. 51 ; 36 Sol. Jo. 41, C. A.

Annotation :—**Folld.** *Re* Laye, Turnbull *v.* Laye, [1913] 1 Ch. 298.

1569. —— ——.]—Where a life interest in a trust fund is to determine on the happening of any event whereby the income or any part thereof would, if belonging absolutely to the tenant for life, become "payable to some other person," the life interest determines if a receiving order is made against the tenant for life & any income comes to the hands of the trustees before it is discharged. *Qu. :* whether the same result will follow if no income comes to hand while the receiving order is in force.—*Re* LAYE, TURNBULL *v.* LAYE, [1913] 1 Ch. 298 ; 82 L. J. Ch. 218 ; 108 L. T. 324 ; 57 Sol. Jo. 284 ; 20 Mans. 124.

See, further, Part XX., Sect. 4, sub-sect. 2, D., *post.*

1570. On garnishee order.]—In May, 1909, G. recovered judgment against B. for £550. In July M. & W., judgment creditors of G. for a larger amount, obtained a garnishee order *nisi* on the judgment recovered by G. against B., & in Jan., 1910, the garnishee order was made absolute. In Dec., 1909, M. & W. served a bkpcy. notice on G. in respect of their judgment debt, & in Feb., 1910, a receiving order was made against him founded on his non-compliance with the bkpcy. notice. In June, 1910, G's trustee in bkpcy. having first obtained leave under R. S C. Ord. 42, r. 23, to issue execution on the judgment recovered by G. against B., issued a bkpcy. notice against B. in respect of that judgment, & on his failure to comply with the notice presented a petition in bkpcy. against him :—*Held :* the discharge of the garnishee order was not a condition precedent to the right of G.'s trustee in bkpcy. to issue a bkpcy. notice against B., inasmuch as the operation of the order was put an end to by the receiving order against G.—*Re* BAGLEY, [1911] 1 K. B. 317 ; 80 L. J. K. B. 168 ; 103 L. T. 479 ; 55 Sol. Jo. 48 ; 18 Mans. 1, C. A.

Annotation :—**Consd.** *Re* Wilson, [1916] 1 K. B. 382, D. C.

1571. On rights of parties dealing with debtor—Between dismissal of petition & order made on appeal—Order antedated.]—Where a petition has been dismissed in the ct. of first instance, & a receiving order is subsequently made by the Ct. of Appeal & dated back to the day when it ought to have been made in the ct. below, such antedating does not affect third parties, who have dealt innocently with bkpt. during the interval between the dismissal of the petition & the order of the Ct. of Appeal.—*Re* TEALE, *Ex p.* BLACKBURN, [1912] 2 K. B. 367 ; 81 L. J. K. B. 1243 ; 106 L. T. 893 ; 28 T. L. R. 415 ; 56 Sol. Jo. 553 ; 19 Mans. 327, D. C.

On change or transmission of interest or liability.]—*See* Part XXI., *post.*

SECT. 7.—STAY OF PROCEEDINGS UNDER RECEIVING ORDER.

1572. Application for stay—To what court.]—Although an application for a stay of proceedings under a receiving order ought properly to be made to a Divisional Ct. in Bkpcy. as the Ct. of Appeal pointed out by R. S. C. Ord. 58, r. 16 :—*Semble :* where both parties consent an application of such nature will be heard by the bkpcy. judge when sitting alone.—*Re* CARTER, *Ex p.* CARTER (1888), 5 Morr. 284.

See, now, 1915 Rules, r. 135.

1573. —— On whom served—Petitioning creditor.]—Creditors, other than petitioning creditor of debtor against whom a receiving order has been made, are not "parties directly affected by the appeal" from an order staying proceedings under the receiving order under R. S. C. Ord. 58, r. 2, but petitioning creditor comes within those words & the only circumstance that would justify his not being served with notice of the appeal is, that he has assented to the order in such a way that he must be taken to have renounced his right to be served with such notice.—*Re* A DEBTOR, [1901] 2 K. B. 354 ; 17 T. L. R. 536 ; *sub nom. Re* W. L. (A DEBTOR), 70 L. J. K. B. 699 ; 8 Mans. 247 ; *sub nom. Re* A DEBTOR, *Ex p.* OFFICIAL RECEIVER, 84 L. T. 666 ; 45 Sol. Jo. 520, C. A.

See, now, 1915 Rules, r. 188.

1574. Discretion of registrar—As to sufficiency of consents.]—The registrar, before granting a stay of proceedings, is not bound to be satisfied that the consent of all the creditors has been obtained, but he must exercise his discretion as to the sufficiency of the consent obtained in each case. —*Re* CARR, *Ex p.* CARR (1886), 35 W. R. 150 ; 3 T. L. R. 120, C. A.

Annotation :—**Expld.** *Re* Hester, *Ex p.* Hester (1889), 22 Q. B. D. 632, C. A.

1575. Grounds for granting—Assent of creditors—What must be considered.]—Where a receiving order has been made against debtor, & he subsequently applies, under 1883 Act, s. 109, for an order staying advertisements & all proceedings under the receiving order, the ct. ought not, in the exercise of its discretion, to accede to the application simply because petitioning

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PART IV. SECT. 7.

1575 i. *Grounds for granting—To enable debtor to raise legal question.*]—The ct. may in certain cases in the exercise of the discretion given to it under the Insolvency Law stay sequestration in order to enable resp. to obtain a decision upon a matter which he either could not bring or had excusably failed to bring before the ct. as a defence in a provisional case.—KENT *v.* TRANSVAALSCHE BANK, [1907] T. S. 765.—**S. AF.**

creditor & the other creditors assent thereto, but, taking into consideration all the circumstances of the case, must have regard to the larger & higher view to be taken of the matter, viz. the interests of the public of which the Board of Trade is the guardian.—*Re* A DEBTOR, [1901] 2 K. B. 354 ; 17 T. L. R. 536 ; *sub nom. Re* W. L. (A DEBTOR), 70 L. J. K. B. 699 ; 8 Mans. 247 ; *sub nom. Re* A DEBTOR, *Ex p.* OFFICIAL RECEIVER, 84 L. T. 666 ; 45 Sol. Jo. 520, C. A.

—— **Simultaneous orders in different courts.**]—*See* No. 323, *ante*.

1576. Stay of advertisement in Gazette—When properly granted—Pending rescission or stay of proceedings.]—Pending a rescission or stay of proceedings a stay of the advertisement by the receiver may properly be granted.—*Re* CARR, *Ex p.* CARR (1886), 35 W. R. 150 ; 3 T. L. R. 120, C. A.

Annotations :—**Mentd.** *Re* Hester, *Ex p.* Hester (1889), 22 Q. B. D. 632, C. A. ; *Re* Izod, *Ex p.* Official Receiver (1897), 67 L. J. Q. B. 111, C. A.

1577. —— —— **Court satisfied no act of bankruptcy.**]—On a petition to supersede a commission under which debtor had been found a bkpt., on an affidavit which stated debtor had more than sufficient to pay his debts & had not committed an act of bkpcy., the advertisement was suspended, the ct. being satisfied there was no act of bkpcy.—*Ex p.* PROSTON (1812), 1 Rose, 259.

1578. —— —— **Affidavit of solvency, etc.—Progress of commission otherwise not interfered with.**]—Publication in the *Gazette* was suspended, upon an affidavit of solvency, & of not having committed any act of bkpcy., etc., but the operation of the commission was in other respects continued.—*Ex p.* FLETCHER (1813), 1 Ves. & B. 350 ; 1 Rose, 336 ; 35 E. R. 137.

1579. —— **"Till further order"—Progress of commission not otherwise interfered with.**]—An order was made staying publication in the *Gazette* "till further order," without otherwise interfering with the progress of the commission.—*Ex p.* FOSTER (1810), 17 Ves. 414 ; 1 Rose, 49 ; 34 E. R. 160, L. C.

Annotations :—**Follid.** *Ex p.* Proston (1812), 1 Rose, 259. **Refd.** *Ex p.* Lanchester (1811), 17 Ves. 512 ; *Re* Pownall, *Ex p.* Pownall (1834), 3 L. J. Bcy. 55.

1580. Control of estate pending stay.]—Pending a stay of proceedings under a receiving order debtor should not, even with the consent of all the petitioning creditors, be left in unfettered control of the estate.—*Re* CARR, *Ex p.* CARR (1886), 35 W. R. 150 ; 3 T. L. R. 120, C. A.

Annotations :—**Mentd.** *Re* Hester, *Ex p.* Hester (1889), 22 Q. B. D. 632, C. A. ; *Re* Izod, *Ex p.* Official Receiver (1897), 67 L. J. Q. B. 111, C. A.

SECT. 8.—**MEETINGS OF CREDITORS.**

See Part XXIII., *post*.

Part V.—Adjudication Order.

See 1914 Act, s. 18.

SECT. 1.—**IN GENERAL.**

1581. Power to adjudicate—Delegation—By county court judge to deputy registrar.]—A county ct. judge may delegate to a deputy registrar the power to make an order of adjudication in bkpcy.—*Re* LINDSAY, *Ex p.* LINDSAY (1874), L. R. 19 Eq. 52 ; 44 L. J. Bcy. 5 ; 31 L. T. 415 ; 23 W. R. 44.

1582. —— **What must be proved.**]—The adjudication may be matter of right provided the requisites are proved, *i.e.*, a trading, petitioning creditor's debt, an act of bkpcy., & there be no evidence to invalidate such testimony, but the trading must be such as is within the contemplation of the bkpcy. laws, & if, in opposition to the *primâ facie* case of petitioning creditor, it appear from the records of the ct., or from other testimony, that the person could not be a trader, as on the ground of infancy, or being an uncertified bkpt. & his effects vested in the assignees under a former commission, the ct. has no authority to adjudicate in such circumstances.—*Re* CHAMBERS (1837), 3 Mont. & A. 294.

1583. —— **Act of bankruptcy not definitely proved.**]—The ct. cannot make an order of adjudication without definite proof of an act of bkpcy. ; & an order, made solely on a petition & an affidavit in general terms, that the act of bkpcy. committed by debtor was that being a trader he had made a fraudulent conveyance, gift, delivery, or transfer of his property or of part thereof, is unsustainable.—*Re* LINDSAY, *Ex p.* LINDSAY (1874), L. R. 19 Eq. 52 ; 44 L. J. Bcy. 5 ; 31 L. T. 415 ; 23 W. R. 44.

1584. —— **Without presentation of petition—Or notice to creditors.**]—Where the ct. is satisfied that proceedings in liquidation cannot proceed without injustice & undue delay of creditors, it may at once adjudicate debtor bkpt., without the presentation of any petition for adjudication, or notice to the creditors.—*Re* ASHTON, *Ex p.* MARLAND (1875), L. R. 20 Eq. 777 ; 44 L. J. Bcy. 116 ; 32 L. T. 875 ; 23 W. R. 951.

1585. —— **Without notice to debtor.**]—When a receiving order has been made against debtor & the creditors have resolved that he be adjudged bkpt., the ct. has jurisdiction, on the application of the official receiver, to make an adjudication without any previous notice to debtor of the intention to make the application. But as a general rule it is convenient that notice should be given to debtor.—*Re* PONSFORD, *Ex p.* PONSFORD, [1904] 2 K. B. 704 ; 73 L. J. K. B. 913 ; 91 L. T. 510 ; 53 W. R. 120 ; 48 Sol. Jo. 687 ; 11 Mans. 342, C. A.

Annotation :—**Expld.** *Re* Williams, *Ex p.* Official Receiver, [1913] 2 K. B. 88, C. A.

1586. —— **On refusal to approve scheme—In exceptional circumstances.**]—When the ct. refuses to approve of a scheme of arrangement with creditors proposed by debtor, an immediate adjudication of bkpcy. against him will be made only in the most exceptional circumstances.—*Re* FLEW, *Ex p.* FLEW, [1905] 1 K. B. 278 ; 74 L. J. K. B. 280 ; 92 L. T. 333 ; 53 W. R. 438 ; 12 Mans. 1, C. A.

1587. —— **Against wishes of creditors.**]—In ordinary circumstances unless a scheme is accepted either at the first meeting of creditors or at one adjournment thereof, on the application of the official receiver debtor may be adjudicated a bkpt., & although the ct. will have regard to the wishes of the creditors, the order may be made against their

PART V. SECT. 1.

1587 i. *Power to adjudicate—Against wish of sole creditor.*]—Where a trader petitions for adjudication against himself, & is opposed by a sole creditor, whose demands bkpt.'s assets are insufficient to pay, the adjudication will be granted if in the opinion of the ct. the proceedings be *bonâ fide*.—*Re* MARKS (1867), I. R. 1 Eq. 67.—IR.

Sect. 1.—*In general.*]

wishes.—*Re* A DEBTOR (1910), 130 L. T. Jo. 176, C. A.

1588. —— Discretion of court—Compounding debtor.]—The power given to the ct. to adjudge a compounding debtor a bkpt. is a discretionary power & is independent of the commission by him of an act of bkpcy.—*Re* CHARLTON, *Ex p.* CHARLTON (1877), 6 Ch. D. 45; 46 L. J. Bcy. 110; 37 L. T. 45; 25 W. R. 800, C. A.

Annotations:—**Consd.** *Re* Kearley & Clayton's Contract (1878), 7 Ch. D. 615; *Re* Jones, *Ex p.* Jones (1881), 18 Ch. D. 109, C. A. **Refd.** *Re* McHenry, *Ex p.* McDermott (1888), 21 Q. B. D. 580, C. A. **Mentd.** *Re* Shiers, *Ex p.* Shiers (1877), 7 Ch. D. 416; Champion *v.* Formby (1878), 26 W. R. 391; Sharp *v.* McHenry, Sharp *v.* Brown (1887), 38 Ch. D. 427.

1589. —— —— —— Debtor forming wrong estimate of assets.]—Where debtor has, without fraud, misled the creditors as to the value of his assets comprised in an assignment to a trustee for the creditors, & the creditors have received a less dividend than debtor led them to expect, the ct. has jurisdiction to adjudge him bkpt. It will not exercise such discretionary power if it can see plainly that the creditors can gain nothing by an adjudication, but it will exercise the power, if there is only a probability that the creditors will gain by an adjudication.—*Re* MOON, *Ex p.* MOON (1887), 19 Q. B. D. 669; 56 L. J. Q. B. 496; 35 W. R. 743; 3 T. L. R. 744; 4 Morr. 263, C. A.

Annotation:—**Mentd.** *Re* Stephenson, *Ex p.* Brown (1897), 4 Mans. 13.

See, also, No. 1593, *post,* & *see, further,* Part XXIII., *post.*

1590. —— —— To refuse so as to allow creditors to consider proposal.]—Where a receiving order has been made & a composition is not accepted, the words "shall adjudge" in 1883 Act, s. 20, do not make the adjudication so clearly *ex debito justitiæ* that the ct. has no discretion in the matter, but the ct. has no discretion to refuse to adjudge debtor bkpt. merely in order that the creditors may have time to reconsider the proposal for composition.—*Re* PINFOLD, *Ex p.* PINFOLD, [1892] 1 Q. B. 73; 61 L. J. Q. B. 161; 65 L. T. 683; 40 W. R. 223; 8 T. L. R. 73; 36 Sol. Jo. 79; 8 Morr. 312, D. C.

Annotation:—**Apld.** *Re* Thurlow, *Ex p.* Official Receiver, [1895] 1 Q. B. 724, C. A.

1591. —— —— ——.]—At the first adjournment of the first meeting of the creditors of debtor, the official receiver declined further to adjourn the meeting & did not put a resolution that debtor should be adjudged bkpt., but stated his intention to apply. The application for adjudication was subsequently made & supported by creditors for £146,000. Certain creditors & debtor opposed the application, & desired an adjournment thereof in order to call a new meeting of creditors & formulate a scheme. The registrar declined to adjourn the application & made the order of adjudication:—*Held:* he had exercised his discretion rightly.—*Re* SILBER, [1915] H. B. R. 97, C. A.

1592. Power to adjourn application—Where advantageous to creditors.]—The ct. has power for good reason to adjourn an application by the official receiver for an immediate adjudication in bkpcy. against a debtor. This discretion is rightly exercised where it will be to the advantage of the creditors to have the adjudication postponed.—*Re* THURLOW (LORD), *Ex p.* OFFICIAL RECEIVER, [1895] 1 Q. B. 724; 64 L. J. Q. B. 479; 72 L. T. 642; 59 J. P. 309; 43 W. R. 403; 11 T. L. R. 299; 39 Sol. Jo. 366; 2 Mans. 158; 14 R. 320, C. A.

Annotation:—**Consd.** *Re* Ponsford, *Ex p.* The Bankrupt (1904), 91 L. T. 82, D. C.

1593. Duty to adjudicate—Failure to provide agreed composition—Wrong estimate by debtor.]—On application to the ct. to approve a composition the official receiver reported that he had a sufficient sum in his hands for payment thereof, such report being founded on the estimate given by debtor in his statement of affairs, which subsequently proved to be wrong:—*Held:* if debtor thus formed a wrong estimate of his position, unless the amount found to be necessary to pay the composition agreed upon was procured, the proper order for the ct. to make was one adjudging such debtor bkpt. & annulling the composition under 1883 Act, s. 18 (11).—*Re* WEBSTER, *Ex p.* FOSTER & Co. (1886), 3 Morr. 132.

See, also, No. 1589, *ante,* No. 1606, *post.*

1594. At whose instance made—Firm of which partner named as trustee for creditors—Neither firm nor partner acceding to deed.]—Where the name of a creditor is inserted as one of the trustees in a trust deed, the firm, of which he is a partner, cannot sue out a fiat as petitioning creditors, if the deed was not executed by himself, nor any member of the firm.—*Re* WOOD (1839), 3 Deac. 514, Ct. of R.

1595. —— Debtor—Under pressure of committal order—Policy of 1883 Act.]—A creditor obtained judgment against debtor, a furniture dealer's sales-

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1588 i. —— *Discretion of court—Compounding debtor.*]—An arranging trader had an overwhelming majority of creditors to sanction the proposal for a composition offered by him. A very large amount of machinery, which was erected by a particular creditor, had been mortgaged, by the trader at the time that such machinery was in process of erection, without any intimation to that creditor:—*Held:* the ct. would, notwithstanding that majority, adjudicate the trader bkpt., & adjourn the proceedings into open ct., & give the creditor opposing his costs.—*Re* BECK (1867), 1 I. L. T. Jo. 29.—**IR.**

1588 ii. —— —— —— *Notwithstanding protection order.*]—A trader presented an arrangement petition, obtained a protection order, & lodged the money required by the ct.:—*Held:* a creditor might, nevertheless, obtain an adjudication in bkpcy. upon an act of bkpcy. committed by the trader before filing the arrangement petition.—*Re* KILMARTON (1866), 18 Ir. Jur. 240. —**IR.**

1588 iii. *S. P. Re* KERR (1877), 1 L. R. Ir. 67.—**IR.**

b. —— —— *Sufficiency of notice.*]—Where the main body of creditors were resident without Newfoundland & many had no notice of the proceedings, of which notice had been given in the ordinary way in Newfoundland, the ct. declared petitioner insolvent.—*Re* ARCHIBALD (1852), 3 Nfld. L. R. 270.—**NFLD.**

c. —— —— *Though act of bankruptcy committed.*]—Resp. committed an act of insolvency, & applts. thereupon obtained a provisional order of sequestration against him. On the return day it appeared that the insolvent had a claim against a certain person for work done by him, & that the amount of such claim exceeded the total liabilities by £200:—*Held:* the rule should be discharged.—BLOXAM *v.* GREEN (1905), T. S. 333.—**S. AF.**

d. —— —— *Separate estates in bankruptcy of partnership.*]—The ct. when finally sequestrating a partnership estate has a discretion as to the private estates of the partners.—MARAIS & ZOUTENDIJK *v.* STREET (1913), C. P. D. 593.—**S. AF.**

1592 i. *Power to adjourn application—Upon separate petition of member of firm—To enable other members to join.*]—The ct. will not adjudicate upon the separate petition of a member of a firm, but will adjourn it in order to give to the other member or members of the firm an opportunity of joining in the petition for adjudication.—*Re* PELAN (1868), 2 I. L. T. Jo. 637.—**IR.**

1593 i. *Duty to adjudicate—On proof of act of bankruptcy—& petitioning creditor's debt.*]—*Held:* the word "may" in Debtors & Creditors Act, 1876, s. 35, was imperative, & should be read "shall"; & on due proof of the act of bkpcy. & petitioning creditor's debt the ct. was bound to adjudicate debtor bkpt.—*Re* MACKAY, 2 J. R. N. S. 150—**N.Z.**

1595 i. *At whose instance made—Debtor.*]—Where a trader petitions for adjudication against himself & is opposed by a sole creditor, whose demands bkpt.'s assets are insufficient to pay, the adjudication will be ordered if in the opinion of the ct. the proceedings be *bonâ fide.*—*Re* MARKS (1867), I. R. 1 Eq. 67.—**IR.**

man, whose sole income was derived from his salary or wages, payable weekly, & commission on his sales. He had two children dependent upon him. On debtor failing to pay the judgment debt, the creditor obtained, on a judgment summons, an order for payment of the debt by instalments. The instalments having fallen into arrear, the creditor obtained a committal order for the amount of the arrears, under pressure of which order debtor paid the money. The instalments having again fallen into arrear, the creditor obtained a second committal order, whereupon debtor, finding himself unable to comply with it, presented a bkpcy. petition, which was followed, upon his own application, by a receiving order & adjudication. The judgment creditor was his only creditor, & he had no assets beyond the personal earnings from his employment. The judgment creditor then applied for annulment of the bkpcy. proceedings on the ground that they were an abuse of the process of the ct.; but the registrar refused the application:—*Held:* the proceedings were not, in the circumstances, an abuse of the process of the ct., & in fact would not prejudice the judgment creditor, inasmuch as the personal earnings of bkpt., beyond what was necessary for the maintenance of himself & his family, could be applied, in the proceedings, towards payment of the judgment debt.—*Re* HANCOCK, *Ex p.* HILLEARYS, [1904] 1 K. B. 585; 73 L. J. K. B. 245; 90 L. T. 389; 52 W. R. 547; 48 Sol. Jo. 260; 11 Mans. 1, C. A.

1596. —— Secured creditor—Security must be valued or given up.]—A secured creditor must offer to give up his security or have it valued in order to obtain an adjudication in bkpcy. against debtor.—*Re* GILES, *Ex p.* MAURITZ (1870), 5 Ch. App. 779; 39 L. J. Bcy. 56; 23 L. T. 293; 18 W. R. 1097, L. JJ.

Annotation:—**Folld.** Barnfather *v.* Barrow, Barrow, Page, & Draper (1877), 37 L. T. 231.

See, generally, Part IX., Sect. 3, *post.*

1597. Against whom made—Person in custody for provable debt—Attachment for contempt by Court of Chancery—1861 Act, s. 101.]—If under an order of the Ct. of Ch. to pay a sum of money into ct. the party upon whom the order is made is attached for contempt, he must be considered to be in "custody for debt" within 1861 Act, s. 100, *i.e.*, for debt provable under the bkpcy., & can be rightly adjudicated bkpt. by the registrar of the Ct. of Bkpcy., pursuant to s. 101.—*Re* DUNN, *Ex p.* PAYNTER (1862), 6 L. T. 510.

1598. —— Undischarged bankrupt—Assets sufficient to pay creditors in full under first commission.]—*Semble:* where bkpt.'s property was more than sufficient to satisfy the creditors under a first commission 20*s.* in the pound, a second commission might issue against an uncertificated bkpt.—*Ex p.* HOLLINGSWORTH (1791), cited 1 Cooke's Bankrupt Laws, 7th ed., at p. 12.

Annotation:—**Dbtd.** Fowler *v.* Coster (1830), 10 B. & C. 427.

1599. —— —— Right of assignees under second fiat to maintain action for conversion.]—A second fiat against bkpt. who has not obtained his certificate under the first, is not void, & the assignees under the second fiat may maintain an action against a third person for the conversion of property acquired by bkpt. after the date of the first fiat, the assignees under the first fiat not intervening.—MORGAN *v.* KNIGHT (1864), 15 C. B. N. S. 669; 3 New Rep. 469; 33 L. J. C. P. 168; 9 L. T. 803; 12 W. R. 428; 143 E. R. 947.

Annotations:—**Follds.** *Re* Roberts, *Ex p.* Watson (1879), 12 Ch. D. 380, C. A. **Mentd.** Barker *v.* Furlong, [1891] 2 Ch. 172; *Re* Clark, *Ex p.* Beardmore, [1894] 2 Q. B. 393, C. A.

1600. —— —— Resuming trade with permission of trustee under previous fiat.]—An adjudication of bkpcy. against debtor, who has not obtained his discharge under a previous adjudication & has been allowed by the trustee to resume business, is not void.—*Re* ROBERTS, *Ex p.* WATSON (1879), 12 Ch. D. 380; 41 L. T. 516; 28 W. R. 205, C. A.

1601. —— Member of joint stock banking company—Whether necessary to proceed first against public officer.]—A creditor of a joint stock banking co., constituted under Country Bankers Act, 1826 (c. 46), may sue out a fiat against any member of that co. who commits an act of bkpcy., & need not proceed in the first instance against the public officer of the co.—*Re* WOOD, *Ex p.* WOOD (1840), 1 Mont. D. & De G. 92; 9 L. J. Bcy. 20; 4 Jur. 251, Ct. of R.

Annotation:—**Overd.** Davison *v.* Farmer (1851), 6 Exch. 242. *Ex p. Wood* was decided before the nature of the liability of joint stock cos. had been fully understood (PARKE, B.).

—— **Infant.**]—*See* Part I., Sect. 3, sub-sect. 4, *ante.*

1602. Within what time made—Unwillingness of court to enlarge.]—The ct. is not disposed to grant time in opening a fiat for the purpose of enabling bkpt. to compromise with his creditors.—*Re* TODD (1840), 4 Jur. 91, Ct. of R.

1603. How proceedings commenced.]—*Held:* proceedings under 1870 Rules, r. 267, for adjudication of bkpcy., based upon the neglect of the first meeting of creditors to pass a resolution for liquidation or composition, must be commenced by petition.—*Re* CONDON, *Ex p.* JAMES (1874), 9 Ch. App. 609; 43 L. J. Bcy. 107; 30 L. T. 773; 22 W. R. 937, L. JJ.

1598 i. —— *Creditor—After acceptance of composition with consideration.*]—An agreement by a creditor with his debtor to accept a compromise, no consideration appearing for such agreement, & debtor not having been induced thereby to change his position will not prevent the creditor from sequestrating his debtor's estate.—HANSEN & SCHRADER *v.* QUIRK (1885), 5 E. D. C. 35.—**S. AF.**

1596 ii. —— *Execution creditor—Indian Insolvency Act* (11 & 12 *Vict. c.* 21), *s.* 8.]—The only person who can obtain an order adjudicating another person insolvent under the above sect. on the ground of his lying in prison for twenty-one days in execution of a decree, is the creditor in execution of whose decree he has been in prison.—*Re* AHMED ISMAIL MUNSHI (1902), I. L. R. 26 Bom. 649.—**IND.**

1596 iii. —— *Second execution creditor—After assets seized by first execution creditor—But before sale.*]—A creditor obtained judgment against a debtor, sued out execution thereon & attached property. Another creditor subsequently, but before the execution sale, also obtained judgment & sued out execution, but found that no goods remained to satisfy his judgment. He thereupon took proceedings to have debtor's estate sequestrated. The ct. decreed the sequestration of debtor's estate.—VAN DER BYL & Co. *v.* SMIT (1877), Buch. 16.—**S. AF.**

e. Against whom made—Joint debtors]—The estate of joint debtors, whether partners or not, may be sequestrated under Insolvency Act, 1871 (No. 379), s. 37. The provisions of s. 41 are to meet cases where the act of insolvency is committed by one partner only.—*Re* THOMAS & COWIE (1883), 9 V. L. R. 2.—**AUS.**

f. —— *Partnership — After all partners bankrupt.*]—Where each member of a partnership becomes bkpt. no joint adjudication against the firm is necessary.—*Re* SIEGERT (1888), 6 N. Z. L. R. 257.—**N.Z.**

1598 i. —— *Undischarged bankrupt.*]—A person may become insolvent a second time before he has received his final discharge under the first insolvency.—DOSSA GOPAL *v.* BHANJI DAMJI (1901), I. L. R. 26 Bom. 171.—**IND.**

1598 ii. —— ——.]—Creditors had taken no steps in a sequestration which had been practically dormant since 1914, the trustee had been discharged & bkpt. though undischarged had carried on business. A new creditor presented a petition for sequestration:—*Held:* where the ct. in which the new application for sequestration was made was the same as that in which sequestration had previously taken place it might competently be awarded to the new creditor.—MELLOR *v.* DRUMMOND (1919), 2 S. L. T. 68.—**SCOT.**

Sect. 1.—In general.]

Annotations :—**Consd.** *Re* McHenry, *Ex p.* McHenry (1883), 24 Ch. D. 35, C. A. **Mentd.** *Re* Shackleton, *Ex p.* Whittaker (1875), 10 Ch. App. 447, n. ; Crew *v.* Terry (1877), 2 C. P. D. 403 ; *Re* Collie, *Ex p.* Adamson (1878), 8 Ch. D. 807, C. A. ; *Re* Carnac, *Ex p.* Simmonds (1885), 16 Q. B. D. 308, C. A. ; *Re* Rivett-Carnac (1885), 2 T. L. R. 18, C. A. ; *Re* Brown, Dixon *v.* Brown (1886), 32 Ch. D. 597 ; *Re* Opera, [1891] 2 Ch. 154 ; Mercer *v.* Vans Colina (1897), 4 Mans. 363 ; *Re* Rhoades, *Ex p.* Rhoades, [1899] 2 Q. B. 347, C. A. ; Hand *v.* Blow, [1901] 2 Ch. 721, C. A. ; *Re* Griffiths Cycle Corpn., Dunlop Pneumatic Tyre Co. *v.* Griffiths Cycle Corpn. (1901), 85 L. T. 675 ; *Re* Hall, *Ex p.* Official Receiver, [1907] 1 K. B. 875, C. A. ; *Re* Tyler, *Ex p.* Official Receiver, [1907] 1 K. B. 865, C. A. ; Tapster *v.* Ward (1909), 101 L. T. 25 ; *Re* Ash (1913), 110 L. T. 48, D. C. ; Wells *v.* Wells, [1914] P. 157, C. A. ; *Re* Craig, *Ex p.* Hinchcliffe, [1916] 2 K. B. 497 ; *Re* Stokes, *Ex p.* Mellish, [1919] 2 K. B. 256 ; *Re* Thellusson, *Ex p.* Abdy (1919), 88 L. J. K. B. 1210, C. A.

1604. Who may appear to dispute—Solicitor of debtor—General authority.]—Although 1849 Act, s. 104, speaks only of bkpt. himself appearing to dispute the adjudication, yet any person properly authorised may appear for him, or employ a solr. for that purpose ; & in such case a general authority to act for bkpt., who was absent from England, held by the uncle of bkpt., was considered sufficient. —*Re* FRAMPTON, *Ex p.* FRAMPTON (1859), 1 De G. F. & J. 263 ; 28 L. J. Bcy. 21 ; 33 L. T. O. S. 341 ; 5 Jur. N. S. 970 ; 7 W. R. 690 ; 45 E. R. 359, L. JJ.

Annotation :—**Folld. & Extd.** *Re* Wallace, *Ex p.* Wallace (1884), 14 Q. B. D. 22, C. A.

1605. Grounds for adjudicating—Composition proceedings tainted with fraud—Creditor purchasing debt to vote in favour of composition resolution.]—Where the passing of a resolution in favour of a composition has been obtained by the vote of a creditor, who has purchased the debt, in respect of which he votes, in order to vote in favour of the composition, such a fraud taints the whole of the proceedings for a composition, & the ct. will make an order of adjudication of bkpcy. against debtor, on the petition of a duly qualified creditor in spite of the pendency of the proceedings for a composition.—*Re* BURRS & Co., *Ex p.* FORE ST. WAREHOUSE Co., Ltd. (1874), 30 L. T. 624, L. J.

1606. —— Failure to pay composition.]—A declaration by debtor of his inability to pay one of the instalments of the composition at the time appointed is a sufficient ground for the exercise of the power given to the ct. to adjudge a compounding debtor a bkpt.—*Re* CHARLTON, *Ex p.* CHARLTON (1877), 6 Ch. D. 45 ; 46 L. J. Bcy. 110 ; 37 L. T. 45 ; 25 W. R. 800, C. A.

Annotations :—**Distd.** *Re* Shiers, *Ex p.* Shiers (1877), 7 Ch. D. 416. **Consd.** *Re* Kearley & Clayton's Contract (1878), 7 Ch. D. 615 ; *Re* Jones, *Ex p.* Jones (1881), 18 Ch. D. 109, C. A. ; Sharp *v.* McHenry, Sharp *v.* Brown (1887), 38 Ch. D. 427. **Refd.** Champion *v.* Formby (1878), 26 W. R. 391 ; *Re* McHenry, *Ex p.* McDermott (1888), 21 Q. B. D. 589, C. A.

See, also, No. 1593, *ante*, & cases in Sect. 3, subsect. 3, *post*.

1607. What evidence necessary to support adjudication—Direct evidence.]—When a person, as of a given character, & in certain circumstances is brought within the bkpcy. laws, the adjudication of the comrs. ought to proceed upon direct evidence before them, that the person is of the character & within the circumstances required, & not upon a deposition incorporating the substance of an affidavit, in which (in another ct.) those essentials have been attested.—*Ex p.* HARCOURT (1815), 2 Rose, 203, L. C.

Annotations :—**Mentd.** *Re* Wilbran, *Ex p.* Wilbran (1820), 5 Madd. 1 ; *Re* Royal British Bank, *Ex p.* Gillett (1856), 28 L. T. O. S. 68 ; King *v.* Henderson, [1898] A. C. 720, P. C.

1608. Grounds for refusing to adjudicate—Failure

1604 i. *Who may give notice of objection—Agent of respondent—Though no definite power to sign notice.*]—A notice of objections to an order *nisi* for sequestration may be lodged by resp.'s usual agent though he be acting under a power of attorney which has ceased to be strictly applicable, & has no definite power to sign such notice.—*Re* OPPENHEIMER (1872), 3 V. R. 20.—**AUS.**

1605 i. *Grounds for adjudicating—Composition proceedings tainted with fraud.*]—A debtor, after advertising his intention to surrender, without notice to his secured creditors, made an offer of composition to his unsecured creditors, & in order to carry it out intimated his intention of realising portion of his assets at a price far below their value. The ct., at the instance of a general mtgee., anticipated the surrender & sequestrated debtor's estate.—HEYMAN, GORDON & Co. *v.* COHEN (1907), T. S. 1038.—**S. AF.**

1605 ii. —— —— *Evidence of fraud.*]—An arranging trader having entered into a composition with his creditors, which he paid, & obtained his certificate, the ct. will not withdraw the certificate, & adjourn the case into bkpcy. Where there is clear evidence of fraud & suppression, the certificate may be set aside, but the application to turn the case into bkpcy. should be made pending the proceedings. The omission from a schedule, afterwards amended in reference thereto, of a doubtful debt paid to a trader after obtaining the certificate, will not *per se* be deemed evidence of fraud.—*Re* GRAY (1860), 12 Ir. Jur. 267.—**IR.**

1605 iii. —— —— *Assets omitted from schedule.*]—Where, in an affidavit to verify a petition presented to the ct. by an arranging trader, he states that the schedule of assets contains a true & full account of the property he has to be made available for payment of the composition, & creditors, relying on the truth of this, accept the composition offered, & the trader obtains his certificate, the creditors may, long after the certificate is obtained, bring the case by motion before the ct., praying that the certificate may be withdrawn, & the ct., on satisfactory evidence that leasehold property has been omitted, & that the affidavit to support the petition was untrue, will withdraw the certificate, & put the case into bkpcy.—*Re* ARRANGING TRADER (1864), 16 Ir. Jur. 120.—**IR.**

1605 iv. —— —— *Composition based on invalid settlement—After composition paid.*]—An arranging trader, having presented his petition to the ct., filed the usual affidavit of assets, which consisted partly of an interest in a valuable house of business, alleged to have been made the subject of a marriage settlement, the trader having received as a marriage portion £400, charged on his property. The settlement, being submitted to the creditors, was believed to be genuine. A composition of 10*s.* in the pound was agreed to, & actually paid. Afterwards it was discovered that the alleged marriage was void, the trader having had a wife living at that time :—*Held :* the arrangement proceedings should be set aside, & the case turned into bkpcy., although the composition had been paid.—*Re* ARRANGING TRADER (1866), 18 Ir. Jur. 336.—**IR.**

1606 i. —— *Failure to pay composition.*]—Where debtor failed, through no culpable default of his own, to pay the first instalment provided in a composition deed :—*Held :* the entire arrangement failed & debtor should be adjudicated bkpt.—*Re* BIRT, [1906] 2 I. R. 452 ; 40 I. L. T. 178.—**IR.**

1606 ii. —— ——.]—Where a trader offers a composition to his creditors which he is unable to pay, & then calls a meeting under Bkpcy. & Insolvency Act, s. 351, his inability to pay will be held not to be such a difficulty as is contemplated by that section, & the case will be turned into bkpcy.—*Re* WELPLY (1870), 4 I. R. Eq. 204.—**IR.**

1606 iii. —— —— *One of three joint compounding debtors.*]—Three persons trading in partnership presented a petition for an arrangement, & subsequently made proposals to their creditors for the payment of a composition on foot of their joint liability, & also on foot of their respective separate liabilities. The proposal of one of the partners having failed with regard to his separate liability, an order was made adjudicating the three partners bkpt. :—*Held :* the order was right.—*Re* LORÉ (1889), 23 L. R. Ir. 365.—**IR.**

1607 i. *What evidence necessary to support adjudication—Amount of debt.*]—It is the duty of petitioning creditor to bring before the ct. at the hearing evidence sufficient to justify the ct. in finding either that the debt was unsecured, or that after a valuation of the security by the ct. as provided by Bkpcy. Act, 1892, s. 37, the balance of the debt due is not less than £30, & unless the ct. can find one of these things, it ought not to make an adjudication.—*Re* EWING, *Ex p.* MORGAN (1905), 24 N. Z. L. R. 808.—**N.Z.**

1607 ii. —— *Affidavit as to truth of petition — When burden of proof shifted.*]—To support an application for adjudication there should be, in addition to the ordinary affidavit verifying the petition to the best of petitioner's knowledge, information, & belief, an affidavit of the truth of the facts contained in the petition, sworn to by somebody who is able to swear to them of his own knowledge. The burden of proof at the hearing will then lie on debtor.—*Re* MACKAY, 2 J. R. N. S. 150.—**N.Z.**

1608 i. *Grounds for refusing to adjudicate — Non-compliance with procedure.*] — The ct. will not grant

to show bankrupt possessed of assets.]—The failing to show that bkpt. was possessed of any property, is not a sufficient reason for refusing to adjudicate.—*Re* JONES, *Ex p.* JOHNSTON (1835), 2 Mont. & A. 390; 4 L. J. Bcy. 82, Ct. of R.

1609. —— Debtor executing & registering deed of inspectorship—After issue of debtor's summons before adjudication.]—Where, after the issuing of a judgment debtor's summons, & before adjudication debtor executes & duly registers a deed of inspectorship with his creditors, the ct. will not adjudicate debtor a bkpt. under 1861 Act, s. 83, at the instance of the judgment creditor.—ANON. (1868), 16 W. R. 966.

See, generally, Part XXIII., *post.*

1610. —— Tender to one of two creditors whose debts together exceed £50.]—A tender of the amount of his debt to one of two creditors, whose debts together amount to more than £50, though each debt is less, does not prevent the adjudication.—*Re* ANDREW, *Ex p.* ANDREW (1875), 1 Ch. D. 358; 45 L. J. Bcy. 57; 33 L. T. 556; 24 W. R. 197, C. A.

1611. —— Petition presented malâ fide—To extort money.]—When the ct. sees that a bkpcy. petition has been made use of for an inequitable purpose, *e.g.*, to extort money from debtor, by way of bonus for an adjournment, it will refuse to make an adjudication, even though there is a good petitioning creditor's debt, & an act of bkpcy. has been committed.—*Re* DAVIS, *Ex p.* KING (1876), 3 Ch. D. 461; 45 L. J. Bcy. 159; 25 W. R. 239, C. A.

Annotations:—**Folld.** *Re* Adams, *Ex p.* Griffin (1879), 12 Ch. D. 480, C. A. **Refd.** *Re* Ellis, *Ex p.* Thoday (1876), 34 L. T. 261; *Re* Baker, *Ex p.* Baker (1887), 5 Morr. 5, D. C.; King *v.* Henderson, [1898] A. C. 720, P. C. **Mentd.** *Re* Solomon, *Ex p.* Dressler (1878), 9 Ch. D. 252, C. A.; *Re* Pinfold, *Ex p.* Pinfold (1891), 61 L. J. Q. B. 161.

1612. —— —— To bring pressure to bear on debtor.]—When the ct. sees that a bkpcy. petition is presented, not with the *bonâ fide* view of obtaining either adjudication upon a trader's own petition or protection in arrangement cases, unless the solr. takes out the meeting in the usual way, has it listed, & has attested copies of documents ready.—ANON. (1867), 1 I. L. T. Jo. 648.—**IR.**

1608 ii. —— *Not reckless conduct of debtor.*]—Under Provincial Insolvency Act, 1907, transfer of property by debtor with intent to defraud his creditors, or reckless contracting of debts, or giving unfair preference to any of his creditors, or committing any other act of bad faith is a ground for refusing an absolute order of discharge but not ground for refusing to make an order of adjudication.

Petitioner for a declaration of insolvency feigned ignorance about the existence of his account books, & prevaricated about other matters:—*Held:* his petition could not be dismissed on those grounds, the object of the Legislature being to make it easier to obtain an order of adjudication.—GIRWARDHARI *v.* JAI NARAIN (1910), I. L. R. 32 All. 645.—**IND.**

1608 iii. —— *To prevent abuse of process of court.*]—The ct. has power to refuse to make an order of adjudication on the grounds of prevention of abuse of process of the ct., & unnecessary harassing of a debtor by the creditor.—JEER *v.* RENGASAMI (1913), I. L. R. 36 Mad. 402.—**IND.**

1608 iv. —— *Collateral motive of petitioning creditor.*]—Where the legal requisites of an adjudication are shown to exist, it requires a very strong case to warrant a refusal to adjudicate, on the ground that petitioners are influenced by some collateral motive.—*Re* BROWN, *Ex p.* MIDDLETON (1883), 2 N. Z. L. R. 189.—**N.Z.**

1608 v. —— —— *Evidence required.*]—The ct. will not decide that the object of petitioning creditor in adjudicating debtor is an indirect one, except upon strong evidence.—*Re* ELL, *Ex p.* AUSTIN & HASKINS (1886), 4 N. Z. L. R. 114.—**N.Z.**

1608 vi. —— *Debt purchased for ulterior purpose.*]—Where a debt is purchased for the purpose of founding a petition for adjudication upon it, not to recover the debt, but for purposes outside the law of bkpcy., the ct. will not make an adjudication.—*Re* COOPER, *Ex p.* COLEMAN & CLARKE (1882), 1 N. Z. L. R. 301.—**N.Z.**

1608 vii. —— *One of two petitioning creditors with indirect object.*]—Where two creditors join in a petition in bkpcy., the fact that one creditor has an indirect object in petitioning is no answer to the adjudication, if the other creditor has not.—*Re* ELL, *Ex p.* AUSTIN & HASKINS (1886), 4 N. Z. L. R. 114.—**N.Z.**

1608 viii. —— *Act of insolvency not available for then existing creditors.*]—*Held:* an adjudication cannot be made upon an act of insolvency, unless when it was committed it was available for adjudication on the petition of the then existing creditors.—*Re* BOWLER, *Ex p.* CALDWELL (1895), 6 Q. L. J. 242.—**AUS.**

1608 ix. —— *Petition served on debtor while attending court.*]—It is no ground for refusing an adjudication in bkpcy. that the petition has been served upon debtor while attending a sitting of the Supreme Ct. as a suitor.—*Re* ELL, *Ex p.* AUSTIN & HASKINS (1886), 4 N. Z. L. R. 114.—**N.Z.**

1608 x. —— *Defective advertisement of sale of debtor's interest in land—Debtor's interest doubtful.*]—A discrepancy in the area of the land, or a failure to define the boundaries thereof or debtor's interest therein, in the advertisement of the sale by the sheriff of a debtor's interest in land are matters entitled to consideration in deciding whether an adjudication should be made; & where they were accompanied by an error in debtor's name, & by a doubt as to whether debtor had any interest in the land which was to be determined by an action then pending, the ct. dismissed the petition without prejudice to the creditor's right to file a fresh petition.—*Re* MEHAFFY, [1919] N. Z. L. R. 113.—**N.Z.**

1608 xi. —— *On separate estate of partner—Unrealised partnership assets.*]—Before sequestrating a private estate, the ct. will carefully scan all the circumstances, &, if there is reason for believing that there are assets of the partnership which have not been seized in execution, & which, if realised, would satisfy the creditor's claim, the ct. will stay its hand.—MARAIS & ZOUTENDIJK *v.* STREET (1913), C. P. D. 593.—**S. AF.**

g. *Previous adjudication in England—Application for sequestration in Scotland.*]—Four trustees carried on business in partnership, having a house of business in London & another in Edinburgh. Two of the partners resided in Scotland & the others in London. The partnership was adjudicated bkpt.:—*Held:* (1) all the personal property wherever situated vested in the assignees; (2) creditors in Scotland were precluded from attaching property in that country by sequestration, & from administrating it under a sequestration. *Semble:* the converse applied to a sequestration in Scotland, which precluded English creditors from sustaining a commission against debtor, the subject of an antecedent & operative sequestration.—ROYAL BANK OF SCOTLAND *v.* CUTHBERT (1813), 1 Rose, 462.—**SCOT.**

h. *Order of adjudication—Form of.*]—Upon a general adjudication of bkpcy., it is not necessary that the particular grounds upon which the party has been declared a bkpt. should be set out upon the adjudication.—PALMER *v.* GATCHELL (1858), 9 I. C. L. R. 238; 4 Ir. Jur. 85.—**IR.**

j. —— ——.]—In 1879 resp. was adjudicated bkpt. in England & shortly afterwards gave a bond to secure £2,500. In 1900 he succeeded to certain entailed estates. On an application by the assignee of the bond for sequestration of resp.'s estate founded on the bond & on certain other debts of which resp. had tendered payment both before & after the present petition, resp. claimed that a special declaration should be inserted in the award specifying the particular debt on which sequestration was awarded, on the grounds that the main debt founded on by petitioning creditor was incurred prior to Entail (Scotland) Act, 1882, c. 53, by s. 18 of which the trustee in the sequestration could claim to disentail the estate:—*Held:* sequestration should be awarded in common form upon the petition as presented.—BRABY, PETITIONER (1903), 10 S. L. T. 779.—**SCOT.**

k. —— *Amendment of date—When allowed.*]—The solr. of petitioning creditor on one & the same day filed the affidavit necessary for obtaining a commission of bkpcy.; applied for the commission, & paid the necessary fees, but did not state that it was required for that day. It was not issued, nor did it bear date until the following day. The ct. refused to alter the date to the former day, it not appearing that there was any default on the part of the officer of the ct. in not issuing it as of that day.

Qu.: whether the ct. would have altered the date if its officer had been in default?—*Re* DIGAN, *Ex p.* REGAN (1849), 13 I. Eq. R. 328.—**IR.**

l. —— *As evidence—Of insolvency.*]—The defence of insolvency is supported by the production of the adjudication & schedule, without the petition.—BRENNAN *v.* DILLANE (1843), Ir. Cir. Rep. 853.—**IR.**

m. —— —— *Of inclusion of debt in insolvent's schedule.*]—In *assumpsit* on a promissory note against an insolvent, the act of adjudication is not sufficient evidence that the debt was included in his schedule; the schedule & petition must be produced.—ANON (1841), Ir. Cir. Rep. 58.—**IR.**

n. *Renewal of order.*]—A commission of bkpcy. will be renewed, though thirty years have elapsed, no proceedings having been taken in the meantime, bkpt. also having been dead for several years.—*Re* DOHERTY (1854), 7 Ir. Jur. 303.—**IR.**

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an adjudication, but for a collateral purpose & with the view of putting pressure on debtor, it will refuse to make an adjudication, even though there be a good petitioning creditor's debt, & an act of bkpcy. has been committed.—*Re* ADAMS, *Ex p.* GRIFFIN (1879), 12 Ch. D. 480; 48 L. J. Bcy. 107; 41 L. T. 515; 28 W. R. 208, C. A.

Annotations:—**Consd.** *Re* Pooley, *Ex p.* Harper (1882), 20 Ch. D. 685, C. A. **Distd.** *Re* Baker, *Ex p.* Baker (1887), 5 Morr. 5, D. C. **Consd.** *Re* Dunhill, *Ex p.* Dunhill, [1894] 2 Q. B. 234. **Refd.** *Re* Purrett, *Ex p.* Purrett (1895), 2 Mans. 403, C. A.; King *v.* Henderson, [1898] A. C. 720, P. C. **Mentd.** *Re* Lennox, *Ex p.* Lennox (1885), 16 Q. B. D. 315, C. A.; *Re* Pinfold, *Ex p.* Pinfold (1891), 61 L. J. Q. B. 161.

See, also, cases in Sect. 3, sub-sect. 3, *post.*

1613. Effect of death of debtor—After petition presented but before adjudication—Proper procedure.]—Where debtor dies after a bkpcy. petition is presented, but before adjudication, the ct. should, under 1883 Act, s. 108, adjudicate him a bkpt., & the order of adjudication should be gazetted & advertised in the ordinary way.—*Re* WALKER (1886), 54 L. T. 682; 3 Morr. 69; *sub nom. Re* WALKER, *Ex p.* SHARP, 34 W. R. 550, D. C.

Annotations:—**Consd.** *Re* Easy, *Ex p.* Hill & Hymans (1887), 19 Q. B. D. 538, C. A. In *Re Walker, Ex p. Sharp* the debtor himself presented the petition (LORD ESHER, M.R.). **Refd.** *Re* Hardy, Hardy *v.* Farmer, [1896] 1 Ch. 904.

See, now, 1914 Act, s. 112.

1614. —— After composition approved—On failure to pay instalment.]—In July 1890, debtor made a composition with his creditors under 1883 Act, s. 18, & under the composition, which was approved of by the ct., the creditors were to be paid by three instalments extending over a year. Default was made in payment of the instalments, & debtor died two months after the expiration of the year:—*Held:* the Ct. of Bkpcy. had jurisdiction to proceed in debtor's bkpcy. under 1883 Act, ss. 18 (11), 108, notwithstanding his death.—*Re* HARDY, HARDY *v.* FARMER, [1896] 1 Ch. 904; 65 L. J. Ch. 461; 74 L. T. 403; 44 W. R. 503; 40 Sol. Jo. 437; 3 Mans. 150.

1615. Restraint of proceedings on petition for adjudication—Petition by debtor for liquidation on date appointed for hearing of petition.]—A judgment debtor took no notice of the service on him of a debtor's summons, nor of the filing of a petition for adjudication in bkpcy., until the day appointed for the petition being heard. He then himself filed a petition for liquidation by arrangement, & obtained & served on his creditor an *ex p.* injunction restraining him from taking further proceedings in bkpcy.:—*Held:* the creditor's legal right to an adjudication in bkpcy. would not be interfered with, & the order for the injunction must be discharged.—*Re* WILLIAMS, *Ex p.* DIMOND (1870), 5 Ch. App. 743; 39 L. J. Bcy. 47; 23 L. T. 292; 18 W. R. 1123, L. JJ.

1616. —— Stay—Sum on petition differing from that in summons.]—Where a debtor's summons was obtained for £517, but on the petition for adjudication only £110 was shown to be due, it was ordered that the adjudication should not be published for a fortnight, & that if during that time the £110 was paid, all proceedings should be stayed, leaving each party to bear his own costs.—*Re* HARRIS, *Ex p.* HARRIS (1875), 10 Ch. App. 458; 44 L. J. Bcy. 77; 32 L. T. 417, L. JJ.

1617. Where fiat granted — To be executed in place other than place where bankrupt resided—Undertaking to pay bankrupt's expenses.]—The ct., on granting a fiat, issued against a trader residing in Oxford, to be executed before a comr. in London, made petitioning creditor undertake to pay bkpt.'s travelling expenses.—*Re* MARGETTS, *Ex p.* LAWSON (1838), 7 L. J. Bcy. 41.

1618. Evidence of adjudication—Advertisement in London Gazette—Civil & criminal proceedings.]—If a person adjudicated bkpt. take no steps within the prescribed period to annul the adjudication, the *London Gazette* containing the advertisement of his bkpcy. is conclusive evidence of the bkpcy. in criminal as well as in civil proceedings.—R. *v.* LEVI (1865), Le. & Ca. 597; 6 New Rep. 131; 34 L. J. M. C. 174; 12 L. T. 502; 29 J. P. 420; 11 Jur. N. S. 450; 13 W. R. 724; 10 Cox, C. C. 110, C. C. R.

Annotation:—**Folld.** R. *v.* Robinson (1867), L. R. 1 C. C. R. 80.

See, now, 1914 Act, s. 137.

1619. —— —— 1849 Act, s. 240.]—The mere production of a copy of a *London Gazette* purporting to be printed by authority, containing an advertisement of adjudication of bkpcy., is sufficient proof of the adjudication of bkpcy. under the above sect.—R. *v.* RAUDNITZ (1869), 21 L. T. 621; 34 J. P. 86, C. C. R.

1620. —— —— Conclusive against third parties as to commission of act of bankruptcy.]—An adjudication of bkpcy. advertised in the *Gazette* is, so long as it remains standing, conclusive, not only as between debtor & his assignees, but also against third persons, that the act of bkpcy. on which the adjudication was founded has in fact been committed.—*Re* FOULDS, *Ex p.* LEAROYD (1878), 10 Ch. D. 3; 48 L. J. Bcy. 17; 39 L. T. 525; 27 W. R. 277, C. A.

Annotations:—**Apld.** *Re* Tucker, *Ex p.* Tucker (1879), 28 W. R. 219, C. A. **Mentd.** *Re* Johnson, *Ex p.* Wigg (1879), 12 Ch. D. 905; *Re* Sidebotham, *Ex p.* Sidebotham (1880), 14 Ch. D. 458, C. A.; *Re* Langtry (1894), 1 Mans. 169, D. C.; *Re* Hobbins, *Ex p.* Official Receiver (1899), 6 Mans. 212.

1621. —— Production of adjudication under seal of court.]—On a prosecution against bkpt. under Debtors Act, 1869 (c. 62), s. 11:—*Held:* the production of the adjudication under the seal of the ct. was sufficient evidence of the bkpcy.—R. *v.* THOMAS (1870), 22 L. T. 138; 11 Cox, C. C. 535.

Annotation:—**Mentd.** R. *v.* Bolus (1870), 23 L. T. 339.

1622. Appeal from refusal to adjudicate—Service of notice.]—When debtor gives no notice of his intention to show cause against a bkpcy. petition, & the petition is heard in his absence, & the ct. refuses to make an adjudication, if petitioning creditor desires to appeal against the refusal, he must serve notice of the appeal on debtor.—*Re* WHALLEY, *Ex p.* WARBURG (1883), 24 Ch. D. 364; 53 L. J. Ch. 336; 49 L. T. 243, C. A.

1618 i. *Evidence of adjudication—Advertisement in Royal Gazette—When required to be produced.*]—A fiat in bkpcy. under Acts of Assembly, 5 Vict. c. 43, & 6 Vict. c. 4, may be proved by a certified copy without production of the *Royal Gazette*, except where title is to be shown in the assignee.—CUNNINGHAM *v.* SCOULLAR (1859), 4 All. 385.—**CAN.**

1618 ii. —— *Copy of order—Signed by proper officer.*]—To make a copy of the adjudication of the Insolvent Ct. evidence, the signature of the proper officer thereto must be proved, as also that he was the proper officer.—M'GHEE *v.* MEREDITH (1838), Craw. & D. 556.—**IR.**

1618 iii. —— *Profert of proceedings in foreign ct.*]—Pltf., claiming as assignee of F., alleged by his bill that F., trading in Australia, was duly adjudged an insolvent there; that all his estate, etc., there & in this kingdom thereupon became duly vested in pltf. "in manner as appears by the petition of pltf. to C., Chief Justice; the fiat of C.; the adjudication & vesting order signed by C., & the other orders in the matter, to which pltf. refers," etc. It appeared by the bill that F. was a minor, at the time of the insolvency:—*Held:* pltf.'s title, as assignee, was sufficiently stated, the profert of the proceedings in the foreign Insolvent Ct. being sufficient proof of the preceding allegations that F. was duly adjudged.—STEPHENS *v.* M'FARLAND (1845), 8 I. Eq. R. 444.—**IR.**

SECT. 2.—EFFECT OF ADJUDICATION ORDER.

SUB-SECT. 1.—IN GENERAL.

1623. Proof of bankruptcy against all parties.]—A solr., in insolvent circumstances, prior to his marriage conveyed the whole of his real & personal estate to trustees for his wife, with a joint power of appointment among the children of the marriage (including an illegitimate daughter), but reserving no interest to himself, & immediately after the marriage the power was exercised in favour of the illegitimate daughter. The property remained under the control of the husband, & within two months after the marriage, a fiat in bkpcy. was issued against him. On a bill filed by the wife to establish the settlement, it was objected that the fiat was no proof of bkpcy. as against the wife:—*Held:* the fiat, being the adjudication of a ct. of competent jurisdiction, was, until set aside, proof of the bkpcy. against all parties.—COLOMBINE *v.* PENHALL, PENHALL *v.* MILLER (1853), 1 Sm. & G. 228; 1 W. R. 272; 65 E. R. 98.

Annotations:—**Apld.** Acraman *v.* Corbett (1861), 1 John. & H. 410. **Mentd.** Carter *v.* Hind (1853), 22 L. T. O. S. 116; Goldsmith *v.* Russell (1855), 5 De G. M. & G. 547; Fraser *v.* Thompson (1859), 1 Giff. 49; Bulmer *v.* Hunter (1869), L. R. 8 Eq. 46; *Re* Pennington, *Ex p.* Pennington (1888), 5 T. L. R. 29, C. A.; Whelan *v.* Palmer (1888), 36 W. R. 587; *Re* Reis, *Ex p.* Clough, [1904] 2 K. B. 769.

1624. Final & conclusive—Petition under 1869 Act in county court—Against person resident within district.]—Where a petition in bkpcy. is preferred under 1869 Act, in a county ct. against a person as residing within its district, & he is adjudicated bkpt. thereon, such adjudication not being rescinded or appealed against is final & conclusive.—REVELL *v.* BLAKE (1873), L. R. 8 C. P. 533; 42 L. J. C. P. 165; 29 L. T. 67; 22 W. R. 96, Ex. Ch.

Annotations:—**Apld.** *Re* Buckland (1873), L. R. 15 Eq. 221. **Consd.** *Re* Foulds, *Ex p.* Learoyd (1878), 10 Ch. D. 3, C. A. **Apld.** *Re* Trim, *Ex p.* French (1882), 52 L. J. Ch. 48.

1625. Conclusive evidence of act of bankruptcy.]—An adjudication of bkpcy. is, while it stands, conclusive evidence as against all persons that the act of bkpcy. upon which it was made was in fact committed.—*Re* FOULDS, *Ex p.* LEAROYD (1878), 10 Ch. D. 3; 48 L. J. Bcy. 17; 39 L. T. 525; 27 W. R. 277, C. A.

Annotations:—**Folld.** *Re* Johnson, *Ex p.* Wigg (1879), 12 Ch. D. 905. **Refd.** *Re* Tucker, *Ex p.* Tucker (1879), 28 W. R. 219, C. A. **Mentd.** *Re* Sidebotham, *Ex p.* Sidebotham (1880), 14 Ch. D. 458, C. A.; *Re* Langtry (1894), 1 Mans. 169, D. C.; *Re* Hobbins, *Ex p.* Official Receiver (1899), 6 Mans. 212.

1626. Whether good against all the world—If not appealed against.]—An order of adjudication, duly made, & not appealed against for twenty-one days, is good against all the world.—*Re* JOHNSON, *Ex p.* WIGG (1879), 12 Ch. D. 905; 48 L. J. Bcy. 119; 40 L. T. 528; *sub nom. Re* WIGG, *Ex p.* JOHNSON, 27 W. R. 804.

Annotation:—**Refd.** *Re* Stanger, *Ex p.* Geisel (1882), 53 L. J. Ch. 349, C. A.

1627. Whether notice to all the world.]—Adjudication is not notice to all the world (JESSEL, M.R.).—PALMER *v.* LOCKE (1881), 18 Ch. D. 381; 51 L. J. Ch. 124; 45 L. T. 229, C. A.

Annotations:—**Refd.** *Re* Stone's Estate (1893), 9 T. L. R. 346. **Mentd.** *Re* Jakeman's Trust (1883), 23 Ch. D. 344; Burnaby *v.* Equitable Reversionary Interest Soc. (1885), 54 L. J. Ch. 466; *Re* Allsop & Joy's Contract (1889), 61 L. T. 213; Mercer *v.* Vans Colina (1897), [1900] 1 Q. B. 130, n.

1628. On apprenticeship—Bankruptcy of master.]—The bkpcy. of the master does not dissolve the apprenticeship.—PUCKINGTON (PARISH) *v.* CHEPTON BEENCHAMP, SOMERSET (PARISH) (1724), 1 Stra. 582; 93 E. R. 713.

1629. On committee of lunatic—Bankruptcy of lunatic.]—The committee of the person of a lunatic is not removed in consequence of his bkpcy. On a petition to remove the committee of the person, the ct. (not being prevented by the form of the petition from granting relief according to the nature of the case), directed an inquiry whether the comfort of the lunatic was sufficiently provided for, regard being had to the sum allowed.—*Re* BIRCH, *Ex p.* PROCTOR (1818), 1 Swan. 531; 36 E. R. 493, L. C.

1630. On certificate of default in production of documents.]—Deft., by his answer, admitted documents in his possession, & by the decree was ordered to produce them before the master. Upon some he had borrowed money & handed them over to the lenders, others he retained, & resisted their production. He became bkpt. The master afterwards issued a certificate of default:—*Held:* the certificate was bad, as the bkpcy. had put it out of the power of deft. to produce the documents.—BAINBRIDGE *v.* BLAIR (1837), 1 Jur. 256.

1631. On power of attorney—Bankruptcy of grantor.]—Bkpcy. determines a power of attorney.—MARKWICK *v.* HARDINGHAM (1880), 15 Ch. D. 339; 43 L. T. 647; 29 W. R. 361, C. A.

Annotation:—**Mentd.** Sanders *v.* Sanders (1881), 19 Ch. D. 373.

On authority of agent.]—*See* AGENCY, Vol. I., pp. 691, 692.

1632. On power of tenant for life—To consent to advancement.]—Testatrix gave a moiety of a trust fund to trustees upon trust to pay the income to J. during his life, & after his death in trust for W. (an infant), empowering the trustee to raise any part not exceeding one-half of W.'s share for his advancement, subject to the consent in writing of J. during his life. The trustees were desirous of exercising the power, but J. had become a bkpt. & was still undischarged:—*Held:* the power of consenting to the advancement was not extinguished by his bkpcy., but could not be exercised without the sanction of his trustee in bkpcy. acting under the direction of the Ct. of Bkpcy.—*Re* COOPER, COOPER *v.* SLIGHT (1884), 27 Ch. D. 565; 51 L. T. 113; 32 W. R. 1015.

Annotation:—**Refd.** *Re* Bedingfeld & Herring's Contract, [1893] 2 Ch. 332.

See, further, Part XX., Sect. 8.

PART V. SECT. 2, SUB-SECT. 1.

1631 i. *On power of attorney—Bankruptcy of grantor.*]—A. being entitled as one of the next of kin, with B. her husband executed a power of attorney to S. empowering him to receive money under a will, B. having been adjudicated a bkpt. in England, & a creditors' assignee appointed:—*Held:* B.'s bkpcy. determined the power of S. to receive the fund.—ROPER *v.* SHANNON, 8 N. S. R. 146.—**CAN.**

q. *On writ of civil imprisonment.*]—The mere sequestration of a debtor's estate does not *ipso facto* release him from the operation of a writ of civil imprisonment. Consequently, if he wishes to be released he must apply to the ct. for that purpose, notice whereof must be given to his creditors, who will be entitled to their costs of appearance, unless they take up a frivolous or vexatious attitude.—ROOS *v.* BODEN, [1918] C. P. D. 312.—**S. AF.**

r. *Sequestration of joint estate—Effect on separate estates.*]—On compulsory sequestration as on voluntary sequestration the joint sequestration of the joint estate of partners is a sequestration of the separate estate of each partner, & there need be no separate orders of sequestration for the separate estates.—*Re* TURNBULL (1862), 1 W. & W. 105.—**AUS.**

See, further, Part XI., Sect. 1, *post*.

s. *Discharge of debtor.*]—The comr.'s warrant under 12 & 13 Vict. c. 107, s. 4, expired at the time appointed for the opening of the commission, or at the time that the person or persons against whom it was issued should be adjudged bkpt.; & a party arrested under such warrant previous to adjudication, would have been subsequently discharged after he had been adjudged a bkpt.—*Re* CRAMPTON (1849), 2 Ir. Jur. 48.—**IR.**

Sect. 2.—Effect of adjudication order: Sub-sects. 1 & 2.]

1633. On power to concur with wife in making morgages.]—Under the will of testator, who died in Mar., 1862, M., a married woman, was entitled in reversion expectant on the death of a tenant for life to a share of the proceeds of real estate devised to trustees in trust for sale on that event. In Aug., in the lifetime of the tenant for life, M.'s husband executed a general assignment, under 1861 Act, of all his property to a trustee for the benefit of his creditors. In Aug., 1866, he was adjudged bkpt., & in Dec. following he obtained his discharge. The tenant for life died in Jan., 1869. By a deed executed in Feb. following, & duly acknowledged by M. under Fines & Recoveries Act, 1833 (c. 74), s. 77, M. & her husband assigned all money which should become due to them or either of them under testator's will to S. by way of mtge. Shortly afterwards the trustees of the will sold the real estate, & ultimately paid M.'s share of the proceeds into ct.:—*Held:* the husband was not precluded by the creditors' deed of 1862 or by his bkpcy. in 1866 from concurring with his wife in the mtge. of 1869, & the mtge. was valid against the trustee of the creditors' deed & the assignee in bkpcy.—*Re* JAKEMAN'S TRUSTS (1883), 23 Ch. D. 344; 52 L. J. Ch. 363.

Annotations:—**Mentd.** Miller *v.* Collins, [1896] 1 Ch. 573, C. A.; *Re* Lyne's Settlmt. Trusts, *Re* Gibbs, Lyne *v.* Gibbs, [1919] 1 Ch. 80, C. A.

1634. On contract—"Unduly delaying proper payment."]—In Sept., 1903, A. signed a contract with a local authority to construct sewage works. The contract provided that certain machinery for the works was to be supplied to A. by specified firms, & that (clause 54), "if the engineer shall have reasonable cause to believe that the contractor is unduly delaying proper payment to the firms supplying the machinery, he shall have power, if he thinks fit, to order direct payment to them." On Oct. 12, 1904, A. was adjudicated bkpt. on his own petition. At that date there was then due under the contract a sum of £1,574 15*s.* 10*d.*, but A. owed £836 8*s.* 9*d.* in various amounts to the specified firms for machinery supplied to him for the works, & the engineer in 1905 made two orders under clause 54 directing payment of the £836 8*s.* 9*d.* out of the £1,574 15*s.* 10*d.* to the firms in settlement of their accounts:—*Held:* (1) A. by presenting his own petition in bkpcy. unduly delayed proper payment to the machinery firms within clause 54; (2) the power conferred by that clause on the engineer was not annulled or revoked by A.'s bkpcy., & the firms, by virtue of the two orders of the engineer were entitled to be paid the £836 8*s.* 9*d.* out of the £1,574 15*s.* 10*d.* in priority to the claim of the trustee.—*Re* WILKINSON, *Ex p.* FOWLER, [1905] 2 K. B. 713; 74 L. J. K. B. 969; 54 W. R. 157; 12 Mans. 377.

See, further, Part XX., Sect. 16, *post.*

1635. On surety for composition—Adjudication on default of payment of instalment.]—Debtor having filed a petition under 1883 Act resolutions were passed accepting a composition of 20*s.* in the pound, extending over 15 months, payment of which was secured by a mtge. given by pltf. to deft. as trustee. Default having been made in payment of the instalments, debtor was adjudicated bkpt. on the application of creditors under s. 18 (11), & by the same order the composition was expressly annulled:—*Held:* pltf.'s suretyship for the composition was thereby discharged, & the mtge. deed must be set aside, so far as it made pltf. liable as surety.—WALTON *v.* COOK (1888), 40 Ch. D. 325; 58 L. J. Ch. 180; 60 L. T. 91; 37 W. R. 189.

1636. On lessee's covenant not to assign—Bankruptcy of lessee on own petition.]—A lease contained a covenant not to assign without licence, & a proviso for re-entry on bkpcy. of the lessee or breach of any covenant. The lessee having been adjudicated bkpt. on his own petition:—*Held:* the lessee's being adjudicated bkpt. on his own petition did not operate as a breach of his covenant not to assign.—*Re* RIGGS, *Ex p.* LOVELL, [1901] 2 K. B. 16; 70 L. J. K. B. 541; 84 L. T. 428; 49 W. R. 624; 45 Sol. Jo. 408; 8 Mans. 233.

Annotations:—**Distd.** Cohen *v.* Popular Restaurants, [1917] 1 K. B. 480. **Mentd.** *Re* Cotgrave, Mynors *v.* Cotgrave, [1903] 2 Ch. 705.

See, further, Part X., Sect. 4, sub-sect. 2, D. (*b*), *post.*

1637. On provision for gift over on alienation—Adjudication on debtor's own petition.]—Under a will property was given to one for life with a gift over in the event of his "alienating or incumbering, or agreeing to alienate or incumber," his interest. He presented a petition in bkpcy., & on the same day was adjudicated a bkpt. on his own application:—*Held:* the petition in bkpcy. & adjudication consequent thereon constituted an alienation within the meaning of the gift over.—*Re* COTGRAVE, MYNORS *v.* COTGRAVE, [1903] 2 Ch. 705, 710; 72 L. J. Ch. 777; 89 L. T. 433; 52 W. R. 411; 10 Mans. 377.

See, further, Part X., Sect. 4, sub-sect. 2, D. (*b*), *post.*

1638. On pending action.]—The making, after the commencement of an action, of an adjudication order against deft. causes such change or transmission of interest or liability within R. S. C. Ord. 17, r. 4, as to render it necessary or desirable that the official receiver should be made a party to the action.—*Re* BERRY, DUFFIELD *v.* WILLIAMS, [1896] 1 Ch. 939; 65 L. J. Ch. 245; 74 L. T. 306; 44 W. R. 346; 40 Sol. Jo. 275; 3 Mans. 11.

See, further, Part XXI., *post.*

1639. On sequestrator—Restraint from exercise of powers.]—Where a sequestrator has become bkpt., the ct. will restrain him from exercising his power, & permit the assignees to use his name, until a new sequestrator has been appointed.—*Re* IVESON, *Ex p.* HALL (1835), 1 Deac. 87; 2 Mont. & A. 392; 4 L. J. Bcy. 83, Ct. of R.

1640. Whether "conveyance" within Middlesex Registry Act, 1708 (c. 20)—Adjudication with direction for summary administration.]—An order adjudging debtor bkpt. & directing the summary administration of his estate, under which the official receiver becomes trustee, is not a "conveyance" within the above Act.—*Re* CALCOTT & ELVIN'S CONTRACT, [1898] 2 Ch. 460; 67 L. J. Ch. 553; 78 L. T. 826; 46 W. R. 673; 42 Sol. Jo. 653; 5 Mans. 208, C. A.

1641. Protection of bankrupt trustee—Order to pay sum into court.]—A trustee, who had been ordered in a suit to pay into ct. an amount admitted to be due from him, & mixed with his own money, was adjudicated bkpt.:—*Held:* although the debt was one from which an order of discharge would not release him, as it was a debt provable under the bkpcy., he was, pending the bkpcy. proceedings, protected by 1869 Act, s. 12, from attachment for disobedience to the order.—COBHAM *v.* DALTON (1875), 10 Ch. App. 655; 44 L. J. Ch. 702; 23 W. R. 865, L. JJ.

Annotations:—**Distd.** Lewes *v.* Barnett (1877), 6 Ch. D. 252, C. A.; Pashler *v.* Vincent (1878), 8 Ch. D. 825, C. A. **Folld.** *Re* Chatterton, *Ex p.* Hemming (1879), 13 Ch. D. 163, C. A. **Expld.** Ross *v.* Gutteridge (1882), 52 L. J. Ch. 280. **Apld.** *Re* Ryley, *Ex p.* Official Receiver (1885), 15 Q. B. D. 329. **Folld.** *Re* Simes, Simes *v.* Newbery (1890), 62 L. T. 721. **Dbtd.** Iles *v.* T. (1892), 36 Sol. Jo. 502. **N.F.** *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A. **Dbtd.** *Re* Edgcome, *Ex p.* Edgcome, [1902]

2 K. B. 403, C. A. **Refd.** Phosphate Sewage Co. *v.* Hartmont (1877), 25 W. R. 743 ; *Re* Freston (1883), 11 Q. B. D. 545, C. A.

See, further, cases in Part XXII., *post*.

1642. Second adjudication—Power of court to transfer proceedings.]—Debtor was adjudicated bkpt. on his own petition, in Dec., 1869, in a county ct. A creditor, who had proved under the bkpcy., for the purpose of impeaching the first bkpcy., filed a fresh petition for adjudication, in June, 1870, in the Ct. of London, under which debtor was a second time adjudicated bkpt. The Chief Judge made an order transferring the proceedings in the first bkpcy. from the county ct. to London :—*Held :* he had power under 1869 Act, s. 80, to make the order, although the proceedings had been begun under the 1861Act.—*Re* WIELAND, *Ex p.* WIELAND (1870), 5 Ch. App. 486 ; 22 L. T. 324 ; 18 W. R. 616, L. J.

SUB-SECT. 2.—DISQUALIFICATIONS OF BANKRUPT & DEBTORS.

See Bankruptcy Disqualification Act, 1871 (c. 50), ss. 6-8, 1883 Act, ss. 32-34, & 1890 Act, s. 9, which were not repealed by 1914 Act, & 1914 Act, s. 106.

1643. Member of Parliament—Duty of court to certify to Speaker.]—The duty, cast upon the Ct. of Bkpcy. by 1869 Act, s. 122, of certifying the bkpcy. of a Member of Parliament to the Speaker, is an *ex officio* duty as between the ct. & the House of Commons, & application for such a certificate should not be made by a creditor.—*Re* RUSSELL, *Ex p.* POOLEY (1872), 7 Ch. App. 519 ; 41 L. J. Bcy. 67 ; 26 L. T. 813 ; 20 W. R. 735, L. JJ.

1644. Mayor, alderman, or councillor—Total indebtedness not exceeding £50—Administration order by county court under 1883 Act, s. 122.]—A person whose total indebtedness does not exceed £50, & whose estate is being administered by an order of a county ct. under 1883 Act, s. 122, is not " adjudged " bkpt. within s. 32 (1) of the Act & is not disqualified from being elected to the office of mayor, alderman, or councillor.—LOWE *v.* LOWRIE, WAKEFIELD MUNICIPAL ELECTION PETITION (1902), 18 T. L. R. 553, D. C.

Annotation :—**Distd.** Bradfield *v.* Cheltenham Grdns., [1906] 2 Ch. 371.

1645. Guardian of poor—Administration order under 1883 Act, s. 122.]—Where a guardian of the poor obtains an administration order under the above sect., providing for the payment of less than 20*s.* in the pound in respect of his debts, he has made a " composition or arrangement with his creditors " within Local Govt. Act, 1894 (c. 73), s. 46, & is disqualified for office.—BRADFIELD *v.* CHELTENHAM GUARDIANS, [1906] 2 Ch. 371 ; 75 L. J. Ch. 618 ; 95 L. T. 78 ; 70 J. P. 371 ; 54 W. R. 611 ; 22 T. L. R. 639 ; 50 Sol. Jo. 560 ; 4 L. G. R. 961 ; 13 Mans. 207.

1646. Member of school board—Adjudication before 1883 Act, s. 32.]—*Held:* the above sect. was not retrospective, & a person adjudicated bkpt. before it came into operation & undischarged, was not disqualified for, *e.g.*, a seat on a school board.—*Re* PULBOROUGH SCHOOL BOARD ELECTION, BOURKE *v.* NUTT, [1894] 1 Q. B. 725; 63 L. J. Q. B. 497; 70 L. T. 639 ; 58 J. P. 572 ; 42 W. R. 388 ; 10 T. L. R. 349 ; 38 Sol. Jo. 327 ; 1 Mans. 172 ; 9 R. 395, C. A.

Annotation :—**Refd.** Lane *v.* Lane, [1896] P. 133.

1647. Borough councillor—Proceeding by quo warranto against.]—A bkpt. is disqualified not only for election to, but also for holding or exercising office, of a borough councillor, & may be ousted by an information in the nature of a *quo warranto*, notwithstanding Municipal Corpns. Act, 1882 (c. 50), s. 87.—R. *v.* BEER, [1903] 2 K. B. 693 ; 72 L. J. K. B. 608 ; 89 L. T. 412 ; 67 J. P. 326 ; 52 W. R. 221 ; 1 L. G. R. 634 ; 10 Mans. 263 ; *sub nom.* R. *v.* EALING CORPN., R. *v.* BEER, *Ex p.* TYER, 19 T. L. R. 531, D. C.

Annotation :—**Mentd.** Forrester *v.* Norten, [1911] 2 K. B. 953, D. C.

1648. " Person interested "—Right to inspect accounts of local authority.]—Adjudication does not deprive a " person interested " of his right to inspect the accounts of a local authority, given by Public Health Act, 1875 (c. 55).—MARGINSON *v.* TILDSLEY (1903), 67 J. P. 226 ; 1 L. G. R. 333.

Annotation :—**Refd.** R. *v.* Fleetwood U. D. C. (1904), 2 L. G. R. 1209.

1649. Director of company.]—T. was an undischarged bkpt. One of the articles provided that a director should vacate his office if he became bkpt. : —*Held :* this did not prevent the appointment of bkpt. to be a director.—DAWSON *v.* AFRICAN CONSOLIDATED LAND TRADING CO., [1898] 1 Ch. 6 ; 67 L. J. Ch. 47 ; 77 L. T. 392 ; 46 W. R. 132 ; 14 T. L. R. 30 ; 42 Sol. Jo. 45 ; 4 Mans. 372, C. A.

Annotations :—**Mentd.** Astley *v.* New Tivoli (1898), 68 L. J. Ch. 90 ; Boord *v.* African Consolidated Land & Trading Co., [1898] 1 Ch. 596 ; British Asbestos Co. *v.* Boyd, [1903] 2 Ch. 439 ; *Re* Allison Johnson & Foster, *Ex p.* Birkenshaw, [1904] 2 K. B. 327 ; Channel Collieries Trust *v.* Dover St. Margaret's & Martin Mill Light Ry. Co., [1914] 2 Ch. 488, C. A.

See, further, COMPANIES.

1650. ——.]—Pltf. was adjudicated a bkpt. in 1888 & never obtained his discharge. In Apr., 1902, he was a director of & held one thousand shares in a co., the articles of assocn. of which required that the qualification of a director should be the holding " in his own right " of one hundred shares, & that his office should be vacated if he ceased to hold the qualifying number of shares. In the same month pltf.'s trustee in bkpcy. wrote to the co. claiming the shares as his, but postponing his decision whether he would be registered himself or have some nominee registered as transferee. Thereupon the other directors excluded pltf. from the board, on the ground that he had become disqualified. Subsequently a transfer of one hundred other shares in pltf.'s favour was executed & lodged with the co. for registration. Although the trustee had not raised any objection to registration, the directors refused to register the transfer :—*Held :*

PART V. SECT. 2, SUB-SECT. 2.

1647 i. *Borough councillor—Whether disqualified for election.*]—Circumstances in which K. was held to be an uncertified insolvent, & as such incapable of being elected a borough councillor.—R. *v.* KNIPE. *Ex relatione* WHITE (1866), 3 W. W. & A'B. 46.—**AUS.**

1647 ii. —— ——.]—An uncertified insolvent may be elected as municipal councillor.—*Ex p.* MOSSMAN (1867), 6 N. S. W. S. C. R. 245.—**AUS.**

t. *Member of stock exchange.*]—Bye-laws which give the governing committee of a stock exchange the right to sell a member's seat at the board, for cause of insolvency, are reasonable & *intra vires ;* & on receiving notice from a member that he has been compelled to suspend payments, the governing committee may proceed to dispose of his seat.—MCIVER *v.* MONTREAL STOCK EXCHANGE (1888), M. L. R. 4 S. C. 112.—**CAN.**

w. *Town Commissioner.*]—A person who had been an insolvent debtor twelve years previously, but ever since that time had been in solvent circumstances, was elected Town Comr. :—*Held :* the previous insolvency created no disqualification.—R. *v.* BRADY (1858), 7 I. C. L. R. 610 ; 10 Ir. Jur. 222.—**IR.**

y. ——.]—D., a Town Comr., acting under Comrs. Clauses Act, 1847, during the tenure of his office, entered into an arrangement with his creditors :—*Held :* D. was not thereby disqualified from holding his office, Debtors Act (Ireland), 1872, s. 20, only disqualifying the persons mentioned in Municipal Corpns. (Ireland) Act, s. 16, & not being applicable to the case of Town Comrs. acting under Towns Improvement & Comrs.' Clauses Acts.—R. *v.* CUNNINGHAM (1887), 20 L. R. Ir. 490.—**IR.**

Sect. 2.—Effect of adjudication order: Sub-sect. 2. Sect. 3: Sub-sect. 1.]

(1) pltf. had ceased to hold the thousand shares "in his own right," & was not entitled to an injunction to restrain his exclusion from the board; (2) he was entitled to have the register of members rectified by the insertion of his name therein as holder of the second hundred shares.—SUTTON *v.* ENGLISH & COLONIAL PRODUCE CO., [1902] 2 Ch. 502; 71 L. J. Ch. 685; 87 L. T. 438; 50 W. R. 571; 18 T. L. R. 647; 10 Mans. 101.

Annotation:—**Refd.** Boschoek Proprietary Co. *v.* Fuke, [1906] 1 Ch. 148.

1651. Contributory of company—Cannot apply in winding up.]—A person, whose name has been settled on the list of contributories of a co. in liquidation, becoming a bkpt., becomes a stranger to the co., & can make no application to the ct. in the winding up, & the ct. has no jurisdiction to make any order upon his application.—*Re* CAPE BRETON CO. (1881), 19 Ch. D. 77; 51 L. J. Ch. 202; 45 L. T. 395, C. A.

Annotation:—**Mentd.** *Re* Securities Insce. (1894), 42 W. R. 465, C. A.

1652. Solicitor—Right to certificate.] — *Held:* there was no discretion to refuse to grant a certificate to a solr., who was upon the roll of solrs., upon the ground that he was an undischarged bkpt. — *Re* A SOLICITOR, [1902] 1 K. B. 128; 71 L. J. K. B. 36; 85 L. T. 619; 50 W. R. 196; 18 T. L. R. 114; 46 Sol. Jo. 71, C. A.

See, now, Solicitors Act, 1906 (c. 21), &, *generally*, SOLICITORS.

1653. Executor—Restrained from acting on bankruptcy.]—The ct. has jurisdiction to restrain an exor., who has become bkpt. since the death of testator, from further acting as exor., &, if there is a co-exor. willing to continue to act, will not require the appointment of a receiver.—BOWEN *v.* PHILLIPS, [1897] 1 Ch. 174; 66 L. J. Ch. 165; 75 L. T. 628; 45 W. R. 286; 41 Sol. Jo. 188; 4 Mans. 370.

See, further, EXECUTORS & ADMINISTRATORS.

Trustee—Removal of & appointment of new trustee.]—*See* TRUSTS & TRUSTEES.

1654. Removal of disqualification—"Misfortune without misconduct"—Bankruptcy resulting from—Libel or slander action.]—*Held:* the words "misfortune without any misconduct" in 1883 Act, s. 32 (2) (*b*), meant pure misfortune as distinguished from & without misconduct, & the word "misconduct" in that sect. is not to be interpreted with reference to s. 28 of the Act, or confined to the "conduct" therein specified.

Bkpt., the editor of a newspaper, was indicted for a libel & sentenced to three months' imprisonment & to pay the costs of the prosecution. During the time he was in gaol all his property was sold under a bill of sale given for the purpose of the defence, & he subsequently presented his own petition. On appeal from a decision of the county ct. judge refusing a certificate under 1883 Act, s. 32 (2) (*b*):—*Held:* the bkpcy. was caused by the libel, the sentence, & the imprisonment, & it was impossible to say that such bkpcy. was caused by misfortune without any misconduct on bkpt.'s part; & the refusal of the certificate was right.—*Re* BURGESS, *Ex p.* BURGESS (1887), 57 L. T. 200; 35 W. R. 702; 4 Morr. 186, D. C.

1655. —— —— —— ——.]—Applt., who was in the habit of making speeches on social questions, used words at a meeting in a public place with reference to an insurance co., for which an action for slander was brought, in which he was ordered to pay damages & costs. Having been made bkpt. as a result of the action, he applied for a certificate under 1883 Act, s. 32 (2) (*b*), so that he might become a candidate for Parliament. Applt.'s evidence went to show that he had no personal interest in the matter & what he did was from motives of charity. The county ct. judge refused to grant the certificate:—*Held:* applt. had not discharged the *onus* of showing that "the bkpcy. was caused by misfortune without any misconduct on his part," & the certificate should not be granted. —*Re* THOMPSON, *Ex p.* THOMPSON (1919), 88 L. J. K. B. 646; [1918–19] B. & C. R. 150, D. C.

1656. —— —— —— **Costs of unsuccessful divorce suit.**]—Debtor instituted a suit for a divorce against his wife & co-resps. on the ground of her adultery. At the trial the jury found that the wife had not committed adultery, & the petition was dismissed, & debtor was ordered to pay the costs of his wife & of co-resps. The means of debtor both before & after the commencement of the proceedings were wholly insufficient to pay such costs, & he was adjudged a bkpt. on the petition of one of co-resps.:—*Held:* the bkpcy. of debtor had not been "caused by misfortune without any misconduct on his part," & he was not entitled to the certificate described in 1883 Act, s. 32.—*Re* CAMPBELL (LORD COLIN) (1888), 20 Q. B. D. 816; 59 L. T. 194; 36 W. R. 582; 4 T. L. R. 374; 5 Morr. 94, C. A.

1657. —— —— —— **Pure misfortune on stock exchange.**]—Bkpt., a stockbroker, was granted an order of discharge, subject to a nominal suspension of one day by reason of a previous failure, under which he had paid all his creditors in full. On an application for a certificate under 1883 Act, s. 32, that his bkpcy. was caused by misfortune, without any misconduct on his part:—*Held:* (1) each case must depend on the circumstances in which the bad debts were contracted, & in certain circumstances, bad debts would not come within the meaning of the word "misfortune"; (2) the facts that bkpt. had carried on a legitimate business, & had given credit prudently & cautiously, & that his debtors had afterwards failed from circumstances, over which bkpt. had no control, constituted "misfortune"; the certificate ought not to be withheld merely on the ground of the former failure.—*Re* GRAHAME (1889), 5 T. L. R. 259.

SECT. 3.—APPEALS FROM AND ANNULMENT OF ADJUDICATION ORDER.

SUB-SECT. 1.—JURISDICTION AND DISCRETION OF COURT.

1658. Jurisdiction of court—Court of Appeal.]—A. presented a petition for protection under 1849 Act, s. 211, & a day was appointed for a private sitting. On that day A. did not appear. The

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PART V. SECT. 3, SUB-SECT. 1.

a. *Jurisdiction of court—To review registrar's decision.*]—Where an adjudication is made by a registrar in the absence of a judge it is open to review by the judge.—*Re* BURKE (1886), 4 N. Z. L. R. 303.—**N.Z.**

b. —— *To amend order against firm—By striking out name of deceased partner.*]—On the petition of the surviving partner in a firm, an order was made sequestrating the firm's estate. On an application by the extrix. of D., a deceased partner, to strike out D.'s name from the order & amend it so as to sequestrate the estate of the surviving partner only:—*Held:* the Ct. of Insolvency under its general jurisdiction had power to amend the order.—*Re* DOBSON, WATSON & CO. (1890), 16 V. L. R. 700.—**AUS.**

c. —— *As to mere irregularities & matters of regulation.*]—Where petitioning creditor was a corpn. & the affidavit had been made by one officer of the corpn. & the bond given by another:—*Held:* although the com-

comr., by an order then made, dismissed the petition, & by the same order, after finding that A. had not made a full disclosure of his effects, & was not desirous of making a *bonâ fide* arrangement with his creditors, adjudicated A. to be bkpt. The Ct. of Appeal, the above findings not being disproved, declined to reverse the order made by the comr. *Qu.:* whether the Ct. of Appeal has any discretion as to annulling an adjudication of bkpcy., or whether it is not bound to decide the legal question of its validity or invalidity.—*Re* BARNETT, *Ex p.* BARNETT (1850), 20 L. J. Bcy. 3; 15 Jur. 617.

1659. —— Equitable invalidity—Declaration of insolvency signed without knowledge as to future use.]—The comr. has jurisdiction to annul an adjudication for equitable invalidity, *e.g.*, where debtor has been induced by a creditor's solr. to sign a declaration of insolvency without knowing that he has been asked to do it in order to bring about his bkpcy.—*Re* JOHNSTONE, *Ex p.* JOHNSTONE (1851), 4 De G. & Sm. 204; 16 L. T. O. S. 492; 15 Jur. 739; 64 E. R. 799.

1660. —— After discharge—Adjudication on bankrupt's petition.]—The ct. has jurisdiction, with consent of creditors, to annul an adjudication of bkpcy. made upon bkpt.'s own petition after he has obtained his order of discharge.—*Re* NEWALL, *Ex p.* NEWALL (1865), 11 L. T. 782.

See, now, 1914 Act, ss. 21, 29.

1661. —— Apart from statutory power.]—The ct. can under its general jurisdiction annul an adjudication in a proper case, independently of any express power given it by stat.—*Re* HOARE, *Ex p.* ASHWORTH (1874), L. R. 18 Eq. 705; 43 L. J. Bcy. 142; 30 L. T. 906; 22 W. R. 925.

Annotations:—**Mentd.** *Re* Ker, *Ex p.* Bagshaw (1879), 13 Ch. D. 304, C. A.; *Re* Stanger, *Ex p.* Geisel (1882), 22 Ch. D. 436, C. A.

1662. —— Notwithstanding expiration of time for appealing against—Effect of 1869 Act, s. 10.]—The ct. has power in a proper case to annul an order of adjudication, notwithstanding that the time for appealing against the order has expired.

The above sect. does not apply to an application to annul an adjudication.—*Re* STANGER, *Ex p.* GEISEL (1882), 22 Ch. D. 436; 53 L. J. Ch. 349; 48 L. T. 405; 31 W. R. 264, C. A.

1663. —— To allow submission to commission on terms.]—*Semble:* the ct. had jurisdiction to sanction an arrangement made between assignees & bkpt., who had obtained an issue to try the validity of the commission, for bkpt. to submit to the commission on payment to him of a certain sum out of his estate, & to order his assignees to pay to him a portion of that sum, in pursuance of such arrangement, the major part of bkpt.'s creditors, both in number & value, having agreed to the arrangement at a meeting duly convened for that purpose.—*Re* CHAMBERS, *Ex p.* JERRARD (1837), 3 Deac. 1, L. C.

1664. Discretion of court to annul—On approval of scheme.]—The ct., upon approving a composition or scheme under 1883 Act, s. 23, after debtor has been adjudged bkpt., will not as a matter of course annul the bkpcy. The ct. has a discretion in such a case.—*Re* SULLIVAN & HUGHES (1904), 20 T. L. R. 393.

1665. —— What must be regarded.]—Where application is made in bkpcy. to annul an adjudication, the ct. refuses to act upon the mere assent of the creditors in the matter, & considers not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality & to the interests of the public at large. The mere consent of the creditors is but an element in the case. The ct. has to exercise a discretion. It is bound to regard not merely the interests of the creditors; it has a duty with regard to the commercial morality of the country (BUCKLEY, J.).—*Re* TELESCRIPTOR SYNDICATE LTD., [1903] 2 Ch. 174; 72 L. J. Ch. 480; 88 L. T. 389; 51 W. R. 409; 19 T. L. R. 271; 10 Mans. 213.

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mission was not strictly regular, it was in the discretion of the ct. to support it; mere irregularities or matters of regulation are within the jurisdiction of the Chancellor.—*Re* SNEYDS, *Ex p.* SNEYDS, *Ex p.* BANK OF IRELAND (1829), 1 Mol. 261.—**IR.**

d. —— *Appeal to Privy Council—Amount at issue—How estimated.*]—The value of debtor's estate, not the amount of petitioning creditor's debt, is to be regarded in estimating the amount of the matter in issue for the purpose of an appeal to the Privy Council under 15 Vict. No. 10, s. 33, from an order as to compulsory sequestration.—*Re* MACDONALD (1871), 2 V. L. R. 12.—**AUS.**

e. —— *To supersede commission—Under old law.*]—Upon a bkpt.'s petition to set aside a commission on facts lately come to his knowledge, the ct. will not grant an issue, but it cannot restrain bkpt. from bringing an action.—*Re* PERSE (1817), 2 Mol. 441.—**IR.**

f. —— —— *Vice-Chancellor.*]—Commission superseded on application to the Vice-Chancellor in the first instance, & not by way of appeal.—*Re* MERRITT (1844), 1 O. S. 283.—**CAN.**

g. —— —— *After death of bankrupt.*]—A commission cannot be superseded after the death of bkpt.—*Re* HOMAN (1829), 3 Ir. L. Rec. 1st ser. 56.—**IR.**

h. —— —— —— *Debtor cannot file bill in own name.*]—A bkpt. who disputes the validity of the commission, has no right to file a bill in his own name, though his assignees refuse to do so in theirs.—KELLY *v.* DOWLING (1826), 1 Hog. 367.—**IR.**

1660 i. —— *To annul adjudication—After discharge.*]—The sequestration of an Englishman, the large majority of whose creditors were resident in England, & whose assets, if any existed, were situated there, recalled, although, in consequence of delay in following out the petition for recall, bkpt. had obtained his discharge.—SAMUEL & BRANDON *v.* STEPHENS (1862), 34 Sc. Jur. 131; 24 Dunl. (Ct. of Sess.) 263.—**SCOT.**

1660 ii. —— —— ——.]—The ct. has jurisdiction to annul an adjudication of bkpcy. after debtor has obtained his order of discharge, without proof that the debts are paid in full.—*Ex p.* FIRTH (1891), 11 N. Z. L. R. 7.—**N.Z.**

j. —— *To annul sequestration—Liquidation in England.*]—*Held:* an action for reduction of a sequestration, on the ground that the ct. had no jurisdiction to award sequestration by reason of the existence of a liquidation in England of debtor's estates, was incompetent.—GIBSON *v.* MUNRO (1894), 21 R. (Ct. of Sess.) 840.—**SCOT.**

1664 i. *Discretion of court to annul—On acceptance of composition.*]—After bkpcy., a bkpt. arranged with his creditors to pay them a composition outside the ct. Upon presenting a petition founded on their consent, & paying the costs, the adjudication was annulled.—*Re* FEAGAN, 13 Ir. Jur. 375.—**IR.**

1664 ii. —— —— *Certificate of creditors' consent necessary.*]—B. lodged with the official assignee a sum of money to secure bkpts.' creditors a composition of 6*s.* 8*d.* in the pound. All the creditors assented that the adjudication should be annulled, the composition paid, & bkpts. replaced in possession of their estate:—*Held:* the adjudication could not be annulled until the chief registrar made his report, & certified all the creditors had assented.—*Re* DOOLEYS (1868), 2 I. L. T. Jo. 44.—**IR.**

1664 iii. —— —— *Before last instalment paid.*]—A bkpt., after bkpcy., proceeded under 20 & 21 Vict., c. 60, ss. 149, 150, to carry out a composition of which he paid the first two instalments. The ct., upon payment of the costs of the bkpcy., annulled the adjudication before payment of the last instalment, that course appearing beneficial to the creditors & to the trader himself.—*Re* KELLY, 13 Ir. Jur. 374.—**IR.**

1664 iv. —— *On release of debts by creditors.*]—Where all the creditors of a bkpt. released their debts & consented to the sequestration order being annulled, an order was made annulling same.—*Re* GALE, *Ex p.* GALE (1896), 17 N. S. W. B. 18.—**AUS.**

1664 v. —— *On award—After reference to arbitration.*] — When there is a dispute between the creditors & the alleged bkpt., the matter may, with the ct.'s consent, be referred to arbn., pending proceedings to show cause. Upon the arbitrators making their award, the bkpcy. will be annulled.—*Re* A DISPUTED ADJUDICATION (1866), 18 Ir. Jur. 324.—**IR.**

1664 vi. —— *Without report from commissioners as to passing of final examination—Where all creditors consent.*]—ANON. (1830), 3 Ir. L. Rec. 1st ser. 27—**IR.**

Sect. 3.—Appeals from and annulment of adjudication order: Sub-sect. 2.]

SUB-SECT. 2.—PROCEDURE.

1666. Who may appeal or apply—Bill of sale holder—Adjudication founded on execution by debtor of bill of sale.]—An adjudication of bkpcy. was made, founded upon the execution by debtor of a bill of sale, which was held to be an act of bkpcy. :—*Held :* the bill of sale holder was entitled to appeal from the adjudication.—*Re* ELLIS, *Ex p.* ELLIS (1876), 2 Ch. D. 797 ; 45 L. J. Bcy. 159 ; 34 L. T. 705, C. A. ; *affg.* S. C. *sub nom. Re* ELLIS, *Ex p.* THODAY, 2 Ch. D. 229.

Annotations :—**Apprvd.** Administrator-General of Jamaica *v.* Lascelles De Mercado, *Re* Rees' Bankruptcy, [1894] A. C. 135, P. C. **Refd.** *Re* Foulds, *Ex p.* Learoyd (1878), 10 Ch. D. 3, C. A. ; *Re* Sidebotham, *Ex p.* Sidebotham (1880), 14 Ch. D. 458, C. A. **Mentd.** *Re* Williamson, *Ex p.* Threlfall (1876), 25 W. R. 127 ; *Re* Vane, *Ex p.* Greener (1877), 46 L. J. Bcy. 76, C. A. ; *Re* Parker, *Ex p.* Dann (1881), 17 Ch. D. 26 ; *Re* Berry, *Ex p.* Wilkinson (1883), 31 W. R. 649, C. A. ; *Re* Sinclair, *Ex p.* Chaplin (1884), 26 Ch. D. 319.

1667. —— "Persons aggrieved"—Trustees of deed for benefit of creditors.]—A. issued a writ against B., claiming £49 11*s.* 7*d.* debt & £3 costs. On the same day, B. executed a deed assigning all his property to trustees for the benefit of his creditors. A. afterwards signed judgment for £49 11*s.* 7*d.* debt & costs, which were taxed at £8 9*s.* 6*d.*, making £58 1*s.* 1*d.* in all, & presented a bkpcy. petition against B., alleging as the act of bkpcy. the execution of the creditors' deed. The county ct. judge having adjudicated B. bkpt. : —*Held :* the trustees of the creditors' deed had a right to appeal as "persons aggrieved" under 1869 Act, s. 71.—*Re* WHELAN, *Ex p.* SADLER (1878), 48 L. J. Bcy. 43 ; 39 L. T. 361 ; 27 W. R. 156.

See 1914 Act, s. 108 (2).

1668. —— —— First petitioning creditor—Adjudication on second petition.]—Where two bkpcy. petitions are presented against same debtor, & debtor colludes with the second petitioning creditor, so that an adjudication is made on the second petition behind the back of the first petitioning creditor, the ct. will, on the application of the first petitioning creditor, give him the conduct of the proceedings consequent on the adjudication. In such a case the first petitioning creditor is not a "person aggrieved" within 1869 Act, s. 71, & has no *locus standi* to appeal against the adjudication.—*Re* WHITE, *Ex p.* MASON (1880), 14 Ch. D. 71 ; 49 L. J. Bcy. 56 ; 42 L. T. 884 ; 28 W. R. 749, C. A.

1669. —— —— Official receiver—Appeal from refusal to adjudicate.]—When an application made by the official receiver under 1883 Act, s. 20, & 1886 Rules, r. 191, for an immediate adjudication of bkpcy. against debtor, on the non-approval of a scheme of arrangement, has been refused or adjourned, the official receiver is a "person aggrieved" by the order, & as such is entitled to appeal against it.—*Re* REED, BOWEN & Co., *Ex p.* OFFICIAL RECEIVER (1887), 19 Q. B. D. 174 ; 56 L. J. Q. B. 447 ; 56 L. T. 876 ; 35 W. R. 660 ; 3 T. L. R. 640 ; 4 Morr. 225, C. A.

Annotations :—**Apld.** *Re* Lamb, *Ex p.* Board of Trade, [1894] 2 Q. B. 805, C. A. **Consd.** *Re* Williams, *Ex p.* Official Receiver, [1913] 2 K. B. 88, C. A. **Mentd.** *Re* Pinfold, *Ex p.* Pinfold (1891), 61 L. J. Q. B. 161, D. C. ; *Re* Thurlow, *Ex p.* Official Receiver, [1895] 1 Q. B. 724, C. A.

1670. Who will be heard—Solicitor—Remission to enable bankrupt to appear & be heard.]—Upon an application to annul an adjudication in bkpcy., A., a solr. of the Ct. of Bkpcy., appeared in ct. for bkpt., not as his solr., but as representing his solrs., whose managing clerk A. was. The comr. refused to hear him, & the application was thereupon dismissed :—*Held :* (1) the privilege given by 1861 Act, s. 212, to solrs. to appear & plead, personally in Cts. of Bkpcy., was confined to solrs. appearing as solrs. of the particular clients ; (2) having regard to the fact that bkpt. was present in ct. & taken by surprise, the matter ought to be remitted to the comr. to enable bkpt. to appear & be heard.—*Re* BROADHOUSE, *Ex p.* BROADHOUSE (1867), 2 Ch. App. 655 ; 26 L. J. Bcy. 29 ; 17 L. T. 126 ; 15 W. R. 1154, L. JJ.

Annotation :—**Apld.** R. *v.* Oxfordshire County Court Judge, [1894] 2 Q. B. 440, D. C.

1671. Manner of application—In accordance with 1861 Act.]—*Held :* application to annul bkpcy. before advertisement must be made strictly in accordance with 1861 Act, s. 110.—*Re* ANON. (1863), 2 New Rep. 389.

1672. Within what time—Non-trader—1849 Act, s. 104—1861 Act, s. 70.]—In addition to 1861 Act, s. 70, a non-trader is entitled after adjudication, under 1849 Act, s. 104, to time to show cause against the adjudication.—*Re* HEPBURN (1867), 36 L. J. Bcy. 48 ; 17 L. T. 275 ; 15 W. R. 1065, L. JJ.

Annotation :—**Apprvd.** *Re* Bristow (1868), 3 Ch. App. 247, L. J.

1673. —— Bankrupt resident in Isle of Man—1842 Act, s. 24—1849 Act, s. 233.]—The Isle of Man is not within the United Kingdom, & a person residing there at the time of an adjudication of bkpcy. against him, has three months within which he may contest the validity of the fiat or

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PART V. SECT. 3, SUB-SECT. 2.

1666 i. *Who may appeal or apply — Party interested.*] — *Held :* 1867 Act, s. 85, did not take away the right of a third party interested to apply & get the adjudication annulled. —HARDING *v.* HOOPER (1869), C. A. 315.—**N.Z.**

1666 ii. —— *Creditor not having proved —Commission fraudulently obtained.*]—A commission of bkpcy. will be superseded, & the certificate stayed, at the instance of a person who has not proved a debt, but is proceeding at law against bkpt., when the commission has been fraudulently obtained.—*Re* BURGESS (1828), 1 Ir. L. Rec. 1st ser. 374.—**IR.**

1670 i. *Who will be heard—When petitioning creditors are induced to withdraw.*]—Applt. appealed against the order adjudging him insolvent, petitioning creditors being resps. named on the record. When the appeal came on for hearing, resps. did not appear, applt. having settled with them, in order to induce them to withdraw from the appeal. Another creditor, whose name was in the insolvent's schedule applied to be heard in the appeal in support of the order of adjudication, & if necessary that his name should be entered on the record as resp. The ct. granted the application.—*Re* HAROON MAHOMED (1890), I. L. R. 14 Bom. 189. —**IND.**

1671 i. *Manner of application—Must be distinct.*]—An application, upon equitable grounds, to set aside an adjudication should be made, not by way of defence to the order of adjudication, but by a distinct, substantive application, either by petition or motion, setting forth the special grounds relied on.—*Re* W. M. (1877), I. R. 11 Eq. 409.—**IR.**

1671 ii. *S. P. Re* M'G. (1877), 11 I. L. T. 93.—**IR.**

1671 iii. —— *Form of petition.*]—A commission issued in 1838. On a petition for a *supersedeas* in 1844, the Lord Chancellor said that the petition should have set forth the cause of delay, & directed an inquiry before the comr. to ascertain whether, in the circumstances stated, & under Bkpt. Act, 1836, s. 151, petitioner was entitled to have the commission superseded.—*Re* FERGUSON, *Ex p.* FERGUSON (1844), 6 I. Eq. R. 521.—**IR.**

k. *Consent to supersedeas — Whether sufficient signature.*]—The consent of a creditor to a *supersedeas* in bkpcy. was signed by a person authorised under a power of attorney, executed by the creditor, then resident in New York. The verifying affidavit was sworn before the British Consul, & attested by his seal of office, & did not purport to have been sworn before a justice of the peace :—*Held :* the consent was sufficiently signed.—*Ex p.* HUTTON (1844), 6 I. Eq. R. 522.—**IR.**

1672 i. *Within what time.*]—An application to rehear an order for adjudication must be made within the thirty days allowed for entering an appeal by Irish 1857 Act, s. 29.—*Re* DOHERTY (1877), I. R. 11 Eq. 318.—**IR.**

petition for adjudication under 1842 Act, s. 24 or 1849 Act, s. 233.—DAVISON *v.* FARMER (1851), 6 Exch. 242; 20 L. J. Ex. 177; 15 J. P. 691; 155 E. R. 531.

Annotations :—**Mentd.** O'Flaherty *v.* McDowell (1857), 6 H. L. Cas. 142, H. L.; Mather *v.* Brown (1876), 1 C. P. D. 596.

1674. —— Effect of delay.]—A petition by a creditor to annul a fiat, on the ground of legal invalidity only, was dismissed by reason of the creditor's delay in presenting such petition.

A ct. asked to give relief, which is not *ex debito justitiæ*, but of which the refusal is within the compass of its lawful functions, is justified in requiring appct. to show that he has proceeded without unnecessary delay, & with reasonable diligence, or to show, in a case where without any reason or excuse the commencement of the proceedings has been delayed for a considerable time, as, for instance, a twelvemonth or upwards beyond the period at which it might have taken place, & where its success must vary the rights of persons perfectly innocent & blameless, that these rights will not be affected prejudicially, or will not be affected otherwise than they would have been had the proceeding been commenced with diligence (KNIGHT BRUCE, V.-C.).—*Re* BRETTARGH, *Ex p.* MAXWELL (1844), 3 Mont. D. & De G. 708; 3 L. T. O. S. 341.

Annotation :—**Consd.** *Re* Bradbury, *Ex p.* Emery (1854), 4 De G. M. & G. 901, L. JJ.

See, now, 1914 Act, s. 29.

1675. —— ——.]—A receiving order having been made against debtor, a scheme of arrangement was proposed which was considered on Dec. 15, 1903, by a meeting of creditors, at which debtor was present. The meeting rejected the scheme & resolved on adjudication. Immediately after the meeting, without any notice to & in the absence of debtor, the order of adjudication was made on the application of petitioning creditors. On Apr. 14, 1904, debtor applied to the registrar to annul the order. The trustee had in the meanwhile realised a portion of the estate :—*Held :* the application was rightly dismissed on the ground that it was too late.—*Re* PONSFORD, *Ex p.* PONSFORD, [1904] 2 K. B. 704; 73 L. J. K. B. 913; 91 L. T. 510; 53 W. R. 120; 48 Sol. Jo. 687; 11 Mans. 342, C. A.

Annotation :—**Refd.** *Re* Williams, *Ex p.* Official Receiver, [1913] 2 K. B. 88, C. A.

1676. —— —— Infant.]—A petition to annul an adjudication in bkpcy. on the ground of the infancy of bkpt., but which was not presented until after the expiration of the time limited for that purpose by 1849 Act, s. 233, was dismissed as out of time, the case of an infant being no exception from the provisions of that sect.—*Re* WEST (1853), 3 De G. M. & G. 198; 21 L. T. O. S. 277; 1 W. R. 421; 43 E. R. 79, L. C.

Annotation :—**Consd.** *Re* Smedley (1864), 10 L. T. 432.

1677. —— —— Creditor petitioning at instigation of bankrupt—After expiry of time for appeal.]—Where the time had elapsed during which bkpt. would have been at liberty to dispute the adjudication, a petition to annul, presented by a creditor at bkpt.'s instigation, was dismissed with costs.—*Re* BRADBURY, *Ex p.* EMERY (1854), 4 De G. M. & G. 901; 23 L. J. Bcy. 33; 43 E. R. 760, L. JJ.

1678. Extension of time—Judgment suffered by default through ignorance.]—Debtor allowed his wife a separate maintenance, but she, notwithstanding, incurred further debts, & debtor through ignorance suffered judgment, by default, & was adjudicated a bkpt. under the judgment debtor summons clauses of 1861 Act. The ct. extended for a few days the time for showing cause against the adjudication.—*Re* ANON. (1863), 11 W. R. 881; *subsequent proceedings*, 11 W. R. 988.

1679. —— One of three partners not appealing in time.]—An adjudication having been made against three partners, two of them appealed. The cases of all three were identical. The third, who had not appealed within the time fixed by 1870 Rules, was allowed to appeal, & the adjudication was annulled against all three.—*Re* HAYWARD, *Ex p.* HAYWARD (1871), 6 Ch. App. 546; 40 L. J. Bcy. 49; 24 L. T. 782; 19 W. R. 833, L. JJ.

Annotations :—**Mentd.** *Re* Foulds, *Ex p.* Learoyd (1878), 10 Ch. D. 3, C. A.; Faulks *v.* Atkins (1893), 10 T. L. R. 178; *Re* Moore, Bartholomew's Case (1899), 68 L. J. Ch. 302.

1680. —— "Person aggrieved"—Debt paid by bankrupt after alleged act of bankruptcy—Creditor ignorant of act of bankruptcy.]—A third person, who is without notice of the date of the act of bkpcy. upon which an adjudication has been made until after the expiration of the time limited for appealing, & who is aggrieved by the adjudication by reason of his having been paid a debt by bkpt., after the alleged act of bkpcy., & denies that the act was committed, is entitled *ex debito justitiæ* to an extension of time for appealing, if he applies promptly after notice.—*Re* TUCKER, *Ex p.* TUCKER (1879), 12 Ch. D. 308; 48 L. J. Bcy. 118; 28 W. R. 219, C. A.

Annotations :—**Apprvd.** *Re* Stanger, *Ex p.* Geisel (1882), 22 Ch. D. 436, C. A. **Apld.** *Re* A Debtor, *Ex p.* A Person Aggrieved *v.* Petitioning Creditors & Official Receiver (1912), 106 L. T. 344.

1681. What evidence admissible—Examination of third party before commissioners—Taken behind back of bankrupt.]—The examination of a third party before the comr., which is taken behind the back of bkpt., cannot be read in evidence on bkpt.'s petition to supersede, but the ct., for its own satisfaction, has a right to look at it.—*Re* CHAM-

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1674 i. —— *Effect of delay.*]—An order for sequestration of a firm, consisting of two partners, was made on the petition of one partner. The other partner was absent & never authorised or consented to the petition, but took no steps to set aside the order for sequestration until thirteen years later :—*Held :* the ct. would not exercise its power of setting aside the order in the absence of reasons of D.'s delay in making the application.—*Re* MYERS & DAVIS, (TRADING AS J. D. MYERS & CO.) (1891), 17 V. L. R. 351.—**AUS.**

1674 ii. —— ——.]—At a meeting of S.'s creditors it appeared doubtful whether he was a trader. A solr., who was a creditor & concerned for another, but not of sufficient amount to support a commission, insisted that S. was a trader, & guaranteed B., another creditor, against costs, if he would allow him to use B.'s name as petitioning creditor :—*Held :* though such an arrangement was improper & against the policy of the bkpcy. laws, the ct. should not, three years after, supersede the commission on the petition of S., he having used its protection & failed in impeaching it on other grounds, bkpcy. being inevitable, & the commission having been *bonâ fide* worked.—*Re* SEMPLE (1848), 12 I. Eq. R. 338.—**IR.**

1674 iii. —— ——.]—An order adjudging a trader bkpt. under Irish 1857 Act, s. 127, is among those which the ct. "may review, rescind, or vary," under Irish 1872 Act, s. 6, but in the absence of any special circumstances accounting satisfactorily for the delay, that ct., in the exercise of a proper discretion, will not grant the prayer of a petition to annul an adjudication, which has not been presented till after the time both for showing cause & for appealing under 1857 Act, s. 29, has elapsed.—*Re* DE SERANCOURT (1874), I. R. 9 Eq. 252; 8 I. L. T. 137.—**IR.**

1674 iv. —— ——.]—CENTRAL MOTOR ENGINEERING CO. *v.* GALBRAITH, [1918] S. C. 755.—**SCOT.**

1674 v. —— —— *Security for costs.*]—If a bkpt. submits to a commission for a length of time, then disputes it, & prays an issue, the ct. will refuse it; if he comes in early, as before his final examination, it will grant it upon his finding security for costs. But an action is open to him at any time without finding security for costs.—*Re* DOWLING (1809), 2 Mol. 443.—**IR.**

1681 i. *What evidence admissible—Evidence of petitioning creditor.*]—On the hearing of a motion to discharge an order for sequestration, the ct. may call petitioning creditor as a witness & obtain evidence from him as to the transaction on which insolvency proceedings were based.—*Re* SMART & WALKER, *Ex p.* HILL (1894), 20 V. L. R. 97.—**AUS.**

1681 ii. —— *Evidence of creditor.*]—On the question whether a commission of bkpcy. is or is not sustainable, a creditor of bkpt. is a competent witness to prove the negative.—*Re* CODD (1804), 2 Sch. & Lef. 116.—**IR.**

Sect. 3.—Appeals from and annulment of adjudication order: Sub-sects. 2 & 3.]

BERS, *Ex p.* CHAMBERS (1835), 1 Deac. 197; 2 Mont. & A. 440.

Annotations:—**Consd.** *Re* Scowcroft, *Ex p.* Rees (1845), 6 L. T. O. S. 104, Ct. of R. **Refd.** *Re* Durrant, *Ex p.* Thirkill (1836), 5 L. J. Bcy. 40, Ct. of R.; *Re* Newall, *Ex p.* Newall (1838), 3 Deac. 333, Ct. of R.; *Re* Prescott, *Ex p.* Prescott (1840), 4 Jur. 852, Ct. of R.

1682. —— —— ——.]—On a petition by bkpt. to annul, an affidavit stating the substance of the examination of a third person before the comrs. cannot be read.—*Re* NEWALL, *Ex p.* NEWALL (1838), 3 Deac. 333; 3 Mont. & A. 666, Ct. of R.

1683. —— **Evidence of bankrupt—Affidavits.**]—*Held:* (1) the evidence of bkpt. was admissible on an appeal by him against an adjudication; (2) affidavits of witnesses would not be received unless some special cause were shown for their non-attendance.—*Re* DAVIS (1844), 3 L. T. O. S. 322.

1684. —— **Existence of judgment at law—Establishing validity of commission.**]—A judgment at law, establishing the validity of a commission, is not conclusive on the Great Seal, on a subsequent petition to supersede; & the ct. is bound to look into all the circumstances of the case, as affecting the requisites to support the commission.—*Re* CHAMBERS, *Ex p.* CHAMBERS (1835), 1 Deac. 197; 2 Mont. & A. 440.

Annotations:—**Mentd.** *Re* Durrant, *Ex p.* Thirkill (1836), 5 L. J. Bcy. 40, Ct. of R.; *Re* Newall, *Ex p.* Newall (1838), 3 Deac. 333, Ct. of R.; *Re* Prescott, *Ex p.* Prescott (1840), 4 Jur. 852, Ct. of R.; *Re* Scowcroft, *Ex p.* Rees (1845), 6 L. T. O. S. 104, Ct. of R.

1685. Right of bankrupt to inspect whole proceedings—In action against assignees—Only depositions proving trading & petitioner's debt read by assignees.]—In an action by bkpt. against his assignees to try the validity of the commission, where notice has been given only to dispute the act of bkpcy., & defts. read the two depositions on the file of the proceedings which prove the trading & petitioning creditor's debt, the residue of the proceedings are not to be considered in evidence, & pltf.'s counsel has no right to inspect them.—BLUCK *v.* THORNE (1815), 4 Camp. 191, N. P.

Annotation:—**Apld.** M'Beath *v.* Cooke (1826), 12 Moore, C. P. 122.

1686. Production of documents referred to in affidavit of petitioning creditor—Discretion of court.] — On a petition to supersede an adjudication resp., petitioning creditor, in his affidavits referred to certain exhibits:—*Held:* where documents were referred to in an affidavit, it did not give the other side an absolute right to their production, but it was a matter for the discretion of the ct.—*Re* LORD, *Ex p.* ARNSBY (1833), 2 Deac. & Ch. 192; 2 L. J. Bcy. 16, Ct. of R.

1687. Right to copies of exhibits referred to in affidavit in answer to petition to annul—Exhibits not mutual accounts or documents between parties.]—Where an affidavit, in answer to a petition to annul a fiat referred to certain exhibits, which did not appear to be mutual accounts or documents between the parties, the ct. refused an application of petitioner to have copies of them furnished to him, before the hearing of the petition.—*Re* PARR, *Ex p.* PARR (1839), 3 Deac. 607, Ct. of R.

1688. Inquiry ordered—Alleged negligence of petitioning creditor.]—Upon a petition by bkpt. to annul a fiat issued by an attorney for the amount of his bill of costs, on the ground that the chief part of the bill consisted of charges for the prosecution of an action on the part of bkpt., in which he was nonsuited by reason of the gross negligence of the attorney, the ct. referred it to the registrar to inquire & report as to the *quantum* of negligence.—*Re* SOUTHALL, *Ex p.* SOUTHALL (1839), 4 Deac. 91; 1 Mont. & Ch. 656; 3 Jur. 1177, Ct. of R.

Annotation:—**Consd.** *Re* Billinton, *Ex p.* Billinton (1840), 10 L. J. Bcy. 13, Ct. of R.

1689. Costs—Commission superseded on ground of fraud—Liability of solicitor.] — Upon superseding a fraudulent commission of bkpcy. the solr. was charged with costs as well as the other parties, except as to a criminal prosecution, not under a direction in bkpcy., & in which he was not deft.—*Ex p.* ARROWSMITH (1807), 14 Ves. 209; 33 E. R. 501, L. C.

Annotations:—**Mentd.** *Ex p.* Binmer (1816), 1 Madd. 250; Clarkson *v.* Parker (1838), 7 Dowl. 87.

1690. —— **Failure of petition to annul—Collusion—Suspicious circumstances—Right of respondents.**]—When a petition is to supersede a commission for collusion & stay a certificate, & there are suspicious circumstances, costs will not be given to resps., though the petition fails.—*Re* AUBERT, *Ex p.* STEVENS (1819), 4 Madd. 256; 56 E. R. 700.

1691. —— **Application to adjourn bankrupt's petition to annul—To enable opposition to file affidavits—Liability of applicants.**]—Where an application was made that bkpt.'s petition to annul the fiat might stand over, to enable the other side to file affidavits in opposition, it was ordered to be on payment of full costs of the day.—*Re* KENT, *Ex p.* KENT (1837), 2 Deac. 287, Ct. of R.

1692. —— **Failure of appeal from adjudication—Undertaking of solicitors as to costs.**]—Two out of four bkpts. appealed from the adjudication, & the Ct. of Appeal gave them leave to try the question in an action, upon the undertaking of their solrs. to abide by such order as the Ct. of Appeal might make as to costs. The adjudication was sustained at law:—*Held:* the appeal must be dismissed, but without costs, the solrs., in pursuance of their undertaking, to pay the costs of the action.—*Re* CASTELLI, *Ex p.* CASTELLI (1854), 23 L. J. Bcy. 42, L. JJ.

Appeal from order of annulment & from refusal to annul.]—*See* sub-sect. 7, *post.*

1685 i. *Right of bankrupt's counsel to inspect file of proceedings & depositions.*]—On a motion to supersede a commission of bkpcy., bkpt.'s counsel are not entitled to inspect the file of proceedings, or to call for the depositions of the witnesses proving the act of bkpcy. to be read, in order to argue against the finding. The practice is for the Lord Chancellor to look into them apart & he supersedes the commission, if he do not find sufficient on the face of the proceedings to satisfy himself that an act of bkpcy. has been committed.—*Re* SNEYDS, *Ex p.* BANK OF IRELAND (1829), 1 Mol. 261.—**IR.**

l. *Stay of application—To enable petitioning creditor to prove bankruptcy.*]—Where a petition was presented by debtor to supersede a commission which issued on June 3, & under which there were several meetings until June 19, but no act of bkpcy. was proved, the ct. allowed a week to the creditor to go before the comrs., & prove the bkpcy. if he could, & ordered him in any case to pay the costs of debtor's petition.—*Ex p.* CREAN (1828), 2 Mol. 147; 2 Ir. L. Rec. 1st ser. 42.—**IR.**

1689 i. *Costs—Commission superseded as invalid—What costs given.*]—An issue was directed to try the validity of a commission of bkpcy., & a verdict was found against the commission. On motion to supersede it, the costs of the original petition, of the issue, & of the application were given.—*Re* JOHNSON (1831), 4 Ir. L. Rec. 1st ser. 112.—**IR.**

m. —— *Of debtor's petition to supersede—Postponements of hearing.*]—Where a commission of bkpcy. issued on June 3, & the comrs. sat on the 19th, & on Nov. 8 bkpt. applied to have the commission superseded, & petitioning creditors, after two or three postponements, at last got a finding from the comrs. they were ordered to pay the costs of bkpt.'s petition.—*Re* CREAN (1828), 2 Ir. L. Rec. 1st ser. 42.—**IR.**

n. —— *Of official assignee.*]—The official assignee is entitled to his costs of appearing in an appeal against an order of adjudication.—*Re* HAROON MAHOMED (1890), I. L. R. 14 Bom. 189.—**IND.**

SUB-SECT. 3.—GROUNDS FOR GRANTING.

See, also, cases in Sect. 1, *ante.*

1693. General rule.]—Bkpt. was granted his discharge on his brother paying all costs, the trustee's remuneration, & 7*s.* 6*d.* in the pound to the creditors. An application was then made to annul the adjudication to enable him to return to the position which he had occupied prior to his bkpcy:—*Held:* even if the ct. had power outside 1883 Act to annul a bkpcy., such power ought not to be exercised in the circumstances.

The Act is intended to be a complete code, & the ct. is not at liberty to annul an adjudication upon any grounds that may for the time being commend themselves to their judgment (CAVE, J.). —*Re* GYLL, *Ex p.* BOARD OF TRADE (1888), 58 L. J. Q. B. 8; 59 L. T. 778; 37 W. R. 164; 5 Morr. 272, D. C.

Annotations:—**Refd.** *Re* Burnett, *Ex p.* Official Receiver (1894), 1 Mans. 89, D. C.; *Re* Debtor, *Ex p.* Official Receiver (1901), 84 L. T. 666, C. A. **Mentd.** *Re* Hester, *Ex p.* Hester (1889), 22 Q. B. D. 632. C. A.

See, now, 1914 Act, ss. 21, 29.

1694. Proceedings taken with improper motive—Motive not fraudulent.]—If in issuing a commission petitioning creditor be influenced by motives not fraudulent, although other than the mere distribution of the estate, the ct. will not on that account supersede the commission.—*Re* WILBEAM, *Ex p.* WILBEAM (1820), Buck, 459; *sub nom.* WILBRAN, *Ex p.* WILBRAN, 5 Madd. 1; 56 E. R. 794.

PART V. SECT. 3, SUB-SECT. 3.

1694 i. *Proceedings taken with improper motive—Motive not fraudulent.*]—Proceedings taken by a creditor for the sequestration of the estate of a debtor, with the object, not of getting the debt paid, nor of getting a distribution of the assets of debtor, nor of putting in force any of the penal provisions of Insolvency Acts, but with the object of obtaining on an examination under Insolvency Acts information as to who was "behind" debtor in the publication by debtor of certain pamphets defamatory of the creditor, are not an abuse of the process of the ct.; the motive of the creditor in taking the proceedings is not a ground for refusing to make the order *nisi* for sequestration absolute.—DOWLING *v.* COLONIAL MUTUAL LIFE ASSURANCE SOCIETY, LTD., [1915] V. L. R. 604.—**AUS.**

o. —— *For collateral purposes.*]—The fact that a commission of bkpcy. was issued for an indirect & improper object is not a ground for superseding it, if that was not the sole object.—*Re* WALL (1848), I. R. 12 Eq. 285.—**IR.**

p. —— *Debt purchased to stifle action by debtor.*]—Where a debt is purchased for the purpose of founding a petition for adjudication upon it, not to recover the debt, but for purposes outside the law of bkpcy., the ct. will not make an adjudication. It is a fraud upon the bkpcy. laws for a creditor to purchase a debt for the purpose of petitioning for the adjudication of debtor in order to stifle or delay the prosecution of a suit then pending by debtor against petitioning creditor. —*Re* COOPER, *Ex p.* COLEMAN (1882), 1 N. Z. L. R. 301.—**N.Z.**

q. —— *To stifle action by debtor.*]—An adjudication in bkpcy. will be annulled when it has been obtained by a judgment creditor of debtor for the purpose of putting a stop to pending litigation against the creditor at the suit of debtor.—*Re* ELL (1885), 3 N. Z. L. R. 433.—**N.Z.**

r. —— *To avoid effect of composition agreement & resolutions.*]—A creditor who had assented to a deed, whereby debtor assigned all his estate to trustees for the benefit of his creditors, & who afterwards assented to an agreement for a composition by debtor, & to a resolution of creditors acceding to the agreement, subsequently, in concert with debtor & his sureties, for the purpose of getting rid of the effect of the deed, agreement, & resolution, procured an act of bkpcy. to be committed by debtor, &, thereupon, filed a petition against him, upon which he was adjudicated a bkpt.:—*Held:* the adjudication should be annulled.—*Re* H., *Ex p.* VANCE & WILSON (1874), 8 I. L. T. 185.—**IR.**

s. —— *At the instance of the debtor.*]—A commission will be superseded when it appears to have been procured at the instance of bkpt. himself, & in such cases always with costs. —*Re* NICHOLSON (1829), 3 Ir. L. Rec. 1st ser. 185.—**IR.**

t. —— *Petition filed to defeat & delay creditors—Whether malâ fide.*]—On an application to set aside an adjudication made on debtor's own petition, it was alleged that the petition was filed to defeat & delay creditors, & was presented *malâ fide* for the purpose of defrauding the only creditor on the estate:—*Held:* the action of debtor, in the circumstances, was not *malâ fide*, or such as to justify the ct. in setting aside the adjudication.—*Re* HAZLETON [1915] 2 I. R. 425; 49 I. L. T. 29.—**IR.**

u. —— *To defeat wife's right to maintenance.*]—A husband, in order to defeat his wife's right to maintenance under a separation deed, filed a petition in bkpcy. & was thereupon adjudged a bkpt. The ct. annulled the adjudication as an abuse of the process of the ct.—*Re* AEKINS, *Ex p.* AEKINS (1911), 30 N. Z. L. R. 1021.—**N.Z.**

w. —— *To determine partnership.*]—It is neither fraud nor an abuse of process to petition for a sequestration order with an indirect motive, that is for a purpose other than the equal distribution of the assets, as, for example, to exclude debtor from a partnership; *secus,* if such order would in the circumstances be unsuitable, & enable petitioner fraudulently to defeat the rights of others whether legal or equitable.—KING *v.* HENDERSON, [1898] A. C. 720; 67 L. J. P. C. 134; 79 L. T. 37; 47 W. R. 157; 14 T. L. R. 490; 5 Mans. 308, P. C.—**AUS.**

y. —— *In Scotland—To evade English law.*]—R., a domiciled Englishman, obtained sequestration under Bkpcy. (Scotland) Act, 1856; R. had come to Scotland to take advantage of the above Act, the whole of his effects were, & nearly all his creditors resided, in England:—*Held:* the case fell within the provisions of Bkpcy. (Scotland) Amendment Act, 1860 & the sequestration was recalled.—SMITH & CO. *v.* ROSTRON (1860), 23 Dunl. (Ct. of Sess.) 140.—**SCOT.**

a. —— —— ——.]—A bkpt. came to Scotland for the purpose of availing himself of the Scottish law of sequestration, & applied for sequestration by a designation clearly calculated to mislead his English creditors. Nearly all his creditors were in England:—*Held:* the sequestration must be recalled, the Scottish Cts. not proposing to allow the English bkpt. laws to be evaded & the Scottish law "to be made a cover & protection for getting affairs brought under it which ought to be dealt with elsewhere."—MOSES *v.* GIFFORD (1866), 4 Macph. (Ct. of Sess.) 1056; 38 Sc. Jur. 537.—**SCOT.**

b. —— —— ——.]—A foreigner resident in London having become insolvent, came to Scotland & got sequestration there. He had no creditors or assets in Scotland, the majority of his creditors in value being abroad, & the rest in England. Petition for recall of sequestration, in respect that there were no creditors in Scotland, refused. —SMITH BROTHERS & CO. *v.* RISCHMANN (1869), 42 Sc. Jur. 48.—**SCOT.**

c. —— —— ——.]—A Scotchman by origin, while residing & trading in England, contracted debt there to a large amount. He subsequently came to Scotland & obtained sequestration. A large majority of his creditors in number & value were resident in England. His assets consisted chiefly of shares in English mining & other cos., most of them unmarketable, which were pledged to certain of his creditors in security of their debts. The ct. recalled the sequestration, chiefly on the ground that the bkpcy. was essentially an English bkpcy., & that the object of resorting to sequestration in Scotland was to enable bkpt. to obtain his discharge on less stringent conditions than would have been imposed by English law, although it did not appear that bkpt. had come to Scotland merely for the purpose of obtaining sequestration, & although a large majority of the creditors in number & value lodged answers stating their wish that the sequestration should proceed in Scotland.—COOPER *v.* BAILLIE (1878), 5 R. (Ct. of Sess.), 564; 15 Sc. L. R. 312.—**SCOT.**

d. —— *In Ireland—Debts all contracted in England.*]—An English trader contracted in England large debts, & then came to Ireland & traded there to a very limited extent as a commission agent, having only one Irish trade debt. On the petition of English creditors the bkpcy. was annulled on the ground that there had not been any trading in Ireland & debtor remitted back to the jurisdiction within which the debts were contracted.—*Re* HORNER (1869), 21 L. T. 340; 3 I. L. T. Jo. 677.—**IR.**

e. *Commission fraudulently obtained—At instance of creditor not having proved his debt.*]—A commission will be superseded & the certificate stayed, at the instance of a person who has not proved a debt but is proceeding at law against bkpt., when the commission has been fraudulently obtained. —*Re* BURGESS (1828), 1 Ir. L. Rec. 1st ser. 374.—**IR.**

f. *Prior act of bankruptcy.*]—A prior act of bkpcy. does not invalidate a commission founded on a subsequent one, unless it is proved there was at that time a debt or debts sufficient to take out a commission.—GRAHAM *v.* WALKER, (1809) 2 Mol. 445.—**IR.**

g. —— *Adjudication on debtor's petition.*]—When a trader has obtained an adjudication upon his own petition, if a reasonable ground exists for believing that he has engaged in transactions capable of being deemed acts of bkpcy. before the date of the declaration of insolvency upon which such adjudication was founded, the ct. will annul the existing adjudication, & permit a creditor to file a new petition *eo instanti.*—*Re* FRENCH (1867), I. R. 1 Eq. 66.—**IR.**

Sect. 3.—Appeals from and annulment of adjudication order: Sub-sect. 3.]

Annotations :—**Consd.** *Re* Merryweather (1851), 18 L. T. O. S. 52 ; King *v.* Henderson, [1898] A. C. 720, P. C. **Refd.** *Re* Christie, *Ex p.* Christie (1833), Mont. & B. 329, L. C.

1695. —— ——.]—Unless a fiat issued by bkpt. against himself was issued with the view & purpose that it should be the means or an instrument of fraud, it ought not, for any object of convenience, or otherwise, to be annulled against bkpt.'s consent. If, however, it had been proved, or there were sufficient grounds for judicial suspicion that a fiat issued by bkpt. against himself was issued with the view & for the purpose that it should be the means or an instrument of fraud, it would probably be the duty of the ct. to annul it, or issue an investigation, in order to ascertain whether it was so issued. It is not material that it was issued for the purpose mainly & chiefly of affording bkpt. protection against the consequences of the proceedings at law against him, & without a predominant or active wish to benefit or assist his *bonâ fide* creditors.—*Re* ROBINSON & TURLAY, *Ex p.* NORTON (1847), De G. 504, Ct. of R.

Annotations :—**Refd.** *Re* Robinson & Turlay, *Ex p.* Norton (1850), 15 L. T. O. S. 178 ; Stevenson *v.* Newnham (1853), 13 C. B. 285. **Mentd.** *Re* Merryweather (1851), 18 L. T. O. S. 52 ; *Re* Richards, *Ex p.* Assignees (1865), 11 L. T. 576.

1696. —— **To defeat execution.**]—*Held :* it was no objection that a commission of bkpcy. was taken out for the express purpose of defeating an execution.—*Ex p.* ARROWSMITH (1807), 14 Ves. 209 ; 33 E. R. 501, L. C.

Annotations :—**Refd.** *Ex p.* Binmer (1816), 1 Madd. 250. **Mentd.** Clarkson *v.* Parkes (1838), 7 Dowl. 87.

1697. —— ——.]—A commission may be taken out by a creditor to defeat an execution (LORD ELDON, C.).—*Re* DUCKWORTH, *Ex p.* GOUTHWAITE (1811), 1 Rose, 87, L.C.

Annotations :—**Refd.** *Re* Wailey, *Ex p.* Alexander (1832), 1 L. J. Bcy. 79 ; *Re* Christie, *Ex p.* Christie (1832), 2 Deac. & Ch. 465.

1698. —— ——.]—It is no objection to a commission that it has been taken out to defeat an execution.—*Re* ASPINALL, *Ex p.* GARDNER (1812), 1 Ves. & B. 45 ; 1 Rose, 377 ; 35 E. R. 18, L. C.

Annotation :—**Refd.** *Re* Wailey, *Ex p.* Alexander (1832), 1 L. J. Bcy. 79.

1699. —— **To evade judgments.**]—A creditor having obtained judgment for £294 against a debtor possessed of an inalienable pension, took out a judgment summons against him for payment of the debt by instalments. Debtor, with the intention of evading such proceedings, filed his petition in bkpcy. The creditor was practically the sole creditor, & the assets were under £12. Debtor having been adjudicated bkpt. in due course on the petition :—*Held :* the presentation of the petition by debtor in such circumstances was not an abuse of the process of the ct., & did not entitle the ct. to annul the adjudication.—*Re* PAINTER, *Ex p.* PAINTER, [1895] 1 Q. B. 85 ; 64 L. J. Q. B. 22 ; 71 L. T. 581 ; 43 W. R. 144 ; 11 T. L. R. 9 ; 39 Sol. Jo. 168 ; 1 Mans. 499 ; 15 R. 16, D. C.

Annotations : **Consd. & Distd.** *Re* Betts, *Ex p.* Official Receiver, [1901] 2 K. B. 39, D. C. **Folld.** *Re* Archer, *Ex p.* Archer (1904), 20 T. L. R. 390, D. C. **Refd.** *Re* Hancock, *Ex p.* Hillearys (1904), 52 W. R. 547, C. A. ; *Re* Button, *Ex p.* Haviside, [1907] 2 K. B. 180, C. A.

1700. —— ——.]—Judgment having been obtained against debtor for £100 damages for breach of promise of marriage with costs, a judgment summons was taken out against him under Debtors Act, 1869 (c. 62). Before the hearing of the summons debtor filed his own petition in bkpcy. & was adjudicated bkpt. The judgment creditor was the sole creditor, & there were some assets. The creditor applied to set aside the adjudication as an abuse of the process of the ct. :—*Held :* the petition was not an abuse of the process of the ct., & the adjudication would not be set aside.—*Re* ARCHER, *Ex p.* ARCHER (1904), 20 T. L. R. 390, D. C.

1701. —— **Oppression.**]—Though a commission of bkpcy. is a matter of right, yet where it has been taken out in circumstances of oppression, the ct. will examine into it strictly ; & if there should be no sufficient act of bkpcy. on the proceedings, will not sustain it by directing an inquiry as to any other act.—*Ex p.* SMITH (1811), 1 Rose, 147.

1702. —— **To determine partnership.**]—Although there be a trading, a debt, & an act of bkpcy., yet if the commission be taken out for a purpose foreign from its object, as to work a dissolution of a partnership, it is supersedable at the costs of those who take it out.—*Re* BROWNE, *Ex p.* BROWNE (1810), 1 Rose, 151.

Annotation :—**Refd.** *Re* Adams, *Ex p.* Griffin (1879), 48 L. J. Bcy. 107, C. A.

1703. —— ——.]—A fiat was annulled on the ground that it was sued out not for the legitimate purpose of distributing the estate of bkpt. among his creditors, but solely for the indirect purpose of effecting a dissolution of the partnership between bkpt. & another person.—*Re* JOHNSON, *Ex p.* JOHNSON (1842), 2 Mont. D. & De G. 678 ; 11 L. J. Bcy. 41 ; 6 Jur. 932.

Annotation :—**Expld.** *Re* Rolls, *Ex p.* Williams (1867), 29 L. T. O. S. 25.

1704. —— ——.]—Discussion of the circumstances requisite to justify the annulling of an adjudication on equitable grounds.

An application that an adjudication should be annulled, on the ground that the proceedings in bkpcy. were taken with an improper motive & with the view of promoting the objects of debtor's partners by driving debtor out of the firm, was refused.

When all the legal requisites are shown to exist, it requires a strong case to warrant the annulling the adjudication on the ground of a collateral motive. In the present case there appears considerable reason to think that there was a strong bias in the minds of [debtor's] partners in favour of making him bkpt. & disposing of his contention against them by settling it in this way. But these facts do not constitute a sufficiently strong case for doing away with the legal effect of the adjudication. The partners were well disposed towards bkpcy. ; but that is not enough ; the legal requisites existing, the adjudication must remain (KNIGHT BRUCE, L.J.).—*Re* UPFILL, *Ex p.* UPFILL (1866), 1 Ch. App. 439, L. JJ.

1705. —— —— **To determine lease—To stop action.**]—It is an abuse of the powers of the Great Seal to take out a commission with a view wholly foreign to the object of the bkpcy. laws, as to determine a lease, stop an action, etc.

A commission superseded as having been taken out with the sole view of dissolving a partnership. —*Re* CHRISTIE, *Ex p.* SAUNDERS (1833), 2 Deac. & Ch. 488 ; Coop. *temp.* Brough. 157 ; Mont. & B. 329 ; 47 E. R. 56, L. C.

1706. —— —— **Motive must be established.**]—Before ordering the annulment of a fiat the ct. must be satisfied that it was issued for the sole purpose of dissolving the partnership & not for the purpose of distributing the effects of bkpt.—*Re* PARKES, *Ex p.* PARKES (1837), 3 Deac. 31.

1707. —— —— **Joint fiat against firm.**]—Where one of two partners who was anxious to dissolve the partnership procured a creditor to issue a joint fiat against the firm, & the petition was substantially that of the partner &

not of petitioning creditor, & the payment of the creditors was only subsidiary :—*Held :* the fiat must be annulled at the costs of petitioning creditor & the partner.—*Re* COULSON & PHIPPS, *Ex p.* PHIPPS (1844), 3 Mont. D. & De G. 505 ; 13 L. J. Bcy. 5 ; 2 L. T. O. S. 405 ; 8 Jur. 48.

Annotation :—**Expld.** *Re* Rolls, *Ex p.* Williams (1857), 29 L. T. O. S. 25.

1708. —— To determine lease.]—Although all the requisites of a commission concur to its validity, yet if taken out for an indirect & improper object (as a landlord to determine a lease, contrary to good faith) it will be superseded (LORD ELDON, C.).—*Re* GALLIMORE, *Ex p.* GALLIMORE (1816), 2 Rose, 424, L. C.

Annotations :—**Refd.** *Re* Wilbeam, *Ex p.* Wilbeam (1819), Buck, 459 ; *Re* Coulson & Phipps, *Ex p.* Phipps (1844), 3 Mont. D. & De G. 505 ; *Re* Adams, *Ex p.* Griffin (1879), 48 L. J. Bcy. 107, C. A. ; King *v.* Henderson, [1898] A. C. 720, P. C. **Mentd.** Heane *v.* Rogers (1829), 9 B. & C. 577 ; *Re* Bradbury, *Ex p.* Emery (1854), 4 De G. M. & G. 901, L. JJ. ; *Re* Cleland (1867), 2 Ch. App. 466, L. JJ.

1709. —— To defeat action—But intended to operate as commission.]—When a commission is taken out with a motive of defeating an action, but with the intent & purpose of its operating as a commission, the ct. will not interfere, yet where a commission is taken out for the purpose of putting an end to an action by bkpt. against petitioning creditors & not for the purpose of its operating as a commission, it will not be permitted to stand, even though an intention of working it for the legitimate purpose of a commission be afterwards adopted.—*Re* BOURNE, *Ex p.* BOURNE (1826), 2 Gl. & J. 137, L. C.

Annotations :—**Consd.** *Re* Christie, *Ex p.* Christie (1832), 2 Deac. & Ch. 465 ; *Re* Christie, *Ex p.* Saunders (1833), Coop. *temp.* Brough. 157. **Apld.** *Re* Carter, *Ex p.* Jungmichel Leather & Jacomb (1842), 2 Mont. D. & De G. 471 ; *Re* Bakewell, *Ex p.* Butler (1842), 11 L. J. Bcy. 51. **Consd.** *Re* Coulson & Phipps, *Ex p.* Phipps (1844), 3 Mont. D. & De G. 505. **Mentd.** Butler *v.* Hobson (1836), 5 Bing. N. C. 128 ; *Re* Barber, *Ex p.* Abbott (1836), 5 L. J. Bcy. 33 ; *Re* Merryweather (1851), 18 L. T. O. S. 52 ; *Re* McLintock, *Ex p.* Scott (1854), 23 L. T. O. S. 258 ; Engleback *v.* Nixon (1875), L. R. 10 C. P. 645.

1710. —— —— No evidence of any property to be divided.] —Where a fiat was issued by petitioning creditor as an instrument in the hands of another creditor for the mere purpose of stopping a suit in Ch., which was brought against the latter by bkpt. for an account, & there was no evidence of any property to be divided amongst the creditors, the fiat was annulled with costs.—*Re* KEMP, *Ex p.* KEMP (1841), 1 Mont. D. & De G. 657.

1711. —— To compel satisfaction of third party's debt.]—*Semble :* where proceedings are taken by petitioning creditor not for the purpose of obtaining payment of his own debt, but to compel bkpt. to satisfy the alleged debt of a third party, the fiat cannot be supported.—*Re* GRATTON, *Ex p.* GRATTON (1841), 2 Mont. D. & De. G. 401, Ct. of R.

Annotations :—**Refd.** *Re* Baker, *Ex p.* Baker (1887), 58 L. T. 233, D. C. **Mentd.** *Re* Greener, *Ex p.* Greener (1880), 15 Ch. D. 457, C. A. ; *Re* Sedgwick, *Ex p.* McMurdo (1888), 60 L. T. 8, C. A.

1712. —— Admission that fiat issued for debtor's benefit.] — Where petitioning creditor has admitted that the fiat was issued by him not for his own or the other creditors' benefit, but for an incidental benefit to bkpt., the ct. will annul the fiat.—*Re* SMALLCOMBE, *Ex p.* SMALLCOMBE (1843), 1 L. T. O. S. 411 ; 7 Jur. 708, Ct. of R.

1713. Proceedings taken in breach of good faith.]—A commission which had in contravention of good faith been resorted to pending a negotiation, whereby the parties were thrown off their guard, & for the illegitimate purpose of inducing an accession to the demands of the party issuing it, was superseded.

Looking merely at the circumstances of conduct & good faith, which ought to have been observed pending the negotiations between these parties, there is enough, upon the principles of control over the abuse of their proceedings, which all cts. entertain, to say that this commission ought not to stand (LORD ELDON, C.).—*Ex p.* HARCOURT (1815), 2 Rose, 203.

Annotations :—**Consd.** *Re* Wilbeam, *Ex p.* Wilbeam (1819), Buck, 459. **Refd.** *Re* Royal British Bank, *Ex. p.* Gillett (1856), 28 L. T. O. S. 68 ; King *v.* Henderson, [1898] A. C. 720, P. C.

1714. —— Supersedable for want of prosecution.]—Where a commission is taken out in violation of good faith, etc., application may be made to the ct. to supersede it, notwithstanding that it is supersedable for want of prosecution.—*Re* AMYES, *Ex p.* LOWE (1821), 1 Gl. & J. 78, L. C.

Annotation :—**Distd.** *Re* Bell, *Ex p.* Hallawell (1838), 3 Deac. 278, Ct. of R.

1715. —— Abuse of process—Trustees of deed inducing creditors to petition.]—Debtor, being embarrassed, was advised by two professional friends to make an assignment for the benefit of his creditors, without being informed that it would be an act of bkpcy. The assignment was executed, & they became trustees, & proceeded to sell part of the estates. They then said that the deed was an act of bkpcy., & induced two tradesmen to take out a commission upon the deed :—*Held :* although there had been no collusion, the taking out of the commission was an abuse of the Great Seal.—*Re* WADE, *Ex p.* WADE (1825), cited in 2 Gl. & J. at p. 143.

Annotations :—**Consd.** *Re* Bourne, *Ex p.* Bourne (1826), 2 Gl. & J. 137 ; *Re* Coulson & Phipps, *Ex p.* Phipps (1844), 3 Mont. D. & De G. 505.

1716. Doubt as to legal validity.]—It is not sufficient ground for annulling an adjudication that its legal validity may be subject to doubt.—*Re* BOWERS, *Ex p.* BOWER (1852), 1 De G. M. & G. 468 ; 21 L. J. Bcy. 61 ; 20 L. T. O. S. 27 ; 16 Jur. 734 ; 42 E. R. 633, L. JJ.

Annotation :—**Refd.** *Re* Rawlings, *Ex p.* Rawlings (1862), 1 De G. J. & Sm. 225, L. JJ.

1717. —— Must be clearly established.]—Where an adjudication is disputed on the ground of legal invalidity, such invalidity must be clearly established & it is not sufficient to allege matters of invalidity or supposed invalidity which are contradicted by the other side, or where the balance of evidence does not greatly preponderate.—*Re* ROLLS, *Ex p.* WILLIAMS (1857), 29 L. T. O. S. 25.

1718. Misdescription—Must be material.]—Commission against A. of Finsbury Square, in the City of London, instead of the County of Middlesex :—*Held :* not a material misdescription.—*Re* MARTELLY, *Ex p.* SMITH (1823), 1 Gl. & J. 256.

See, further, Part III., Sect. 3, sub-sect. 1, B., *ante*.

1719. Affidavit of debt sworn before petitioning creditor's solicitor.]—The circumstance that the affidavit of debt was sworn before the solr. to petitioning creditor :—*Held :* not sufficient ground for annulling the fiat, but an improper practice, which, if it became general, might be thereafter considered sufficient ground.—*Re* WRIGHT, *Ex p.* WRIGHT (1843), 3 Mont. D. & De G. 320 ; 7 Jur. 522, Ct. of R.

1720. Uncertainty in particulars of demand—What is convenient certainty.]—In particulars of demand served by a fruit merchant on a grocer, together with a summons under 1849 Act :—*Held :* the word "goods" described the wares supplied sufficiently to prevent an adjudication from being annulled on the ground of uncertainty in the particulars.

Sect. 3.—Appeals from and annulment of adjudication order: Sub-sect. 3.]

What is convenient certainty depends on the situations of the parties as well as the nature of the demand.—*Re* BOWERS, *Ex p.* BOWER (1852), 1 De G. M. & G. 468; 21 L. J. Bcy. 61; 20 L. T. O. S. 27; 16 Jur. 734; 42 E. R. 633, L. JJ.

Annotation:—**Refd.** *Re* Rawlings, *Ex p.* Rawlings (1862), 1 De G. J. & Sm. 225, L. JJ.

1721. Merely formal defect in summons.]—On serving debtor with a debtor's summons, the sealed copy which was delivered to him stated the amount of the debt claimed by the creditor to be £24 (instead of £74, the real amount), but the following words were added, "being the sum claimed of you by him according to the particulars hereunto annexed." The particulars thus referred to were set forth on the second half of a sheet of paper, the first half of which contained the summons. The particulars stated the amount of the debt, & the circumstances under which it arose, correctly:—*Held:* the error in the summons was a merely formal defect, by which debtor could not possibly have been misled, & as the service of the summons was not invalidated by it, an adjudication of bkpcy. founded on the summons could not be impeached.—*Re* JOHNSON, *Ex p.* JOHNSON (1883), 25 Ch. D. 112; 53 L. J. Ch. 309; 50 L. T. 157; 32 W. R. 175, C. A.

Annotation:—**Consd.** *Re* Debtor (478 of 1908), [1908] 2 K. B. 684, C. A.

1722. Joint commission—Annulment as to one bankrupt.]—A joint commission, invalid in its concoction, may be superseded as to one of two bkpts.—*Re* PRATT & RAVENSCROFT, *Ex p.* BYGRAVE (1826), 2 Gl. & J. 391.

Annotation:—**Follid.** *Re* Coleman, (1828), Mont. & M. 15.

1723. ——— ———.]—*Qu.:* whether a commission can be superseded as to one of two bkpts., to give validity to a subsequent commission against the other with a third.—*Re* COLEMAN, *Ex p.* BURLTON (1827), 2 Gl. & J. 344, L. C.

1724. ——— ———.]—Where a joint fiat issues against A. & B., & the debt is separate, it is void & the subsequent superseding it as to A. cannot make it good as a separate fiat as to B.—*Re* CLARKE, *Ex p.* CLARKE (1832), 1 Deac. & Ch. 544; 1 L. J. Bcy. 97, Ct. of R.

1725. ——— ———.]—*Qu.:* whether the ct. can give validity to a fiat, by annulling it as to one of bkpts., against whom it cannot be supported for want of the legal requisites.—*Re* HENDERSON, *Ex p.* VEYSEY (1843), 3 Mont. D. & De G. 420, Ct. of R.

Annotations:—**Refd.** *Re* Lord, *Ex p.* Lord (1849), 3 De G. & Sm. 607; *Re* West & West, *Ex p.* West (1853), 21 L. T. O. S. 108; *Re* Purser, *Ex p.* Stevenson (1868), 19 L. T. 23.

1726. ——— ——— **One being uncertificated bankrupt.**]—A commission having issued against A., B. & C., & it being subsequently discovered that B. was an uncertificated bkpt.:—*Held:* the commission should be wholly superseded.—*Re* HORDEN, WOOD, & CROSSE, *Ex p.* WRAY (1829), Mont. & M. 195.

See, now, 1914 Act, s. 29.

1727. ——— ——— **One being infant.**]—*Qu.:* whether a fiat issued against an infant & another can be annulled as to the infant, & stand good as to the other, under 6 Geo. 4, c. 16, s. 16.—*Re* WATSON, *Ex p.* WATSON (1838), 3 Mont. & A. 682, Ct. of R.

1728. ——— **Commission against two of three partners—Debt jointly due from two.**]—*Qu.:* as to the validity of a joint commission against two of three partners, on a debt jointly due from the two.—*Re* CHAMBERS, *Ex p.* CHAMBERS (1835), 1 Deac. 197; 2 Mont. & A. 440.

Annotations:—**Mentd.** *Re* Durrant, *Ex p.* Thirkill (1836), 5 L. J. Bcy. 40, Ct. of R.; *Re* Newall, *Ex p.* Newall (1838), 3 Deac. 333, Ct. of R.; *Re* Prescott, *Ex p.* Prescott (1840), 4 Jur. 852, Ct. of R.; *Re* Bakewell, *Ex p.* Butler (1842), 2 Mont. D. & De G. 731, Ct. of R.; *Re* Scowcroft, *Ex p.* Rees (1845), 6 L. T. O. S. 104, Ct. of R.

1729. Adjudication against member of banking company—For debt due by company—No judgment against public officer.]—A fiat issued against pltf., on July 20, 1849, upon a debt due from a banking co., in which he was a member, to G., petitioning creditor, without any judgment having been obtained against the public officer, & a warrant of seizure in the ordinary form was issued to F., the messenger, dated July 30. The creditors' assignee was appointed on Aug. 21. 1849 Act came into operation on Oct. 11, & on Oct. 18, a seizure of pltf.'s goods was made under the warrant:—*Held:* the fiat was invalid.—DAVISON *v.* FARMER (1851), 6 Exch. 242; 20 L. J. Ex. 177; 15 J. P. 691; 155 E. R. 531.

Annotations:—**Refd.** O'Flaherty *v.* McDowell (1857), 6 H. L. Cas. 142. **Mentd.** Mather *v.* Brown (1876), 1 C. P. D. 596.

1730. No trustee chosen.]—Bkpt. had only three

1721 i. *Merely formal defect.*]—Where a corpn. was petitioning creditor & the affidavit was made by one officer of the corpn. & the bond given by another officer:—*Held:* although the commission was not strictly regular, it was in the discretion of the ct. to support it; mere irregularities or matters of regulation are not sufficient to supersede the commission.—*Re* SNEYDS, *Ex p.* SNEYDS, *Ex p.* BANK OF IRELAND (1829), 1 Mol. 261.—**IR.**

1721 ii. ——— *Debtor misdescribed in petition — Creditors not misled.*]—A debtor obtained sequestration on a petition, in which he designated himself by his full name, Phillip Ludwig Rischmann. He had previously carried on business under the name of L. or Louis Rischmann:—*Held:* as there was no evidence of the creditors having been misled by the use of bkpt.'s correct name, there was no misdescription to justify recall of the sequestration.—SMITH BROTHERS & Co. *v.* RISCHMANN (1869), 42 Sc. Jur. 48.—**SCOT.**

h. *Irregularity in service of debtor's summons.*]—Debtor, neither carrying on trade nor residing in Ireland, failed to comply with a debtor's summons, which had been served under an order for substituted service, on his solr.:—*Held:* his adjudication must be annulled.—*Re* MURRAY, [1916] 2 I. R. 554.—**IR.**

k. *Joint commission — Against firm—On petition by one partner only.*]—An order for sequestration of a firm, consisting of two partners, was made on the petition of one partner only, the other partner being absent & never having authorised or consented to the petition:—*Held:* the order was bad.—*Re* MYERS & DAVIS (TRADING AS J. D. MYERS & Co.) (1891), 17 V. L. R. 351.—**AUS.**

1722 i. ——— *Annulment as to one bankrupt—Wrongly supposed to be member of firm.*]—When a man trades under a particular name or style, such as "J. & H.," & merchants give credit on the supposition that two brothers are trading in partnership, & a joint adjudication takes place, the ct., on hearing evidence that one of the brothers has not anything to do with the concern to which the goods were sent, will annul the adjudication as to him, & give him his costs.—*Re* M'KEON (1869), 3 I. L. T. Jo. 314.—**IR.**

1722 ii. ——— ——— *Dying before petition.*]—D. & W. carried on business in partnership under the style of D. W. & Co. D. died & W. carried on the business in the firm's name for some time. Upon W.'s petition for the sequestration of the estate of D. W. & Co. stating that his firm admitted that they were unable to pay their debts an order was made sequestrating the estate of D. W. & Co. D.'s extrix. then applied to strike out the name of D. from the order & amend the order, so as to sequestrate the estate of W. only:—*Held:* the amendment made was a proper one, notwithstanding the fact that there was no petition for the sequestration of the estate of W. only.—*Re* DOBSON, WATSON & Co. (1890), 16 V. L. R. 700.—**AUS.**

1722 iii. ——— ——— *Retiring before date of petition — Since dead.*]—On the petition of T. as surviving partner, a sequestration order was made against H. & T. as members of the firm. H. had before the date of the petition & order ceased to be a member of the firm, & died. The sequestration being a voluntary one, H.'s exors. had no opportunity of coming in to show cause against the making of the order:—*Held:* the ct. would eliminate so much of the order as had the effect of sequestrating H.'s private estate.—*Re* HINCHCLIFF, SON & Co., *Ex p.* GRIFFITHS & MITCHELL (1896), 17 N. S. W. B. 14.—**AUS.**

unsecured creditors, one for a large amount, the other two for small sums. At the first meeting of creditors only the large creditor was present & the same thing happened at several adjourned meetings. The result was that no trustee of bkpt.'s property was chosen. The registrar in the exercise of the power given by 1869 Act, s. 84, having annulled the adjudication:—*Held:* this was not a proper exercise of the discretion of the ct., as even a sole creditor was entitled to make his debtor a bkpt., & ought not to be deprived of the remedies which the law gave him without some very strong reason.—*Re* FINNEY, *Ex p.* ENGLISH JOINT STOCK BANK (1870), 6 Ch. App. 79; 40 L. J. Bcy. 43; 23 L. T. 652; 19 W. R. 140, L. JJ.

1731. Insufficiency of petitioning creditor's debt —Less than £50 at date of act of bankruptcy.]—A. issued a writ against B., claiming £49 11*s.* 7*d.* debt & £3 costs. On the same day B. executed a deed assigning all his property to trustees for the benefit of his creditors. A. afterwards signed judgment for £49 11*s.* 7*d.* debt & costs, which were taxed at £8 9*s.* 6*d.*, making £58 1*s.* 1*d.* in all & then presented a bkpcy. petition against B., alleging as the act of bkpcy. the execution of the creditors' deed. The county ct. judge having adjudicated B. bkpt.:—*Held:* there was no good petitioner's debt at the date of the act of bkpcy. & the adjudication must be annulled.—*Re* WHELAN, *Ex p.* SADLER (1878), 48 L. J. Bcy. 43; 39 L. T. 361; 27 W. R. 156.

1732. —— Bankrupt guilty of laches.]—Bkpt., a poor & illiterate person, petitioned to supersede a commission issued in 1829, by an attorney on a debt stated to be £132 10*s.*, due on bills of costs, on the ground that the bills, which had been recently taxed, had been reduced below £100, which was then the minimum amount of a petitioning creditor's debt. Two petitions by bkpt. had been previously dismissed on a matter of form. Petitioning creditor had subsequently proved other debts amounting to over £300:—*Held:* bkpt. having lain by so long before he ascertained the real amount of the debt by taxation, was not entitled after the lapse of more than two years to supersede the commission.—*Re* HOOPER, *Ex p.* HOOPER (1832), 1 Deac. & Ch. 117, Ct. of R.

1733. —— ——.]—An adjudication in bkpcy., not appealed from & duly advertised, will not afterwards be annulled under the general jurisdiction of the ct., on the ground that there was no sufficient petitioning creditor's debt to support the adjudication.—*Re* TRIM, *Ex p.* FRENCH (1882), 52 L. J. Ch. 48; 47 L. T. 339.

1734. —— —— Question of sufficiency must be raised at proper time.]—H. was, without opposition on his part, adjudicated bkpt. At the first meeting of creditors no *quorum* was present, & that fact was represented to the judge, who directed the adjudication to go on with the registrar as trustee. There were only three creditors besides petitioning creditor. Bkpt. & the three creditors applied to have the bkpcy. annulled, & raised a question as to the sufficiency of petitioning creditor's debt:—*Held:* as bkpt. had not disputed the debt at the time of the adjudication he could not do so now, & neither he nor the creditors had any right now to ask to have the adjudication annulled on that ground, but there would be a proper opportunity in the bkpcy. proceedings to dispute the debt.—*Re* HOOPER, *Ex p.* HOOPER (1876), 45 L. J. Bcy. 83; 34 L. T. 262; 24 W. R. 930.

1735. No debt due at time of acts of bankruptcy.]—An acceptance was written on an incomplete bill of exchange, to which no drawer's name was affixed. The acceptor soon afterwards assigned all his property for the benefit of his creditors. Some weeks after that the bill, which had remained in the hands of the acceptor's agent, was completed & indorsed to a *bonâ fide* holder for value, who, on its being dishonoured, obtained an adjudication in bkpcy. against the acceptor, grounded on the assignment as an act of bkpcy.:—*Held:* the adjudication must be reversed, as no debt existed on the bill until it was issued, which was after the act of bkpcy.—*Re* HAYWARD, *Ex p.* HAYWARD (1871), 6 Ch. App. 546; 40 L. J. Bcy. 49; 24 L. T. 782; 19 W. R. 833, L. JJ.

Annotations:—**Refd.** *Re* Foulds, *Ex p.* Learoyd (1878), 10 Ch. D. 3, C. A. **Mentd.** Faulks *v.* Atkins (1893), 10 T. L. R. 178; *Re* Moore, Bartholomew's Case (1899), 68 L. J. Ch. 302, C. A.

1736. That creditor might have realised whole debt—By proceeding with garnishee order.]—*Held:* an adjudication of bkpcy. founded on neglect to comply with a debtor's summons was valid, although the creditor had obtained garnishee orders to an amount exceeding his debt, & might have realised the whole amount by prosecuting them.—*Re* TUPPER (1874), 9 Ch. App. 312; 30 L. T. 102; 22 W. R. 381, L. JJ.

See, now, 1914 Act, ss. 1 (i) (*g*), 2 (ii).

1737. Petition by bankrupt's agent—All creditors consenting.]—Where the petition was by bkpt.'s agent, who held a power of attorney, giving him full power to act, an application to supersede the commission, with consent of creditors, was granted. —ANON. (1834), 3 L. J. Bcy. 96.

1738. No act of bankruptcy—Conveyance not drawn up according to instructions.]—Where the act of bkpcy. was a conveyance of bkpt.'s estate & effects, which upon the evidence appeared not to have been drawn according to the instructions of bkpt.:—*Held:* (1) it could not be considered the deed of bkpt.; (2) the commission must be superseded.—*Re* NORRIS, *Ex p.* NORRIS (1822), 1 Gl. & J. 233, L. C.

Annotation:—**Mentd.** *Re* Bourne, *Ex p.* Bourne (1826), 2 Gl. & J. 137, L. C.

1739. Commission founded on concerted act of bankruptcy.]—A commission on a concerted act of bkpcy., though carried on *bonâ fide* & without collusion, was superseded with costs.—*Re* DUCKWORTH, *Ex p.* GOUTHWAITE (1811), 1 Rose, 87, L. C.

Annotations:—**Consd.** *Re* Wailey, *Ex p.* Alexander (1832), 1 L. J. Bcy. 79 Ct. of R. **Refd.** *Re* Christie, *Ex p.* Christie (1832), 2 Deac. & Ch. 465, Ct. of R.

1731 i. *Insufficiency of petitioning creditor's debt — Debt contingent & secured.*]—Application to set aside an order of sequestration, on the ground that petitioning creditors had only a future contingent debt. The ct. refused the motion, as the conduct of the insolvent was such as to justify petitioners in looking upon him as an absconding debtor.

The fact of petitioning creditor not disclosing the existence of a security for his debt, is not a ground for setting an order for sequestration aside.—*Re* ROWLEY (1876), 2 V. L. R. 50.—**AUS.**

1731 ii. *—— Debt contracted after Irish 1872 Act passed.*]—In 1870, M., a non-trader, became assignee of a freehold lease containing a covenant for payment of the rent reserved, & having failed to provide for the year's rent due in Mar., 1873, for which judgment had been obtained against him, he was adjudicated a bkpt.:—*Held:* the debt was not one "contracted after the passing" of the above Act, & adjudication annulled.—*Re* MARQUESS (1874), I. R. 9 Eq. 93.—**IR.**

m. Set-off against petitioning creditor's debt — No notice of claim to creditor.] — Where a debtor has been adjudicated bkpt. on the petition of a judgment creditor, against whom he had a pecuniary claim, but no notice was given to the creditor at the time that the adjudication was made of the existence of this claim, the adjudication will not be annulled.—*Re* LOWRIE (1891), 9 N. Z. L. R. 702. —**N.Z.**

Sect. 3.—*Appeals from and annulment of adjudication order: Sub-sect.* 3.]

1740. —— Property exhausted to injury of creditors.]—An act of bkpcy. was concerted between bkpt. & his sister, petitioning creditor, with the view of taking from a judgment creditor the benefit of a judgment he had obtained at law, & of injuring him by exhausting the property, which was scarcely sufficient to pay the expenses of the commission :—*Held :* the commission must be superseded & at the expense of petitioning creditor.—*Ex p.* BINMER (1816), 1 Madd. 25 ; 56 E. R. 93.

1741. —— Assignment for benefit of creditors —Creditor assenting thereto.]—A verbal assent by a creditor to a deed of assignment made by his debtor of all his estates & effects for the benefit of creditors is sufficient to prevent such creditor from taking advantage of such assignment as an act of bkpcy., even though he does not execute the deed, & an adjudication at the instance of such creditor, founded upon such act of bkpcy., will be annulled. —*Re* A DISPUTED ADJUDICATION (1860), 1 L. T. 449.

See, further, Part III., Sect. 1, sub-sect. 3, B., *ante*.

1742. Act of bankruptcy after presumed death of debtor.]—A petitioning creditor alleged that his debtor had committed an act of bkpcy. by departing from his dwelling-house with intent to defeat & delay his creditors :—*Held :* the adjudication of bkpcy. must be annulled, on the ground that debtor must be presumed to have been dead when it was made, &, probate having been granted of a will executed by debtor, the costs & charges of the trustee properly incurred, & the costs of all parties of the application to annul & of the appeal, must be paid out of the estate, & the exors. must confirm all acts properly done by the trustee in the bkpcy.—*Re* STANGER, *Ex p.* GEISEL (1882), 22 Ch. D. 436 ; 53 L. J. Ch. 349 ; 48 L. T. 405 ; 31 W. R. 264, C. A.

1743. Evidence insufficient to support adjudication—Debtor signing declaration of insolvency whilst dispute pending—Costs.]—A trader absented himself for three or four days from his place of business, & in his absence a bill of exchange was presented for payment & was dishonoured. Application was also made for payment of other bills. The trader was adjudicated bkpt., the act of bkpcy. being such absence, "with intent to delay his creditors." One of the comrs. in the country annulled the bkpcy., the alleged bkpt. swearing that his absence was occasioned by an attempt of his to get up evidence of perjury against one of his workmen & to obtain pecuniary assistance. Pending this dispute as to the adjudication, the trader signed a declaration of insolvency :—*Held :* (1) the decision of the comr. should be affirmed, as there was not sufficient evidence to support the adjudication ; (2) in the circumstances the trader should not be allowed his costs, as his "declaration of insolvency" whilst applying to annul an adjudication was inconsistent with an honest desire for the equal distribution of his assets.—*Re* HORTON, *Ex p.* BARNEY (1862), 4 De G. F. & J. 503 ; 32 L. J. Bcy. 41 ; 7 L. T. 488 ; 9 Jur. N. S. 286 ; 45 E. R. 1279, L. C.

1744. Creditor refusing to appear in action by debtor—Debtor & creditor resident in Scotland—Adjudication in England.]—A trader, resident & carrying on business in Scotland, was adjudged bkpt. in England on the petition of a creditor resident in Scotland. The trader after the adjudication brought an action against petitioning creditor, but the latter refused to appear to it. On an application by bkpt. to annul the adjudication :—*Held :* (1) if the creditor did not appear to the action within ten days the adjudication should be annulled ; (2) he having failed so to appear, the adjudication should be annulled.—*Re* WOOLHEIM, *Ex p.* WOOLHEIM (1862), 32 L. J. Bcy. 26, L. JJ.

1745. Registration of composition resolutions—1870 Rules, r. 266.]—F. filed a petition for adjudication against P., who shortly afterwards filed a petition for liquidation by arrangement or composition. Before any meeting of creditors had been held, an adjudication was made by consent on F.'s petition, with a stay of proceedings under it till a certain day, before which the creditors duly passed resolutions for accepting a composition, which were afterwards duly registered. Orders had been made, by which the proceedings under the adjudication were from time to time stayed until after the registration :—*Held :* (1) 1870 Rules, r. 266, applied to a case where the petition for adjudication preceded the liquidation petition ; (2) the order for the adjudication must be regarded as made under that rule, &, resolutions for accepting a composition having been duly registered, the adjudication ought to be annulled.—*Re* POOLEY, *Ex p.* FOSTER (1874), 10 Ch. App. 59 ; 44 L. J. Bcy. 22 ; 31 L. T. 397 ; 23 W. R. 145, L. JJ.

1741 i. *Commission founded on concerted act of bankruptcy—After assignment for creditors—Creditor consenting thereto.*]—A creditor assented to a deed of assignment for the benefit of debtor's creditors, & afterwards assented to an agreement for a composition by debtor. Subsequently the creditor, in concert with debtor, procured an act of bkpcy. to be committed by debtor, & thereupon filed a petition against him, upon which he was adjudicated a bkpt. :—*Held :* the adjudication should be annulled.—*Re* H., *Ex p.* VANCE & WILSON (1874), 8 I. L. T. 185.—**IR.**

n. *Interference with pending litigation between judgment creditor & debtor.*]—C. brought an action against a bank & recovered a verdict, but a new trial was granted, & C. was adjudged bkpt. on the bank's petition. C. intended to prosecute his action, but would be prevented from doing so if he were made insolvent :—*Held :* the sequestration should be set aside.—*Ex p.* CAMPBELL (1880), 1 N. S. W. L. R. 77. —**AUS.**

p. —— *Costs.*]—Where an adjudication has been made while a suit is pending against the judgment creditor by debtor, the ct. in annulling it will allow debtor his costs, & will not make them the subject of a set-off. —*Re* BURKE (1886), 4 N. Z. L. R. 303. —**N.Z.**

q. *Founded on judgment from which appeal pending.*]—After notice of appeal from a judgment dismissing an action with costs, defts. having recovered judgment for the costs, presented a petition for sequestration of pltf.'s estate. An order having been made, & the prior judgment having been discharged :—*Held :* (1) the order ought not to have been made, but the petition should have been either adjourned until after the hearing of the appeal or dismissed ; (2) the sequestration ought to be annulled, notwithstanding the judgment for the costs was still standing.—BAYNE *v.* BAILLEAU (1907), 4 C. L. R. 64.—**AUS.**

r. *Judgment obtained by mistake or fraud.*]—The annulling of the *fiat* contemplated by the proviso of Insolvency Act (11 & 12 Vict. c. 21), s. 8, applies only to cases in which the original judgment has been the result of mistake of fact, misapprehension, or fraud.—*Re* SREENARAIN BYSACK, 2 Hyde, 180.—**IND.**

s. *Delay.*]—The ct. will order the commission to be superseded, if there be no adjudication by the comrs. within a limited time.—ANON. (1830), 3 Ir. L. Rec. 1st ser. 279.—**IR.**

t. *Collusion.*]—Circumstances in which it was held that there was no proof of such collusion between the creditor & the insolvent in obtaining the order of adjudication as would bring that order within Indian Evidence Act (I of 1872), s. 44.—*Re* ARANVAYAL SABHAPATHY (1897), I. L. R. 21 Bom. 297.—**IND.**

y. *After trust deed executed—Property remaining in order & disposition of bankrupt.*]—A petition was filed for adjudication by a bkpt. against himself after he had executed a trust deed, under which the trustees did not take possession of his property, but allowed it to remain in the order & disposition of the trader ; the ct. allowed the adjudication, but subsequently annulled it, allowing a new petition by a creditor, who was not a party to the trust deed to be filed.—*Re* SHAW & Co. (1867), 1 I. L. T. Jo. 716, 747.—**IR.**

Annotations :—**Expld. & Distd.** *Re* Stanley, *Ex p.* Milward (1880), 16 Ch. D. 256, C. A. **Refd.** *Re* Dando, *Ex p.* Walton (1875), 10 Ch. App. 215, L. JJ. ; *Re* Ward, *Ex p.* Bennett (1881), 44 L. T. 38, C. A.

See, now, 1914 Act, s. 21.

1746. Failure to pay instalment of composition —No legal difficulties—No prejudice to creditors' interest.]—The creditors of a debtor passed resolutions accepting a composition of 5*s.* in the pound payable in two instalments of 4*s.* & 1*s.*, the first instalment to be paid in five months & to be secured by the promissory notes of debtor & three sureties, the second instalment to be paid in two years, & to be secured by the promissory notes of debtor alone. The first instalment was paid by the sureties, & exceeded in amount the assets of debtor as appearing by his statement of affairs. Debtor, having failed to pay the second instalment, was adjudicated a bkpt. on the application of a creditor :—*Held :* the adjudication could not be sustained, for the creditor failed to show that there were legal difficulties, or that the creditors were prejudiced, & the remedy of the creditor was to sue at law for the remaining instalment of the composition.—*Re* SHIERS, *Ex p.* SHIERS (1877), 7 Ch. D. 416 ; 47 L. J. Bcy. 31 ; 37 L. T. 724.

See, now, 1914 Act, s. 16 (16).

1747. Payment in full—Debts bought up for less than face value.]—The debts of bkpt., amounting to £1,600 were purchased from the creditors for £144, & the creditors withdrew their proofs. The debts were then assigned to bkpt. for £1,600, which sum was provided by a third person :—*Held :* the adjudication ought not to be annulled, as the debts had not been paid in full.—*Re* BURNETT, *Ex p.* OFFICIAL RECEIVER (1894), 63 L. J. Q. B. 423 ; 70 L. T. 385 ; 42 W. R. 368 ; 38 Sol. Jo. 311 ; 1 Mans. 89 ; 10 R. 159.

1748. —— To some creditors by friend of debtor —Others not injured by annulment.]—Debtor filed a liquidation petition in Aug., 1879. A receiver of his property was at once appointed, & injunctions were granted to restrain some of the creditors from proceeding against him for their debts. The first meeting of the creditors was held on Oct. 20, 1879, when it was resolved to adjourn to Dec. 15, 1879. Similar resolutions for adjournment were passed again & again, the meeting being ultimately, on Nov. 15, 1882, adjourned to Mar. 28, 1883. No resolutions for liquidation by arrangement or composition were passed. In Jan., 1883, two of the creditors applied to the Ct. of Bkpcy. by motion, under 1869 Act, s. 125 (12), for an adjudication of bkpcy. against debtor. At the adjourned meeting on Mar. 28, 1883, the creditors resolved that it was inexpedient in the interest of the creditors that any further proceedings should be taken under the petition, & that application should be made to the ct. to discharge the receiver, & dismiss the petition, or stay all further proceedings under it. The registrar, on May 3, made an adjudication. Debtor appealed, & on the hearing of the appeal an offer was made by a friend of his to pay the debts of the two creditors in full & to provide for their costs of the application, the payment to be made by the friend out of his own moneys, & an undertaking being given by him that neither directly nor indirectly should the payment be made out of debtor's assets :—*Held :* notwithstanding the resolution of Mar. 28, & having regard to the fact that the receiver had not been discharged, the liquidation proceedings were still pending, & if the adjudication order was discharged, no other creditor would be injured, for the ct. would have jurisdiction to adjudicate debtor a bkpt. on the application of any other creditor.—*Re* MCHENRY, *Ex p.* MCHENRY (1883), 24 Ch. D. 35 ; 53 L. J. Ch. 27 ; 48 L. T. 921 ; 31 W. R. 873, C. A.

Annotations :—**Refd.** *Re* May, *Ex p.* May (1884), 32 W. R. 839, C. A. **Mentd.** *Re* McHenry, *Ex p.* Credit Co. (1883), 53 L. J. Ch. 161, C. A. ; *Re* Moon, *Ex p.* Moon (1887), 19 Q. B. D. 669, C. A.

1749. —— " Debts "—Unconditional release by creditors.]—The condition precedent to the exercise of the jurisdiction to annul an adjudication in bkpcy., proof " that the debts of bkpt. are paid in full," is not satisfied by an unconditional release given to bkpt. by his creditors. To satisfy the sect. the " debts," including at least all debts which have been actually & properly proved in the bkpcy., must have been fully paid in cash.—*Re* KEET, *Ex p.* OFFICIAL RECEIVER, [1905] 2 K. B. 666 ; 74 L. J. K. B. 694 ; 93 L. T. 259 ; 54 W. R. 20 ; 21 T. L. R. 615 ; 12 Mans. 235, C. A.

Annotation :—**Refd.** *Re* Aron (1905), 21 T. L. R. 693.

1750. Two concurrent commissions.] — Two commissions of bkpcy. for the same purpose cannot subsist together. In general the second will be superseded, but special circumstances as consent, fraud, or laches, in the creditors under the first will support the second & supersede the first ; & though it is wrong to encourage bkpt. to trade pending a commission, & to sue out a second, yet if it does happen, & the assignees will pay the creditors under the first 20*s.* in the pound & all the costs, the first will be instantly superseded.—*Ex p.* BROWN (1793), 4 Bro. C. C. 210 ; 2 Ves. 67 ; 30 E. R. 526, L. C.

Annotations :—**Refd.** Fowler *v.* Coster (1830), 10 B. & C 427 ; *Re* Bakewell, *Ex p.* Butler (1842), 2 Mont. D. & De G. 731, Ct. of R.

1751. —— Joint & separate commission—Separate commission superseded to give effect to subsequent joint one—Convenience & general

1747 i. *Payment in full.*]—Payment in full in Bkpcy. Act, 1889 (51 Vict. No. 19) s. 43, means payment of twenty shillings in the pound.—*Re* TAYLOR *Ex p.* TAYLOR (1898), 19 N. S. W. B. 31.—**AUS.**

1747 ii. —— *Other procedure available.*]—An order of sequestration will not be set aside merely on the ground that the creditors have been paid in full. The proper procedure is to apply for rehabilitation in due course.—*Ex p.* BOTHA (1909), T. S. 707.—**S. AF.**

1747 iii. —— *Condition precedent—Evidence.*]—Before the ct. can make an order annulling an adjudication in bkpcy. it is a condition precedent that the debts of bkpt. shall have been fully paid or satisfied, & there is no power to order the annulment conditionally upon the debts being paid. The payment of the amount of the debts to the official assignee with the assent of the creditors would be sufficient proof to the ct. that bkpt.'s debts had been paid or satisfied.—*Re* FISHER (1907), 27 N. Z. L. R. 98.—**N.Z.**

1747 iv. —— *" Debts."*]—The ct. can only annul the order of adjudication if the ct. is of opinion that debtor ought not to have been adjudicated insolvent or it is proved to the satisfaction of the ct. that the debts of the insolvent have been paid in full & in the latter case the " debts," including at least all debts actually & properly proved in bkpcy., must have been fully paid in cash.—*Re* MEGHRAJ GANGABUX (1912), I. L. R. 38 Bom. 200.—**IND.**

1747 v. —— *Debts bearing interest.*]—S. was adjudicated bkpt. in 1886, the only assets consisting of the life interest of bkpt. in a rentcharge of £200 payable out of lands in the county of Kilkenny, & also of a jointure of £100 a year charged on the same lands. These lands were subject to prior charges, & M., one of the prior chargeants, brought an action to raise her charge. A receiver was appointed in 1886, & from that date till 1893 all the profits of the lands were devoted to paying off M.'s charge. Since 1894 the surplus became available for payment of the creditors in bkpcy. In Sept., 1899, 10*s.* in the pound was paid ; in Jan., 1900, a further dividend of 5*s.* was paid ; &, in Jan., 1901, a dividend of 2*s.* 6*d.* There was no further money immediately available from the rents of the lands to make any payment. Bkpt. was sixty-four years old, & was not a good life, & the assignees had not, up to the date of the motion, taken any steps to sell the life interest in the lands. Bkpt. applied that, on payment by her of the sum of 20*s.* in the pound & of the costs of the bkpcy., the bkpcy. should be annulled :—*Held :* the bkpcy. should be annulled on those terms.—*Re* STAUNTON, [1902] 2 I. R. 57 ; 35 I. L. T. 137.—**IR.**

Sect. 3.—Appeals from and annulment of adjudication order: Sub-sects. 3 & 4.]

advantage to creditors.]—A separate commission will be superseded to give effect to a subsequent joint one, upon the principle of convenience & general advantage to the creditors, & the prior petitioning creditor, unless he has been acting *malâ fide*, receives all the costs of the superseding.—*Re* BROWN, *Ex p.* BROWN (1812), 1 Rose, 433, L. C.

1752. ——— ——— ——— ———.]—Where there was a separate commission against one of three partners & afterwards a commission against two of the firm, the first commission was ordered to be superseded, & the costs paid out of the joint estate.—*Re* MARTELLY, *Ex p.* SMITH (1823), 1 Gl. & J. 256.

SUB-SECT. 4.—GROUNDS FOR REFUSAL.

1753. Question one of law.]—Where a commission of bkpcy. was taken out against a clergyman, who insisted that, as such he was not liable to become bkpt. within bkpcy. stats., Lord Hardwicke declined to supersede the commission, or direct an issue, but left debtor to his action at law, the question being a mere matter of law.—*Ex p.* MEYMOT (1747), 1 Atk. 196; 26 E. R. 127.

Annotations:—**Consd.** *Re* South Wales Atlantic S.S. Co. (1876), 2 Ch. D. 763. **Refd.** Arbuckle *v.* Cowtan (1803), 3 Bos. & P. 321; Cobb *v.* Symonds (1822), 5 B. & Ald. 516. **Mentd.** *Re* Newcastle, *Ex p.* Morris (1869), 5 Ch. App. 172, L. J.; Newcastle *v.* Morris (1870), L. R. 4 H. L. 661, H. L.

1754. Estoppel—Application by bankrupt—Taking part in sale of effects.]—If a person, against whom a commission of bkpcy. issues, acquiesces in it so far as to take a part in the sale of his own effects, under the commission, he shall not afterwards be allowed to question it.—CLARKE *v.* CLARKE (1806), 6 Esp. 61.

Annotations:—**Refd.** Heane *v.* Rogers (1829), 9 B. & C. 577; Freeman *v.* Cooke (1848), 2 Exch. 654.

1755. ——— ——— **Surrender to commission—Attempt to obtain certificate.**]—Bkpt. is not estopped from petitioning to supersede, although he has surrendered to his commission, interfered in the choice of assignees & the disposition of the estate, & has also passed his last examination, & endeavoured to obtain his certificate.—*Re* CHAMBERS, *Ex p.* CHAMBERS (1835), 1 Deac. 197; 2 Mont. & A. 440.

Annotations:—**Consd.** *Re* Rolls, *Ex p.* Williams (1857), 29 L. T. O. S. 25. **Refd.** *Re* Bakewell, *Ex p.* Butler (1842), 2 Mont. D. & De G. 731, Ct. of R. **Mentd.** *Re* Durrant, *Ex p.* Thirkill (1836), 5 L. J. Bcy. 40; *Re* Newall, *Ex p.* Newall (1838), 3 Deac. 333, Ct. of R.; *Re* Prescott, *Ex p.* Prescott (1840), 4 Jur. 852; *Re* Scowcroft, *Ex p.* Rees (1845), 6 L. T. O. S. 104.

1756. ——— **Acquiescence—In ignorance of rights.**]—Bkpt. is not bound by acts of acquiescence, when he is ignorant of his rights.—*Re* CHAMBERS, *Ex p.* CHAMBERS (1835), 1 Deac. 197; 2 Mont. & A. 440.

Annotations:—**Consd.** *Re* Rolls, *Ex p.* Williams (1857), 29 L. T. O. S. 25. **Refd.** *Re* Bakewell, *Ex p.* Butler (1842), 2 Mont. D. & De G. 731, Ct. of R. **Mentd.** *Re* Durrant, *Ex p.* Thirkill (1836), 5 L. J. Bcy. 40; *Re* Newall, *Ex p.* Newall (1838), 3 Deac. 333, Ct. of R.; *Re* Prescott, *Ex p.* Prescott (1840), 4 Jur. 852; *Re* Scowcroft, *Ex p.* Rees (1845), 6 L. T. O. S. 104.

1757. ——— ——— **Failure to object to want of jurisdiction.**]—Debtor filed a liquidation petition in Dec., 1883, & a receiver of his property was appointed. On Jan. 15, 1884, the adjourned first meeting of the creditors was held, when the creditors separated without passing any resolutions, & without again adjourning the meeting. On Jan. 21, one of the creditors presented a bkpcy. petition against debtor under 1869 Act, alleging the filing of the liquidation petition as an act of bkpcy. On Feb. 1, the registrar adjudicated debtor bkpt. on the petition. Debtor was present, & raised no objection to the jurisdiction of the ct. to make the order. The receiver had not been discharged. On Mar. 14, debtor applied to the registrar for a rehearing of the petition, & a reversal of the order of adjudication, on the ground that there was no jurisdiction to make it. The registrar refused the application:—*Held:* as the objection had not been raised before the registrar, a rehearing ought not to be allowed.

Observations as to the exercise of the power to allow a rehearing.—*Re* MAY, *Ex p.* MAY (1884), 12 Q. B. D. 497; 50 L. T. 744; 32 W. R. 839; 1 Morr. 50, C. A.

1758. ——— ——— **Application by solvent partner of bankrupt—Acting under commission.**]—Bkpt.'s solvent partner, who was not a creditor & claimed no interest under the bkpcy., lay by for more than five months before presenting his petition to the ct. to annul the adjudication. During that period he had undertaken, as a condition for the messenger being withdrawn from possession, to render to the official assignee a weekly account of his receipts & payments in respect of the partnership assets, & had also consented to be appointed receiver in a suit in Ch. instituted against him by the assignees, & acted under such appointment in disposing of the assets & partnership premises:—*Held:* there was such an acquiescence on his part as would preclude him from afterwards questioning the propriety of the adjudication, either at law or in equity.—*Re* ROLLS, *Ex p.* WILLIAMS (1857), 29 L. T. O. S. 25.

1759. Bankrupt not surrendered—Joint commission.]—A petition to supersede a joint commission, on consent of creditors, cannot be entertained as to any one of bkpts., who has not surrendered.—*Re* KNOWLSON, *Ex p.* KNOWLSON (1833), 3 Deac. & Ch. 191.

PART V. SECT. 3, SUB-SECT. 4.

1754 i. *Estoppel—Application by bankrupt—Acquiescence.*]—At a meeting of creditors of S. it appeared doubtful whether he was a trader. A creditor whose debt was insufficient to support a commission, being of opinion that he was a trader guaranteed B., another creditor, against costs, if he would allow him to use his name as petitioning creditor. Three years later S. applied to supersede the commission:—*Held:* though such an arrangement was contrary to the policy of the bkpcy. laws, S. having used its protection could not succeed.—*Re* SEMPLE (1848), 12 I. Eq. R. 338.—**IR.**

a. ——— *Application by creditor—After tender of proof.*]—A creditor who has tendered a proof for a debt under Debtors & Creditors Act, 1876, s. 96, even if he did so informally & the proof has been rejected, cannot afterwards appear & ask to have the bkpcy. annulled.—*Re* DUNCAN MCCALLUM (1883), 1 N. Z. L. R. 396.—**N.Z.**

b ——— ——— *After three years.*]—Circumstances (*see supra*) in which on the application of a creditor three years after commission issued:—*Held:* as the bkpcy. was inevitable & the commission had been *bonâ fide* worked, the ct. would not supersede the commission.—*Re* SEMPLE (1848), 12 I. Eq. R. 338.—**IR.**

c. *Failure to pay composition.*]—Where debtor, after he was adjudicated bkpt., entered into a composition agreement, but failed to pay the composition, as agreed upon, to one of his creditors, the ct., upon the resistance of that creditor, refused to annul the bkpcy. upon the terms of paying to, or lodging in ct. for, that creditor the amount of the composition originally agreed on.—*Re* FERGUSON (1877), I. R. 11 Eq. 260.—**IR.**

1759 i. *Bankrupt not surrendered.*]—A bkpt. went to America, taking with him a sum, part of which he expended in settling with his creditors, who released him, & having returned, sought to have the commission superseded. The ct. refused to entertain any application until bkpt. surrendered, which he should do at his own cost.—*Re* REYNOLDS (1850), 2 Ir. Jur. 185.—**IR.**

1759 ii. ——— *Creditors consenting.*]—When all the creditors execute a release of a debtor, against whom a commission has been sued out during his absence from Ireland, the ct. will supersede the commission on consent, although he has not surrendered.—*Ex p.* BRENNAN (1850), 3 Ir. Jur. 53.—**IR.**

e. *Act of bankruptcy on subsequent commission not proved.*]—A separate commission of bkpcy. issued against A., & a joint commission against A., B., & C. As there was some difficulty in the

1760. That injury might arise to some parties.]—Although injury may arise to some parties from superseding a commission, yet if bkpt. is clearly entitled to a *supersedeas*, he must have justice done him, the ct. taking care of the interests of those parties who may be affected by the *supersedeas*.—*Re* CHAMBERS, *Ex p.* CHAMBERS (1835), 1 Deac. 197 ; 2 Mont. & A. 440.

Annotations :—**Mentd.** *Re* Durrant, *Ex p.* Thirkill (1836), 5 L. J. Bcy. 40 ; *Re* Newall, *Ex p.* Newall (1838), 3 Deac. 333, Ct. of R. ; *Re* Prescott, *Ex p.* Prescott (1840), 4 Jur. 852 ; *Re* Bakewell, *Ex p.* Butler (1842), 2 Mont. D. & De G. 731, Ct. of R. ; *Re* Scowcroft, *Ex p.* Rees (1845), 6 L. T. O. S. 104 ; *Re* Rolls, *Ex p.* Williams (1857), 29 L. T. O. S. 25.

1761. Conflicting verdicts & judgments—Case turning on credit of witnesses.]—Where several actions had been brought by & against bkpt. & the assignees, disputing the validity of the commission, & there were conflicting verdicts & judgments at law, the whole case turning upon the credit of the witnesses, the ct. refused to decide the question whether the commission ought to be superseded, but, not being satisfied of the proof of an act of bkpcy., directed an issue to try that fact.—*Re* CHAMBERS, *Ex p.* CHAMBERS (1835), 1 Deac. 197 ; 2 Mont. & A. 440.

Annotations :—**Mentd.** *Re* Durrant, *Ex p.* Thirkill (1836), 5 L. J. Bcy. 40 ; *Re* Newall, *Ex p.* Newall (1838), 3 Deac. 333 ; *Re* Prescott, *Ex p.* Prescott (1840), 4 Jur. 852 ; *Re* Bakewell, *Ex p.* Butler (1842), 2 Mont. D. & De G. 731, Ct. of R. ; *Re* Scowcroft, *Ex p.* Rees (1845), 6 L. T. O. S. 104 ; *Re* Rolls, *Ex p.* Williams (1857), 29 L. T. O. S. 25.

1762. Failure to pay costs of previous application.]—An application by bkpt. for the annulment of an adjudication was refused, on the ground that bkpt. had made eleven previous applications which had been refused, & of which bkpt. had not paid the costs :—*Held :* the application was dismissed on good grounds, inasmuch as, although it was no good reason for dismissing an application made in one matter that costs ordered to be paid in a previous application in another matter substantially different have not been paid, the ct. would not be bound to hear a subsequent application made to it, unless the costs of a previous application in the same matter which had been ordered to be paid by appct., had been settled.—*Re* GREPE, *Ex p.* GREPE (1885), 2 Morr. 298.

1763. Misconduct—Concealment of assets.]—Where bkpt., whose debts have been paid in full, applies for an order annulling his adjudication, the ct. has discretion to refuse an order if, having regard to the conduct of bkpt., it seems right to do so.

Where bkpt., in his statement of affairs, & on his public examination, concealed the fact that he possessed a large sum of money, & afterwards handed to the official receiver a portion of that money sufficient to pay his debts in full, with interest & expenses, an order annulling his adjudication was refused.—*Re* TAYLOR, *Ex p.* TAYLOR, [1901] 1 K. B. 744 ; 70 L. J. K. B. 531 ; 84 L. T. 426 ; 49 W. R. 510 ; 45 Sol. Jo. 382 ; 8 Mans. 230, D. C.

Annotations :—**Refd.** *Re* Beer, *Ex p.* Beer, [1903] 1 K. B. 628, C. A. ; *Re* Sullivan & Hughes (1904), 20 T. L. R. 393. **Mentd.** *Re* Telescriptor Syndicate, [1903] 2 Ch. 174.

1764. —— Interests of commercial morality.]—The creditors of a bkpt., whose discharge had been suspended for two & a half years, after the period of suspension had expired resolved by the proper majority to entertain, under 1883 Act, s. 23, a proposal by bkpt. to pay a composition of 7*s.* 11*d.* in the pound in addition to a dividend of 2*s.* 1*d.* in the pound which had been paid in the bkpcy., on condition that the bkpcy. should be annulled :—*Held :* in the exercise of its discretion under s. 23 as to the approval of the scheme, the ct. ought to consider, not only the interest of the creditors, but also the interests of the public & of commercial morality, &, having regard to the facts found by the official receiver in

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proof of the act of bkpcy., upon which the joint commission issued, the ct. refused to supersede the former commission, but ordered it to be suspended, with liberty to the parties to apply.—*Re* BEALE (1842), 2 Dr. & War. 566.—**IR.**

f. *Previous decision on same grounds.*]—B., a creditor, signed to S. a letter of license, which would suspend his debt, but verbally stipulated that he would not be bound unless all S.'s creditors signed. Several did not sign. A commission of bkpcy. having been sued out by B., an issue was directed to try whether the letter bound him. The jury found, that it did not, but that the condition annexed to his signature had not been communicated to other creditors, who signed when & after B. signed. The ct. refused to supersede the commission :—*Held :* (1) the order was conclusive against another petition to supersede on the same grounds ; (2) the order was correct.—*Re* SEMPLE (1848), 12 I. Eq. R. 338.—**IR.**

1760 i. *That injury may arise to some parties.*]—In an application by an insolvent for an order setting aside the sequestration of his estate, where it was shown that the application for the sequestration had been made in error by a creditor :—*Held :* the order of sequestration having created rights in favour of all the creditors could not be set aside merely by the consent of debtor & petitioning creditor—*Re* KUSSELL'S ESTATE (1906), 16 C. T. R. 963.—**S. AF.**

1760 ii. *S. P.* LITNAITZKY & COHEN *v.* VAN DER HOVEN (1908), T. H. 92.—**S. AF.**

k. *Benefit of other creditors—Although commission collusive.*]—A commission of bkpcy. was issued pending a motion to set aside a verdict in an action against bkpt., petitioning creditor being pltf.'s clerk, & having bought up bills for the purpose of creating a petitioning creditor's debt. Bkpt.'s own conduct was suspicious :—*Held :* although the commission might have been collusively issued to prevent bkpt. resisting the action, yet, as there were other creditors for whose benefit it could be worked, it should not be superseded.—*Re* WALL (1848), 12 I. Eq. R. 285.—**IR.**

l. —— *Though petitioning creditor paid by third party—Absence of consent of other creditors.*]—Where a person was adjudicated a bkpt. on the non-payment of a debtor's summons, & after the adjudication the amount was paid by a third person, who took an assignment of the debt, the ct. declined to allow an application by bkpt. to have the bkpcy. annulled, on the ground that there were other creditors besides petitioning creditor, & that, in the absence of any consent on their part, the adjudication enured for their benefit.—*Re* DANIEL (A BANKRUPT), [1901] 2 I. R. 186.—**IR.**

m. *Evidence of existence of petitioning creditor's debt, or act of bankruptcy.*] — If there was any evidence from which the ct. could infer the existence of petitioning creditor's debt, & the commission of the act of bkpcy., the ct. will not disturb the order on the motion of a creditor, unless he can prove affirmatively that the debt was insufficient or that no act of bkpcy. had been committed.—*Re* MCQUADE, *Ex p.* TURNER, 2 J. R. 164. —**N.Z.**

n. *Protection order in force—Obtained after service of debtor's summons.*]—A trader, within three days after being served with a debtor's summons, presented a petition for arrangement & obtained the usual protection order, but, not having paid or compounded for the debt within the time specified, was adjudicated a bkpt. while the protection order was still in force :—*Held :* the adjudication should not be set aside.—*Re* M'VEIGH (1880), 5 L. R. Ir. 177.—**IR.**

1763 i. *Misconduct—Concealment of assets—Notwithstanding payment in full.*]—A bkpt. in his statement of affairs did not disclose the fact that he had a sum of £50 under his control. On payment in full of his debts fourteen years after the bkpcy. he applied for an order annulling the adjudication, which was refused by the registrar :—*Held :* the ct. would not interfere with the exercise of the registrar's discretion, even though the offence admitted of a great deal of excuse.—*Re* NOWLAND, *Ex p.* NOWLAND (1906), 6 S. R. N. S. W. 286.—**AUS.**

p. *Death of appellant.*]—When an insolvent, who has appealed from the decision of a county judge refusing to set aside an attachment against him, dies during the pendency of this appeal, & no personal representative has been appointed, the appeal fails.—LAWRIE *v.* MCMAHON (1872), 6 P. R. 9.—**CAN.**

q. *Other procedure available.*]—Where the machinery of the Insolvency Law can be set in motion so as to secure the release of the insolvent from sequestration, the ct. will not, save in very special circumstances, discharge the final order.—*Ex p.* GORDON & EFFRER (1910), T. P. D. 207. —**S. AF.**

Sect. 3.—Appeals from and annulment of adjudication order: Sub-sects. 4, 5 & 6.]

his report on bkpt.'s application for his discharge, the bkpcy. ought not to be annulled.—*Re* BEER, *Ex p.* BEER, [1903] 1 K. B. 628; 72 L. J. K. B. 366; 88 L. T. 334; 51 W. R. 422; 19 T. L. R. 319; 47 Sol. Jo. 367; 10 Mans. 136, C. A.

1765. Grounds on which discharge would be refused.]—The jurisdiction to annul an adjudication is discretionary; & in the absence of special circumstances it would not be a good exercise of that discretion to make an order for annulment where an order of discharge would not be granted.—*Re* KEET, [1905] 2 K. B. 666; *sub nom. Re* KEET, *Ex p.* OFFICIAL RECEIVER, 74 L. J. K. B. 694; 93 L. T. 259; 54 W. R. 20; 21 T. L. R. 615; 12 Mans. 235, C. A.

Annotation:—**Mentd.** *Re* Aron (1905), 21 T. L. R. 693.

SUB-SECT. 5.—THE ORDER OF ANNULMENT.

1766. From what time operative.]—An order of the Ct. of Review, confirmed by the Lord Chancellor, annulling a fiat in bkpcy. is operative only from the time of its confirmation by the Lord Chancellor.—SMALLCOMBE *v.* OLIVIER (1844), 13 M. & W. 77; 2 Dow. & L. 217; 1 New Pract. Cas. 37; 13 L. J. Ex. 305; 3 L. T. O. S. 222; 8 Jur. 606; 153 E. R. 32.

Annotations:—**Mentd.** *Re* Newall, *Ex p.* Newall (1865), 11 L. T. 782; Lloyd *v.* Lloyd (1866), L. R. 2 Eq. 722; *Re* Tyrie, *Ex p.* Morris (1866), 14 L. T. 606; White *v.* Chitty (1866), L. R. 1 Eq. 372; Brandon *v.* McHenry (1891), 64 L. T. 59, D. C.

1767. How long binding.]— So long as an annulling order is in force the ct. must treat it as valid & cannot enter into a question whether it was obtained by fraud.—ADAMS *v.* SWORDER (1863), 2 De G. J. & Sm. 44; 3 New Rep. 273; 33 L. J. Ch. 318; 9 L. T. 621; 10 Jur. N. S. 140; 12 W. R. 294; 46 E. R. 291, L. JJ.; *subsequent proceedings, sub nom.* ELSEY *v.* ADAMS (1864), 2 De G. J. & Sm. 147, L. JJ.

Annotation:—**Mentd.** Luddy's Trustee *v.* Peard (1886), 33 Ch. D. 500.

1768. On remission from House of Lords.]—Where the House of Lords, upon an appeal, holding that a bkpcy. ought to be annulled, remitted the matter to the Ct. of Appeal in Ch.:—*Held:* (1) the order of the House of Lords should be made an order of the ct. in bkpcy.; (2) the bkpcy. should be annulled, & the proper advertisements inserted in the *London Gazette*.—*Re* WILLIAMS, *Ex p.* HARDING (1866), 14 W. R. 825, L. J.

1769. Conditional order for annulment—On failure to give indemnity to assignees—Concerted act of bankruptcy.]—Where a fiat was issued by a petitioning creditor, who was a consenting party to a deed of assignment of bkpt.'s effects for the benefit of his creditors, & that deed was set up by him as the act of bkpcy.:—*Held:* he should indemnify the assignees against the invalidity of the fiat, or, in default, they might issue a fresh one.—*Re* ROBINSON, *Ex p.* FERNANDES (1840), 1 Mont. D. & De G. 114.

SUB-SECT. 6.—EFFECT OF ANNULMENT.

1770. General effect.]—When a commission is superseded everything done under it falls with it.—*Re* BROWN, *Ex p.* BROWN (1812), 1 Rose, 433, L. C.

See, now, 1914 Act, ss. 21 (3), 29 (2).

1771. On previous proceedings under fiat—Annulment on ground rendering fiat void.]—An order of the Ct. of Review, confirmed by the Lord Chancellor, for annulling a fiat in bkpcy., does not invalidate the previous proceedings under the fiat, unless where the annulment was on some ground which rendered the fiat originally void.

Where, before the issuing of a writ of *fi. fa.*, a fiat in bkpcy. issued against debtor, but before the return of the writ an order was made by the Ct. of Review for annulling the fiat, & after the return that order was confirmed by the Lord Chancellor:—*Held:* the return of *nulla bona* was well founded.—SMALLCOMBE *v.* OLIVIER (1844), 13 M. & W. 77; 2 Dow. & L. 217; 1 New Pract. Cas. 37; 13 L. J. Ex. 305; 3 L. T. O. S. 222; 8 Jur. 606; 153 E. R. 32.

Annotations:—**Consd.** White *v.* Chitty (1866), L. R. 1 Eq. 372; Brandon *v.* McHenry (1891), 64 L. T. 59. **Refd.** Lloyd *v.* Lloyd (1866), L. R. 2 Eq. 722.

1772. —— Rejection of proof by trustee.]—The rejection of a proof by a trustee in bkpcy., which has not been appealed against, is valid even where the bkpcy. is subsequently annulled, as being "an act done theretofore by the trustee" within 1883 Act, s. 35 (2).—BRANDON *v.* MCHENRY, [1891] 1 Q. B. 538; 60 L. J. Q. B. 448; 39 W. R. 372; 7 T. L. R. 325, C. A.

1773. Right after annulment to impeach sales—Which could have been impeached if bankruptcy not annulled.]—A purchase was made from the assignees of a bkpt., in which their solr. was interested, so as to invalidate the transaction. Afterwards the bkpcy. was by arrangement annulled, without prejudice to any sale or other act done by the assignees, & bkpt. by deed, to which he & the assignees alone were parties, ratified their acts, relieved them from all claims in respect of them, & agreed to execute all further deeds necessary for confirming them. After this bkpt. filed a bill against the purchasers to impeach the sale to them. Defts. alleged that pltf. had obtained the annulling order by fraudulent suppression:—*Held:* by virtue of the annulling order pltf. had the right to impeach all sales on any grounds on which they might have been impeached if the bkpcy. had not been annulled, & the deed executed by him did not affect that right.—ADAMS *v.* SWORDER (1863), 2 De G. J. & Sm. 44; 3 New Rep. 273; 33 L. J. Ch. 318; 9 L. T. 621; 10 Jur N. S. 140; 12 W. R. 294; 46 E. R. 291, L. JJ; *subsequent proceedings, sub nom.* ELSEY *v.* ADAMS (1864), 2 De G. J. & Sm. 147, L. JJ.

Annotation:—**Refd.** Luddy's Trustee *v.* Peard (1886), 33 Ch. D. 500.

1774. Reversion of property to debtor.]—On the annulment of an adjudication order the property reverts to debtor, in absence of an order vesting it in any other person.—BAILEY *v.* JOHNSON

PART V. SECT. 3, SUB-SECT. 5.

r. *Variation of order—As to costs.*]—An order was made on petition in 1847, superseding a commission of bkpcy., with costs to be paid by petitioning creditors. Bkpt. was discharged in 1849, before those costs were paid:—*Held:* the order of 1847 should be varied by directing petitioning creditors to pay the solr. the amount of the taxed costs.—*Re* PETTICREW, *Ex p.* ORR (1850), 1 I. Ch. R. 102.—**IR.**

PART V. SECT. 3, SUB-SECT. 6.

s. *On subsequent proceedings.*]—Where a petition is presented in a matter in which the commission was superseded, it will be dismissed with costs.—*Re* DILLON (1825), 2 Mol. 453.—**IR.**

1774 i. *Reversion of property to debtor.*]—An order annulling the adjudication in bkpcy., under Irish 1857 Act, s. 149, does not revest in bkpt. real estate vested in the assignees by s. 268.—*Re* FRITH & HUGHES (1880), 5 L. R. Ir. 609.—**IR.**

1774 ii. ——.]—*Held:* on discharge of the provisional order insolvent's assets together with the right to an account from the trustee & to any balance shown revested in insolvent.—ROSE *v.* KEMP (1914), W. L. D. 14.—**S. AF.**

1774 iii. ——.]—*Held:* the effect of annulling a bkpcy. under Debtors & Creditors Act, 1876, s. 121, was to revest in bkpt. or his assigns, existing rights of action which had vested in the trustee in bkpcy., subject to the provisions, if any, of a deed of arrangement in relation to the vesting of the estate, & a conveyance by the trustee

(1872), L. R. 7 Exch. 263 ; 41 L. J. Ex. 211 ; 27 L. T. 714 ; 20 W. R. 1013, Ex. Ch.
Annotations :—**Consd.** Crew *v.* Terry (1877), 2 C. P. D. 403 ; *Re* Willis, Percival, *Ex p.* Morier (1879), 12 Ch. D. 491, C. A. **Distd.** *Re* Day, *Ex p.* Young (1879), 41 L. T. 40. **Refd.** Alloway *v.* Steere (1882), 47 J. P. 55.

1775. *S. P.* CREW *v.* TERRY, No. 1785, *post.*
See, now, 1914 Act, ss. 21 (2), 29 (2).

1776. On assignee's right to indemnity—For personal obligation given to release distress.]—A. as assignee of B., a bkpt., gave an undertaking to C. who was the mtgee. of one farm, & was under a contract to purchase another farm, both the property of bkpt., & who had a distress upon the mortgaged premises, that if the distress were withdrawn, he would pay to C. the arrears then due in respect of the mtge. out of the effects on the premises. C. withdrew the distress, & afterwards the bkpcy. was annulled before A. had obtained possession of any part of bkpt.'s effects. C. having brought an action on the undertaking & recovered judgment against A. personally, A. filed a bill against C., to which B. was no party :—*Held :* A. could have no relief in equity against the judgment at law, & he was not entitled, as against C., to claim repayment of the sum thereby recovered out of the price which C. had contracted to pay for the other farm.—PELL *v.* STEPHENS (1833), 2 My. & K. 334 ; Coop. *temp.* Brough. 266 ; 39 E. R. 971, L. C.

1777. Third party's right of set-off against bankrupt—Same as against trustee in bankruptcy.]—J. having been adjudicated bkpt., the adjudication was annulled, & under 1869 Act, s. 81, his property vested by assignment in pltf. as the person appointed by the ct. under that sect. Pltf., as such assignee, having sued deft. for money payable under the common counts, deft. pleaded a set-off for debts due to him from J. before the adjudication & for damages provable in the bkpcy. : —*Held :* the plea was good, as under the above sect. deft. had the same rights of set-off, as he would have had against the trustee in bkpcy.—WEST *v.* BAKER (1875), 1 Ex. D. 44 ; 45 L. J. Q. B. 113 ; 34 L. T. 102 ; 24 W. R. 277.

1778. Trustee's claim statute-barred—Debtor also barred after annulment.]—In 1828 pltf. mortgaged freehold property to B., & in 1832, being about to reside abroad, he gave a full power of attorney to deft., a solr., to receive the rents & profits of all his property, & to apply them in payment of the incumbrances. In 1841 pltf. settled accounts with deft., showing a large balance due to deft., which pltf. agreed to secure by a mtge. of his real estates when required. In 1845 pltf. became bkpt., but his assignee did not interfere with the mortgaged property, & deft. continued to receive the rents & profits. In 1849 deft. took a transfer himself of B.'s mtge. to which pltf. was not a party. In 1865 deft. wrote a letter to pltf. expressing his readiness to settle all accounts. In 1877 pltf's. bkpcy. was annulled, & he brought an action against deft. claiming to redeem the mtge., & claiming an account against him as mtgee. in possession, &, by amendment, as agent & trustee for him. Deft. pleaded Stat. Limitations :—*Held :* (1) even if the assignee would have been entitled to call upon deft. to account, pltf. did not, on the annulment of the bkpcy., succeed to the assignee's right ; (2) pltf.'s estate as mtgor. ceased on the bkpcy. ; (3) as the assignee in the circumstances was barred by Stat. Limitations, pltf. was also barred, notwithstanding the annulment of the bkpcy, & the action must be dismissed with costs.—MARKWICK *v.* HARDINGHAM (1880), 15 Ch. D. 339 ; 43 L. T. 647 ; 29 W. R. 361, C. A.
Annotation :—**Mentd.** Sanders *v.* Sanders (1881), 19 Ch. D. 373, C. A.

1779. Application for return of books & documents—Adjournment pending criminal proceedings against trustee.] — Where criminal proceedings are pending against the trustee & others for conspiring to bring about the bkpcy. with intent to defraud, the application of bkpt., whose bkpcy. has been annulled, for an order for the return of bkpt.'s books & documents, should be adjourned pending the trial.—*Re* PALMER, *Ex p.* PALMER, (1886), 3 Morr. 267, C. A.

1780. On forfeiture on insolvency.]—Testator gave his residuary real & personal estate to trustees upon trust, to pay one-third of the rents & proceeds to his son until he should die or become bkpt., or assign, charge, or incumber or attempt to assign, charge or incumber same or any part thereof, or do something whereby same or some part thereof would by operation of law or otherwise, if belonging absolutely to him, become vested in, or payable to, some other person or persons, with a gift over on the failure or determination of the trust. Shortly before the death of testator, insolvency proceedings were instituted against the son in Melbourne where he was living, & trustees of his estate were appointed, who gave notice to the trustees of testator's will to pay over to them any sums in their hands to which bkpt. was entitled. The insolvency proceedings were very shortly afterwards annulled. The insolvency trustees had not received anything from the trustees of the will :—*Held :* notwithstanding the annulment of the insolvency proceedings the clause of forfeiture had taken effect.—*Re* BROUGHTON, PEAT *v.* BROUGHTON (1887), 57 L. T. 8.

1781. —— Lease.]—*Qu. :* whether the right to enforce a forfeiture of a lease on the bkpcy. of the lessee is affected by the annulment of the bkpcy.—SMITH *v.* GRONOW, [1891] 2 Q. B. 394 ; 60 L. J. Q. B. 776 ; 65 L. T. 117 ; 40 W. R. 46 ; 7 T. L. R. 596.
Annotations :—**Mentd.** Horsey Estate *v.* Steiger, [1899] 2 Q. B. 79, C. A. ; *Re* Newman, *Ex p.* Official Receiver [1899] 2 Q. B. 587.

1782. On officer's pension—Money forming part of pension in hands of trustee in bankruptcy.]—On the annulment of the bkpcy. of an officer entitled to a pension, money forming part of his pension in the hands of his trustee in bkpcy. retains its character of pension, & cannot be seized under an execution. —CROW *v.* PRICE (1889), 22 Q. B. D. 429 ; 58 L. J. Q. B. 215 ; 60 L. T. 915 ; 53 J. P. 389 ; 37 W. R. 424 ; 5 T. L. R. 280, C. A.
Annotation :—**Consd.** Jones *v.* Coventry, [1909] 2 K. B. 1029.
See, now, 1914 Act, s. 29 (2).

1783. Annulment on approval of composition resolutions—Discharge of indentures of apprenticeship.]—A fiat of bkpcy. issued against the master an apprentice, but was afterwards annulled, by eans of a composition between bkpt. & his

to bkpt. upon the annulment of a bkpcy. was unnecessary & improper.—HURREY *v.* BANK OF NEW SOUTH WALES (1883), 1 N. Z. L. R. 115.—**N.Z.**

t. *On disqualification for election.*]—An undischarged bkpt., having been elected a councillor & warden of a municipality, afterwards obtained an order annulling the bkpcies. :—*Held :* the annulling order had no effect on the election which took place prior to the annulment.—*Re* MUNICIPALITY OF NEW TOWN, *Ex p.* ST. HILL (1908), 4 Tas. L. R. 52.—**AUS.**

w. *On previous decree.*]—Circumstances in which it was held that an order setting aside an adjudication did not have the effect of annulling a previous decree.—MILLER *v.* ABINASH CHUNDER DUTT, 4 C W. N. 785.—**IND.**

y. *On official assignee's right to commission.*]—The right of the official assignee to commission under 11 & 12 Vict. c. 21, s. 19, on funds realised, subsists where adjudication is annulled.—OFFICIAL ASSIGNEE *v.* RAMALINGA (1884), I. L. R. 8 Mad. 79.—**IND.**

Sect. 3.—*Appeals from and annulment of adjudication order: Sub-sects.* 6, 7 & 8. *Part VI. Sect.* 1.]

creditors :—*Held :* the indentures of apprenticeship were discharged.—ALLEN *v.* COSTER (1838), 1 Beav. 274 ; 48 E. R. 945.

1784. —— Jurisdiction of court over execution creditor.] — A trader was adjudicated bkpt. on the petition of a creditor, who was, under an execution, in possession of chattels belonging to the trader. Under orders of the ct., the bkpcy. was afterwards annulled, & the property of debtor was assigned by him to the same person who was trustee in the bkpcy., on trust to secure payment of a composition which the majority of the creditors had agreed to accept. The execution creditor then threatened to proceed with his execution :—*Held :* (1) as the assignment had been made & the composition had been accepted with the approval of the ct., the ct. retained jurisdiction over the execution creditor, though the bkpcy. had been annulled ; (2) the chattels were vested in the trustee discharged from the execution, & the creditor ought to be restrained from proceeding with the execution.—*Re* CHIDLEY, *Re* LENNARD (1875), 1 Ch. D. 177 ; 45 L. J. Bcy. 49 ; 33 L. T 553 ; 24 W. R. 182, C. A.

Annotation :—**Consd.** Crew *v.* Terry (1877), 2 C P. D. 403.

1785. —— Rights of non-assenting creditors.]—T. recovered judgment against C., whose goods were seized by the sheriff under a writ of execution. C. thereupon filed a petition for liquidation, & an order was granted restraining the sheriff from selling. This order was afterwards discharged, & C. was adjudged bkpt., but a fresh restraining order was granted under the bkpcy. The sheriff then withdrew voluntarily. Afterwards the creditors of C. resolved under 1869 Act, s. 28, to accept a composition of 5*s.* in the pound upon " the debts proved & admitted in the bkpcy. " ; they further resolved that the order of adjudication should be annulled forthwith, & that the property of C. should be handed back to him. T. did not assent to the resolution. The Ct. of Bkpcy. affirmed the resolutions, & ordered the adjudication to be annulled. Afterwards under the same writ of execution, the sheriff again seized the goods of C., under the direction of T. :—*Held :* the resolutions were not binding upon T., who had neither assented to the composition nor proved under the bkpcy., & the seizure by the sheriff of C.'s goods after the annulment of his bkpcy. was lawful. *Qu. :* whether the seizure after the annulment would have been lawful, if the composition had not been confined to " the debts proved & admitted in the bkpcy." & had extended to any debts " provable under the bkpcy."—CREW *v.* TERRY (1877), 2 C. P. D. 403 ; 46 L. J. Q. B. 787.

SUB-SECT. 7.—DISCHARGE OF ORDER OF ANNULMENT.

1786. Discharge of order—On what grounds.]—The fact that the examination of a bkpt. was imperfect & inaccurate affords no reason why an order duly made to annul the adjudication, to which order the assignees & creditors assented in ignorance of such imperfections & inaccuracy, should be discharged & the proceedings revived. Such an order will not be discharged, even when such imperfection has arisen from bkpt's. own fraudulent misrepresentation & concealment (of which the assignees & creditors were ignorant) of certain debts due to him at the time of the adjudication, if at the date of the order the assignees had knowledge of other fraudulent misrepresentations & concealment by bkpt. in his examination, & yet in assenting to the annulment, relied upon its fullness & accuracy (LORD WESTBURY, C.).—*Re* ADAMS (1863), 10 L. T. 212, L. C.

1787. —— Effect of—Creditors remitted to original rights.]—One of the creditors of a bkpt. held two bills of sale of his chattels. Objections had been raised by the trustee to the validity & extent of the security, though no steps had been taken to set it aside. Ultimately, the mtgee, offered to pay £620 to the trustee. A meeting of the creditors was held, under 1869 Act, s. 28, when it was resolved to accept the mtgee.'s offer, that the bkpcy. should be thereupon annulled, & that the mtgee. should release his claim on bkpt.'s estate, & the bills of sale should not be disputed by the trustee. The resolutions were approved by the ct., &, upon the trustee certifying that the terms of them had been completed to his satisfaction, an order was made annulling the bkpcy. The £620 was divided among the creditors other than the mtgee. The mtgee. realised his security, but did not obtain enough to pay his debt in full. Six years afterwards it was discovered that bkpt. had concealed a reversionary interest to which he was entitled at the date of his adjudication, & an order was obtained discharging the annulling order, & directing that the bkpcy. should proceed as if that order had not been made. The trustee then received the reversionary interest, which had fallen into possession :—*Held :* the mtgee., equally with the other creditors, was remitted to his original rights, & was entitled to prove for the unpaid balance of his debt.—*Re* SPANTON, *Ex p.* JARVIS (1879), 10 Ch. D. 179 ; 48 L. J. Bcy. 45 ; 39 L. T. 651.; 27 W. R. 297, C. A.

1788. Rehearing ordered.]—*Held :* a petition for rehearing might be presented, with a short petition for a *procedendo*, after an order to annul the flat had been made.—*Re* LAVENDER (1835), 4 L. J. Bcy. 44, Ct. of R.

1789. —— Failure to disclose property.]—A *procedendo* was ordered to issue when a commission had been superseded three years previously by consent of the creditors, on the ground that bkpt. had not disclosed the fact of his being entitled to shares in a waterworks co., his defence being that the shares were subject to a mtge. for more than their value but the mtge. turned out to be invalid for want of notice to the co.—*Re* BOWRING, *Ex p.* LAURENCE (1846), 1 De G. 269, Ct. of R.

1790. Appeal from order annulling adjudication—What costs allowed.]—In a creditor's appeal against an order annulling an adjudication the fees of two counsel only were directed to be allowed to applt.—*Re* SAUNDERS, *Ex p.* TREHERNE (1860), 30 L. J. Bcy. 6 ; 3 L. T. 458 ; 6 Jur. N. S. 1317, L. JJ.

1791. Appeal from refusal to annul—Within what time—Service of notice of appeal.]—Notice of an appeal from the refusal to annul an adjudication of bkpcy. must be served on the trustee in the bkpcy. as well as on petitioning creditor ; & if notice of the appeal is served on petitioning creditor in time, but is not served in time on the trustee, the appeal must be dismissed. The time for appealing will not be extended in such a case.—*Re* WARD, *Ex p.* WARD (1880), 15 Ch. D. 292 ; 43 L. T. 183 ; 29 W. R. 206, C. A..

Annotation :—**Apld.** *Re* Webber, *Ex p.* Webber (1889), 24 Q. B. D. 313, C. A.

SUB-SECT. 8.—AGREEMENTS FOR PROCURING CONSENT TO ANNULMENT.

1792. Bills of exchange accepted—By debtor.]—A trader compounded with his general creditors for 4*s.* in the pound, but gave as security to one creditor, his I. O. U. for the whole debt, in order to induce him to concur in annulling the bkpcy. Afterwards in consideration of a loan, he exchanged the I. O. U. for bills of exchange which he accepted :—*Held :* the bills were invalid.—MARE *v.* WARNER (1861), 3 Giff. 100 ; 4 L. T. 351 ; 7 Jur. N. S. 1228 ; 66 E. R. 340.

Annotations :—**Refd.** M'Kewan *v.* Sanderson (1875), 44 L. J. Ch. 447 ; *Re* Milner, *Ex p.* Milner (1885), 15 Q. B. D. 605, C. A.

1793. *S. P.* MARE *v.* EARLE (1861), 3 Giff. 108 ; 4 L. T. 352 ; 7 Jur. N. S. 1230 ; 66 E. R. 343.

1794. —— By friend of debtor—Recovery of money paid in respect of.]—A. having accepted a bill of exchange drawn upon him by B., in order to induce B. to consent to the annulling of the bkpcy. of a friend of A., & having been compelled to pay the bill to a *bonâ fide* holder :—*Held :* A. could not recover back the amount so paid from B.—WATSON *v.* BENNETT (1864), 12 W. R. 1008.

1795. Agreement to pay creditor further sum at future time—Not disclosed to court or other creditors.]—Bkpt., who had been adjudicated a bkpt. under 1869 Act, desiring to obtain the annulment of his bkpcy., induced some of his creditors to sell their debts to two trustees, who were provided with funds for the purpose, & who were as assignees of the debts to consent to the annulment. The trustees obtained assignments of the several debts on various terms, including an assignment of a debt of £25,000 in consideration of £2,000 paid by them to the creditor. This assignment was made in pursuance of an agreement between the creditor & bkpt., whereby bkpt. agreed to pay to the creditor a further sum of £6,000 at a future time. The bkpcy. was annulled on the petition of bkpt., with the consent of the creditors or their assignees. The agreement to pay the £6,000 was not disclosed to the ct. or to the other creditors :—*Held :* there was no duty to disclose the agreement to the ct. as the function of the ct. was merely to ascertain whether the proper parties consented, nor to the other creditors, as there was no common basis of consent, & the agreement was valid.—*Re* MCHENRY, MCDERMOTT *v.* BOYD, LEVITA'S CLAIM, [1894] 3 Ch. 365 ; 64 L. J. Ch. 13 ; 71 L. T. 502 ; 10 T. L. R. 614, C. A.

Part VI.—Official Receiver, Special Manager, and Interim Receiver.

SECT. 1.—**POSITION OF OFFICIAL RECEIVER.**

1796. Different from that of trustee in bankruptcy—Or under scheme of arrangement.]—An official receiver in bkpcy., having no estate or interest vested in him nor any power conferred on him by Bkpcy. Acts of bringing or defending actions, stands in a different position from a trustee in bkpcy., or a trustee of any composition or scheme of arrangement.—*Re* BERRY, DUFFIELD *v.* WILLIAMS, [1896] 1 Ch. 939 ; 65 L. J. Ch. 245 ; 74 L. T. 306 ; 44 W. R. 346 ; 40 Sol. Jo. 275 ; 3 Mans. 11.

1797. —— Unless acting as trustee in bankruptcy—Without committee of inspection.]—When the official receiver is trustee in a bkpcy. without a committee of inspection, he is in the same position as an ordinary trustee.—*Re* DUNCAN, *Ex p.* DUNCAN, [1892] 1 Q. B. 331 ; 65 L. T. 681 ; 40 W. R. 159 ; 36 Sol. Jo. 45 ; 8 Morr. 297.

Annotations :—**Mentd.** *Re* Geiger, [1915] 1 K. B. 439, C. A. ; *Re* Yeatman, [1916] 1 K. B. 461.

1798. May not act as his own solicitor.]—An official receiver, who is a solr., cannot act for himself.—*Re* TAYLOR, *Ex p.* OFFICIAL RECEIVER (1885), 2 Morr. 127, D. C.

See, now, 1914 Act, s. 120 (2).

See, also, Nos. 61 *et seq., ante.*

1799. Whether exempt from court fees—When applying as trustee.]—An official receiver, when applying to the ct. in his capacity of trustee, is not exempt from the fee of 5*s.* prescribed in Table A. to the Order of Oct. 25, 1886. The exemption only applies when he makes the application in his capacity of official receiver.—*Re* WHITAKER (1888), 21 Q. B. D. 261 ; 59 L. T. 255 ; 4 T. L. R. 577, D. C.

1800. Locus standi to appear before Law Society—On application against bankrupt solicitor.]—A solr., adjudicated bkpt., made certain admissions during his public examination. At the instance of the Board of Trade the official receiver made an affidavit in support of an application to the Committee of the Incorporated Law Society under Solrs. Act, 1888 (c. 65). The charges contained in the affidavit were based entirely upon the solr.'s admissions ; none of the persons alleged to have been injured by the solr.'s conduct were made parties to the application, nor were they to be called as witnesses, but it was proposed to adduce in evidence the notes of the public examination & the proceedings in bkpcy. alone. Upon the hearing before the committee a preliminary objection was taken that the official receiver had no *locus standi :*—*Held :* the objection was not a valid one, & the application ought to be heard on its merits.—*Re* A SOLICITOR (1890), 25 Q. B. D. 17 ; *sub nom. Re* SANKEY, *Re* SOLICITORS ACT, 1888, 59 L. J. Q. B. 238, C. A.

Annotation :—**Mentd.** *Re* Atherton, [1912] 2 K. B. 251.

PART VI. SECT. 1.

a. *An officer of the court.*]—An official assignee appointed under Insolvent Act, 1875, is an officer within C. S. U. C. c. 29, s. 2, & goods in his possession as such assignee cannot be replevied.—BARCLAY *v.* SUTTON (1876), 7 P. R. 14.—**CAN.**

b. *General object & nature of appointment.*]—The official assignee of an insolvent's estate is appointed for the conservation of the estate, & his powers & duties are only those pointed out in 1875 Act, s. 16.—SMITH *v.* MCMILLAN (1879), 26 Gr. 300.—**CAN.**

c. *Trustee for creditors.*]—The official assignee holds the assets of an insolvent as a trustee for all the creditors admitted on insolvent's schedule, whether or not they have actually proved their claims.—*Re* DEWCURN JEWRAJ (1888), I. L. R. 12 Bom. 342.—**IND.**

d. *Appointment—Validity of.*]—The county judge of a county, in which no board of trade existed appointed an official assignee for the county within three months after Insolvent Act, 1869, came into force :—*Held :* such appointment was valid under s. 31 of the Act, although a board of trade existed in an adjoining county but had not appointed an assignee.—BLAKELY *v.* HALL (1870), 21 C. P. 138.—**CAN.**

e. —— *By whom—Unincorporated Board of Trade.*]—*Held :* official assignees could not be appointed by unincorporated boards of trade formed after the passing of Insolvent Act.—NEWTON *v.* ONTARIO BANK (1867), 13 Gr. 652 ; 15 Gr. 283.—**CAN.**

f. —— —— *London Board of Trade—Resolutions.*]—*Held :* (1) the London Board of Trade, an organised body in

Sect. 1.—Position of official receiver. Sect. 2: Subsect. 1.]

1801. On application for grant of administration —Sureties dispensed with—Administration bond required.]—Where a grant of administration to the estate of a deceased intestate was made to the chief official receiver in bkpcy. as trustee of a bkpt. next of kin, the ct., while requiring him to give the administration bond, dispensed with the usual sureties.—*In the Goods of* COPE (1890), 15 P. D. 107; 59 L. J. P. 94; 62 L. T. 500; 38 W. R. 688.

Annotations:—**Folld.** *In the Goods of* Thacker (1890), 54 J. P. 759; *In the Goods of* Morgan (1896), 75 L. T. 190; *In the Estate of* Astbury (1899), 80 L. T. 296. **Refd.** *In the Goods of* Conolly (1896), 74 L. T. 461.

1802. —— —— Personal bond accepted.]—Two motions for administration, & that the usual sureties might be dispensed with, were made by two official receivers, who had given bonds for the due performance of their duties under the bkpcies. In one case the whole estate had been already disposed of, with the exception of a sum of about £290, which had recently fallen in, & which was the amount in respect of which a grant of administration was sought. The ct., in each case, made the grant as prayed, & accepted the personal bond of each appct., without sureties, being satisfied that the applications were made by them in their respective official capacities.—*In the Goods of* KNAPP (DECEASED), *In the Goods of* ROBINS (DECEASED) (1890), 63 L. T. 252.

1803. —— —— ——.]—The ct. made a grant of administration under Ct. of Probate Act, 1857 (c. 77), in respect of the personal estate & effects of a married woman who had died intestate, leaving her husband surviving, upon the application & in favour of the official receiver in her husband's bkpcy., & dispensed with the usual sureties.—*In the Goods of* THACKER (DECEASED) (1890), 54 J. P. 759.

1804. —— —— ——.]—A married woman died intestate, leaving her husband, who survived her, an undischarged bkpt., whose estate was vested in the hands of the chief official receiver in bkpcy., under 1883 Act, s. 121. The ct., upon motion by the chief official receiver, made a grant to him of the personal estate & effects of deceased intestate, &, on account of the smallness of the estate, dispensed with any citation upon the husband of deceased, &, as the administrator applied in his official capacity, accepted the administrator's personal bond without sureties.—*In the Goods of* CONOLLY (DECEASED) (1896), 74 L. T. 461.

1805. —— —— Whether notice to debtor necessary.]—One of the official receivers in bkpcy., as trustee of the estate of the husband of a deceased intestate, applied for administration without citing the husband. The amount of the estate was £105 2*s.* 10*d.*, which was claimed by the official receiver on behalf of the creditors of bkpt.:—*Held:* notice of some kind must be given to the husband, but, upon the registrar being satisfied as to this, the grant might go, &, as appct. moved in his official capacity, sureties might be dispensed with.—*In the Goods of* MORGAN (DECEASED) (1896), 75 L. T. 190.

1806. —— —— ——.]—The right of an undischarged bkpt. to a grant of administration vests under 1883 Act in his trustee in bkpcy. without citing bkpt., &, if the official receiver is the trustee in bkpcy., without sureties. The grant will be made under Ct. of Probate Act, 1857 (c. 77), s. 73.—*In the Goods of* BOWRON (1914), 84 L. J. P. 92.

1807. —— —— On security being given to Board of Trade.]—In a grant of administration to an official receiver in bkpcy., who, as an official of the Board of Trade, had given security for the due performance of his duties, the Probate Ct. dispensed with sureties to the administration bond in the special circumstances of the case.—*In the Estate of* CAUSTON, [1906] P. 124; 75 L. J. P. 42; 94 L. T. 613; 22 T. L. R. 247.

1808. —— Application to dispense with sureties —To whom made.]—Where the official receiver applies for a grant of administration of the estate of a deceased bkpt., an application to dispense with sureties to the administration bond should be made to the registrars, & not to the ct.—*In the Goods of* RENNINSON (1894), 1 Mans. 475; 11 R. 583.

1809. Whether in position of incoming tenant— As regards right to supply of gas in debtor's premises without payment of arrears.]—A gas co. cut off the gas from premises, then occupied by the official receiver, until all the arrears owing by debtor were paid. The receiver paid under protest:—*Held:* the trustee in bkpcy. could not recover the money so paid, for the receiver was not in the position of an incoming tenant to whom gas must be supplied without payment of arrears, but the occupation of debtor continued notwithstanding the receiving order.—*Re* SMITH, *Ex p.* MASON, [1893] 1 Q. B. 323; 67 L. T. 596; 57 J. P. 72; 41 W. R. 159; 9 T. L. R. 15; 37 Sol. Jo. 30; 9 Morr. 304; 5 R. 47.

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operation before Insolvent Act 1864, had power, though not incorporated, to appoint official assignees under that Act; (2) such appointment was properly made by resolution; (3) omission to send a copy of such resolution to the clerk of the county ct. would not invalidate the appointment.—CHURCHER *v.* COUSINS (1869), 28 U. C. R. 540.—**CAN.**

g. *Irregular appointment—Effect of.*]—Where a debtor assigns to an official assignee who has not been duly appointed, but the creditors generally accept & act upon the assignment:—*Qu.:* whether the irregularity in the appointment can be set up by an individual creditor as rendering void the assignment.—NEWTON *v.* ONTARIO BANK (1867), 13 Gr. 652; 15 Gr. 283. —**CAN.**

h. —— —— *Liability to bonâ fide purchaser.*]—An official assignee whose appointment was irregular sold goods of the insolvent to pltf., who after full discussion between the parties as to deft.'s right to sell being satisfied by deft.'s assertion, made in the honest belief that he had such right, purchased on deft.'s assertion that he had this right. The sale to pltf. having been pronounced invalid:—*Held:* (1) deft.'s honest belief in his right to sell, as assignee, did not protect him from liability to pltf. if he warranted his title, nor was the knowledge on pltf.'s part of the possible defect in deft.'s title fatal to the warranty on the sale of the goods; (2) had nothing occurred beyond the discussion of his title, & had pltf. bought with this full knowledge, deft. would not have been liable.—JOHNSTON *v.* BARKER (1869), 20 C. P. 228.—**CAN.**

k. *Elected creditors' assignee—Position of.*]—When an official assignee becomes the assignee of the creditors, in case there should be any defect in election, he may rely on his position of assignee by operation of law.—MARSH (ASSIGNEE OF MCGUINESS) *v.* SWEENY (1875), 2 Pug. 454.—**CAN.**

l. —— *Effect on sureties.*]—Where an official assignee had given a bond as such with sureties, pursuant to Insolvent Act, 1875, & amending Acts, & the creditors had duly appointed him to be creditors' assignee under s. 29 of that Act but had not required him to give security as such creditors' assignee, the sureties under the bond given by him as official assignee remained liable for his dealings with the estate, & were not discharged by such appointment as creditors' assignee. —ARMSTRONG *v.* FORSTER (1883), 6 O. R. 129.—**CAN.**

m. *S. P.* LETOURNEUX *v.* DANSEREAU (1886), 12 S. C. R. 307.—**CAN.**

n. *Proceedings against—Payment by sureties.*]—*Semble:* one who brings an action against an official assignee for default in dealing with a certain estate, upon his bond given as security against such defaults, is not bound to ascertain if the assignee is in default as to other estates; & the sureties to the bond are discharged by payment to any one who recovers judgment against them.—ARMSTRONG *v.* FORSTER (1883), 6 O. R. 129.—**CAN.**

Annotations :—**Apld.** Paterson *v.* Gas Light & Coke Co., [1896] 2 Ch. 476, C. A. **Refd.** *Re* Marriage, Neave, North of England Trustee, Debenture & Assets Corpn. *v.* Marriage, Neave (1896), 75 L. T. 169, C. A.

1810. Power of court to appoint as interim receiver—Pending petition—Appointment valid until petition dismissed.]—As the Bkpcy. Ct. has jurisdiction to entertain a petition against an alleged debtor, an order appointing the official receiver as *interim* receiver during the pendency of the petition, with the consequent right of appointing a special manager under 1883 Act, s. 12, continues valid until it is set aside, & thus imparts validity to everything done under it, even though it may turn out to have been erroneously made.—*Re* A. B. & Co., [1900] 2 Q. B. 429 ; 69 L. J. Q. B. 568 ; 82 L. T. 544 ; 48 W. R. 485 ; 16 T. L. R. 365 ; 44 Sol. Jo. 448 ; 7 Mans. 268, C. A.

1811. As regards documents.]—The custody of documents of the official receiver is not the custody of the ct.—*Re* ASH (1913), 110 L. T. 48 ; 21 Mans. 15, D. C.

1812. Sureties for proper performance of duties—How discharged—Negligence of committee—Degree of negligence necessary.]—It is very questionable whether the sureties of the bond given by an official assignee in bkpcy. for the proper performance of his duties would be discharged from their suretyship by the neglect of the creditors' assignees to exercise proper supervision.

Negligence, in order to discharge the sureties, must amount to connivance at the official assignee's getting the fund into his hands improperly, or must be so gross as to be equivalent to a wilful shutting of the eyes to a fraud which he is about to commit. DAWSON *v.* LAWES (1854), Kay, 280 ; 2 Eq. Rep. 230 ; 23 L. J. Ch. 434 ; 22 L. T. O. S. 254 ; 2 W. R. 213 ; 69 E. R. 119.

Annotations :—**Apprvd.** Black *v.* Ottoman Bank (1862), 15 Moo. P. C. C. 472, P. C. **Consd.** Durham Corpn. *v.* Fowler (1889), 22 Q. B. D. 394, D. C. **Mentd.** Kingston-upon-Hull Corpn. *v.* Harding, [1892] 2 Q. B 494, C. A.

SECT. 2.—RIGHTS, DUTIES, AND POWERS OF OFFICIAL RECEIVER.

SUB-SECT. 1.—IN GENERAL.

To report.]—*See* Sect. 5, *post.*

1813. To sell bankrupt's property—With consent of commissioner—Acting under Protection Insolvency Acts—Duty to assign to purchaser.]—Where an interest in property of no value to creditors is vested in the official assignee, the comr. may order him to make, or join in making, an assignment or conveyance to a purchaser.—*Re* ANON. (1862), 6 L. T. 868.

1814. —— Though not perishable—Acting as trustee in bankruptcy.]—The official receiver, when acting as trustee in a bkpcy. in the interval between the adjudication & the appointment of a trustee by the creditors, has power to sell bkpt.'s property, though it be not of a perishable nature.—TURQUAND *v.* BOARD OF TRADE (1886), 11 App. Cas. 286 ; 55 L. J. Q. B. 417 ; 55 L. T. 30 ; 2 T. L. R. 680, H. L. ; *affg.* S. C. *sub nom. Re* PARKER, *Ex p.* BOARD OF TRADE (1885), 15 Q. B. D. 196, C. A., *revsg.* S. C. *sub nom. Re* PARKER & PARKER, *Ex p.* TURQUAND (1884), 14 Q. B. D. 407.

Annotations :—**Consd.** *Re* Cohen, [1905] 2 K. B. 704, C. A. **Refd.** *Re* Wells & Croft, *Ex p.* Official Receiver (1895), 72 L. T. 359. **Mentd.** *Re* Oborne, *Ex p.* Marillier (1896), 3 Mans. 238.

1815. —— Acting as interim receiver—Duty not to encumber estate—Duty to consult Board of Trade or court in unusual matters.]—An official receiver, when acting as *interim* receiver, ought not to realise or encumber the estate, except to protect it or to dispose of perishable goods. Before adopting measures out of the ordinary practice he should consult the Board of Trade, & if necessary apply to the ct.—*Re* WELLS & CROFT, *Ex p.* OFFICIAL RECEIVER (1895), 72 L. T. 359 ; 2 Mans. 41 ; 15 R. 169.

1816. To petition — Without directions from commissioner—Or meeting of creditors.]—If an official assignee petition alone, & without the express direction of the comr., or a meeting of creditors, the petition will be discharged with costs.—*Re* WYATT & THOMPSON, *Ex p.* ADAMS, *Re* WYATT & THOMPSON, *Ex p.* GROOM (1837), 3 Mont. & A. 157 ; 2 Deac. 265, Ct. of R.

1817. To refuse to sanction appointment of special manager—Jurisdiction of Court to interfere with discretion.]—Upon an appeal from a decision of the official receiver refusing to sanction the appointment of a special manager named by the creditors : —*Held :* the ct. had no jurisdiction to interfere with the discretion of the official receiver in this

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PART VI. SECT. 2, SUB-SECT. 1.

1813 i. *To sell bankrupt's property—Bankruptcy Act,* 1892, *s.* 65 (1).]—In 1889 mortgaged property was sold to the mtgees. at a sale through the registrar, at a price far below the amount owing under the mtge. In 1896 the mtgor. became bkpt. on his own petition, to free himself from his liability for the balance due under the mtge. In 1902 the official assignee by deed assigned to the mtgor. all his rights, etc., by virtue of the bkpcy., against the mtgees. in respect of the sale & the property comprised in the mtge. ; & by this deed the mtgor. was constituted a trustee for the creditors in his bkpcy. :—*Held :* (1) the office of official assignee being a creation of the stat., his whole powers, duties, & functions were derived from the stat., & could be exercised only in pursuance of & in compliance with the stat. ; (2) the provisions of s. 65 (1) not having been complied with, the assignment to the mtgor. was *ultra vires* & void.—HAMILTON *v.* BANK OF NEW ZEALAND (1904), 24 N. Z. L. R. 109.—**N.Z.**

1813 ii. —— *Without sanction of court.*]—Under Indian Insolvency Act the official assignee has full power to sell the property & effects of an insolvent, & it is his duty to make a sale of same with all convenient speed. The sanction of the ct. to the sale is not necessary.—WOONWALLA *v.* MACLEOD (1906), I. L. R. 30 Bom. 515. —**IND.**

1813 iii. —— *Without consulting creditors' assignee as to manner of sale.*]—*Qu. :* whether, on a sale of bkpt.'s property by an official assignee, the creditors' assignee ought not to be consulted as to whether particular property of bkpt. should be sold by auction or by private tender.—*Re* HARRIS (1873), 7 I. L. T. 82.—**IR.**

1813 iv. ——*Validity of sale—Bankruptcy Act,* 1892, *s.* 65 (12).]—F. was manager for M. of a mill erected under an agreement giving certain rights. M. became bkpt. & F. put in a considerable claim against his estate. The official assignee sold to F. the interest of M. under the agreement & in the mill. One of the terms of the agreement between the official assignee & F. was that F. should withdraw all claims against M.'s estate :—*Held :* the agreement was a compromise or arrangement within the above sub-sect. & the sale was therefore good although it had not been made by public auction or public tender as required by s. 65 (1).—*Re* MORRISON, *Ex p.* OFFICIAL ASSIGNEE IN BANKRUPTCY (1905), 25 N. Z. L. R. 513.—**N.Z.**

1813 v. —— —— *Statute of Maintenance,* 32 Hen. 8, c. 9, s. 2.]—The above Act applies to conveyances made by official assignees in their official capacity. Effect of 7 Vict. No. 19, s. 15, 8 Vict. No. 5, s. 2, & 10 Vict. No. 14, s. 3, considered.—WOODS *v.* WILLIAMS (1905), 5 S. R. N. S. W. 212. —**AUS.**

p. *To appoint auctioneers to sell bankrupt's property.*]—An official assignee has a right to appoint auctioneers to sell the property of a bkpt., & is not bound to consult the creditor's assignee upon the selection he makes.—*Re* HARRIS (1873), 7 I. L. T. 82 ; I. R. 7 Eq. 341.—**IR.**

q. *To arrange for carrying on debtor's trade—With sanction of court.*]—On application by the official assignee to the ct. to allow S., a leading merchant in Calcutta, to carry on the cultivation & manufacture of certain indigo on the ground that the whole crop would otherwise be lost to the creditors :—*Held :* the ct. would grant the application, &, in exercise of the power given by Insolvency Act, s. 32, would order the indigo factories not to be sold until further notice, & allow the official assignee to make such an arrangement as being one by which the interest of the creditors would be best consulted. —*Re* THOMAS & Co., 1 Ind. Jur. N. S. 352.—**IND.**

Sect. 2.—Rights, duties, and powers of official receiver: Sub-sects. 1, 2 & 3.]

matter.—*Re* WHITTAKER (1884), 50 L. T. 510; 1 Morr. 36.

1818. To appoint special manager—Acting as interim receiver.]—The power to appoint a special manager of the business of debtor conferred on the official receiver by 1883 Act, s. 12 (1), can be exercised by him while acting as *interim* receiver under s. 10 (1).—*Re* BANKRUPTCY PETITION (1900), 69 L. J. Q. B. 222; 81 L. T. 798; 7 Mans. 132, C. A.

See, now, 1914 Act, s. 10.

1819. To oust receiver & manager appointed in foreclosure action before bankruptcy.]—A receiver & manager had been appointed on an *ex p.* application by pltf. in a foreclosure action under a mtge. of brewery premises. The mtgor., deft., afterwards became bkpt. The official receiver opposed a motion by pltf. for the continuance of the original receiver & manager, contending that he ought to be substituted:—*Held:* an order must be made confirming the previous appointment, & continuing the person then appointed as receiver of the rents & profits of the premises comprised in the mtge. & as manager of the business, he to be at liberty to use any of the vats, fixed motive machinery, & other property comprised in the mtge., but nothing else.—DEACON *v.* ARDEN (1884), 50 L. T. 584, D. C.

1820. To apply to court—On question of law.]—The ct. will not advise the official receiver on ordinary matters arising out of the administration of the estate, & he ought not to apply to the ct. unless some question of law is involved.—*Re* MAHLER, *Ex p.* HONYGAR, *Re* MAHLER, *Ex p.* CHARBIN (1884), 1 Morr. 272.

Annotation:—**Consd.** *Re* Oborne, *Ex p.* Marillier (1896), 3 Mans. 238.

1821. —— —— On question of management.]—The official receiver may not apply to the ct. for assistance on questions arising in the course of management of the estate, unless some legal point is involved or there is some substantial question to argue. The ct. sits in a judicial capacity & not to give advice.—*Re* BLAKEWAY, *Ex p.* SHAW (1884), 29 Sol. Jo. 102.

1822. —— —— Whether conveyance void as fraudulent preference.]—An official receiver is entitled to take the opinion of the ct. as to whether a conveyance is void as a fraudulent preference.—*Re* WILKINSON, *Ex p.* OFFICIAL RECEIVER (1884), 1 Morr. 65.

1823. To compromise with creditors holding security.]—The official receiver entered into a compromise with S. & H., bill of sale holders & creditors of debtor. The compromise was entered into before adjudication, but subsequently a certificate of approval was issued by the Board of Trade:—*Held:* the official receiver had power to enter into the compromise.—*Re* JOHNSTONE, *Ex p.* SINGLETON (1885), 2 Morr. 206, D. C.

Annotations:—**Consd.** *Re* Duncan, *Ex p.* Duncan, [1892] 1 Q. B. 331; *Re* Duncan, *Ex p.* Official Receiver, [1892] 1 Q. B. 879, C. A.

1824. To appear on hearing of appeal—In special circumstances.]—As a general rule, the official receiver, though served with a notice of appeal, ought not to appear on the hearing, unless there are special circumstances which he desires to bring before the ct.—*Re* DIXON, *Ex p.* DIXON (1884), 13 Q. B. D. 118; 53 L. J. Ch. 769; 32 W. R. 837, C. A.

Annotations:—**Consd.** *Re* Webber, *Ex p.* Webber (1889), 24 Q. B. D. 313. **Mentd.** *Re* Watson, *Ex p.* Oram (1885), 15 Q. B. D. 399, C. A.

1825. —— ——.]—*Re* REED, *Ex p.* REED, No. 1872, *post.*

1826. To appear & oppose rescission of receiving order.]—In an application to have a receiving order discharged, made by debtor with the concurrence of all the creditors, the official receiver appeared & objected to the discharge of the order until after the public examination had been held, on the ground that he was not satisfied with debtor's conduct:—*Held:* the official receiver was entitled to appear on the application & oppose the discharge of the receiving order.—*Re* LESLIE, *Ex p.* LESLIE (1887), 18 Q. B. D. 619; 56 L. T. 569; 35 W. R. 395; 4 Morr. 75, D. C.

Annotations:—**Refd.** *Re* Izod, *Ex p.* Official Receiver, [1898] 1 Q. B. 241, C. A. **Mentd.** *Re* Reed, Bowen, *Ex p.* Official Receiver (1887), 3 T. L. R. 640, C. A.; *Re* Hester, *Ex p.* Hester (1889), 22 Q. B. D. 632.

To appear to defend report.]—*See* No. 1866, *post.*

1827. To appoint solicitor—With consent of Board of Trade.]—When no trustee & no committee of inspection have been appointed by the creditors, & the official receiver becomes the trustee in the bkpcy., the Board of Trade have the power to authorise the employment of a solr. by the official receiver.

Reliance was placed on 1886 Rules, r. 337. It would be absurd to suppose that the functions of the Board of Trade, being such as I have described, can be exercised by the official receiver when the question is whether the Board of Trade are or are not to give the official receiver permission to do an act. That would be an absurdity, & it cannot be the meaning of the rule. Even though the board should give no directions, the official receiver could not give permission to himself. The notion is ridiculous (LORD ESHER, M.R.).—*Re* DUNCAN, *Ex p.* OFFICIAL RECEIVER, [1892] 1 Q. B. 879; 61 L. J. Q. B. 712; 66 L. T. 508; 40 W. R. 409; 8 T. L. R. 412; 36 Sol. Jo. 330; 9 Morr. 61, C. A.

Annotations:—**Mentd.** *Re* Geiger, [1915] 1 K. B. 439, C. A.; *Re* Yeatman, *Ex p.* Yeatman, [1916] 1 K. B. 780, C. A.

1828. —— —— Different solicitor appointed by creditors.]—The official receiver, as trustee *virtute officii* in a summary case, desired to be advised on questions relating to the estate, & applied for, & obtained, the permission of the Board of Trade to employ solrs. The creditors subsequently passed a resolution to employ other solrs.:—*Held:* the resolution of the creditors to employ other solrs. was *ultra vires*, & might be disregarded by the official receiver.—*Re* SALMON, *Ex p.* OFFICIAL RECEIVER, [1916] 2 K. B. 510; 85 L. J. K. B. 1268; 115 L. T. 155; [1916] H. B. R. 120, D. C.

1829. To attend taxation of costs of solicitor of trustee in bankruptcy.]—An official receiver has no right, without the leave of the ct., to be present at the taxation of the bill of costs of the solr. of a trustee in bkpcy. He may be given leave to attend such taxation, not as a litigant, but merely for the purpose either of assisting the trustee or the taxing master by his advice, or of enabling him to report on the taxation to the Board of Trade.—*Re* NASH & SONS, *Ex p.* CROFTON, CRAVEN & WORTHINGTON, [1896] 1 Q. B. 13; 65 L. J. Q. B. 65; 73 L. T. 477; 44 W. R. 112; 12 T. L. R. 16; 40 Sol. Jo. 13; 2 Mans. 503, D. C.

1821 i. *To apply to court—On question of management.*]—Where a question has been raised by the official assignee of a bkpt.'s estate as to the right of the creditors to a fund claimed by a third party, such a question does not affect the management of the estate within Bkpcy. Act, 1892, s. 67, so as to entitle the official assignee to the opinion, advice, or direction of the ct. thereon.—*Ex p.* PEARSON'S OFFICIAL ASSIGNEE (1895), 13 N. Z. L. R. 338. —N.Z.

Annotations:—**Consd.** *Re* Smith, *Ex p.* Wilson, [1910] 2 K. B. 346. **Refd.** *Re* Geiger, [1915] 1 K. B. 439, C. A.

See, now, 1915 Rules, r. 114.

1830. To determine whether debtor should be prosecuted.]—The duty of ultimately determining whether a prosecution shall be instituted in respect of offences under Bkpcy. Acts rests with the ct., & not with the official receiver.—*Re* DUNN, *Ex p.* SENIOR OFFICIAL RECEIVER, [1902] 1 K. B. 107; 71 L. J. K. B. 83; 85 L. T. 567; 50 W. R. 183; 18 T. L. R. 67; 46 Sol. Jo. 68; 9 Mans. 1, C. A.

1831. To disclaim onerous property—Application of time limit — Election.]—The official receiver, while acting as trustee, may exercise the power of disclaimer without being subject to the limitation of twelve months imposed by 1883 Act, s. 55, as amended by 1890 Act, s. 13, but he may be required by any person interested in onerous property to decide whether he will disclaim or not.—*Re* COHEN, [1905] 2 K. B. 704; 74 L. J. K. B. 864; 93 L. T. 659; 54 W. R. 83; 21 T. L. R. 725; 49 Sol. Jo. 712; 12 Mans. 358, C. A.

See, further, Part XX., Sect. 16, *post.*

1832. To accept offer on behalf of debtor—& allow relaxation or withdrawal of sequestration.]—A beneficed clergyman was adjudicated bkpt., & a sequestrator of the profits of the benefice was appointed under 1883 Act, s. 52, & the bishop of the diocese appointed a curate for the performance of the services of the church under Sequestration Act, 1871 (c. 45), during the continuance of the sequestration. The stipend of the curate & a claim for dilapidations more than swallowed up the income from the benefice. An offer of £300 was made to the official receiver on behalf of debtor on condition that he would consent to the relaxation or withdrawal of the sequestration. The offer was supported by three creditors, but was opposed by the other creditor (there being only four creditors), whose proof largely exceeded the proofs of the other three. The registrar authorised the official receiver to accept the offer:—*Held:* the official receiver could agree to the relaxation or withdrawal of the sequestration in consideration of the payment of a sufficient sum, & the registrar had rightly exercised his discretion in authorising him to accept the offer.—*Re* BARRATT (1906), 22 T. L. R. 427, D. C.

1833. To lend his name to third party—On satisfaction as to propriety of proceedings.]—Before lending his name for proceedings under the protection of an indemnity, the official receiver should satisfy himself as to their propriety.—*Re* PICCADILLY CHAMBERS CO. (1894), 1 Mans. 370; 8 R. 617.

1834. —— Consent in writing.]—Although not so prescribed by the rules, it is desirable that the consent of the official receiver to the use of his name by a third party in launching a bkpcy. motion should be in writing.—*Re* FITZGERALD (LORD) (1914), 112 L. T. 86.

1835. —— Right to notice of taxation of costs—Indemnity insufficient.]—A litigant was allowed to take proceedings in the name of the official receiver. They were unsuccessful, & costs were given against the official receiver. The indemnity given by the litigant proved to be insufficient. No notice of taxation was given to the official receiver, & he was unrepresented except by the solr. for the litigant:—*Held:* the bill ought to be remitted for re-taxation.—*Re* DILLON, *Ex p.* OFFICIAL RECEIVER (1903), 88 L. T. 127; 47 Sol. Jo. 300.

To sue or continue actions by bankrupt.]—*See* No. 1796, *ante.*

Right to indemnity.]—*See* Nos. 1836 *et seq.*, *post.*

Duty as to accounts.]—*See* Sect. 4, *post.*

SUB-SECT. 2.—RIGHT TO REMUNERATION—*See* cases *infra.*

SUB-SECT. 3.—RIGHT TO INDEMNITY.

1836. For expenses of custody of estate incurred before annulment.]—The official assignee, on a bkpcy. being annulled, was allowed his expenses of the custody & sale of bkpt.'s estate out of the assets received by him, & petitioning creditor was ordered to pay the amount of such expenses to bkpt., as well as his costs & the costs of the official assignee.—*Re* WOOLHEIM, *Ex p.* WOOLHEIM (1862), 32 L. J. Bcy. 26, L. JJ.

See, further, Part V., Sect. 3, sub-sect. 6, *ante.*

PART VI. SECT. 2 SUB-SECT. 2.

r. *Commission.*]—Where an insolvent's estate is sufficient to pay his creditors in full, leaving a balance in the hands of the official assignee, the ct. will direct interest at 6 per cent. to be paid on such proved or admitted contract debts as expressly or impliedly carry interest as from the date of the filing of the petition, & will allow the official assignee to retain his commission on such sum so paid as interest, directing any balance that may then remain in his hands to be made over to the insolvent.—*Re* MAHOMED MAHMUD SHAH (1886), I. L. R. 13 Calc. 66. —**IND.**

s. —— *At what rate.*]—No scale for the remuneration of the official assignees having been fixed by the proper authority under Jud. (Ireland) (No. 2) Act, 1897, s. 4 (3), their remuneration should be calculated under s. 67 of the Irish 1857 Act, at "such percentage on the amount realised as shall, upon the consideration of the circumstances of each case, appear to be just & reasonable." The Ct. of Appeal refused to take into consideration a scale of remuneration, which had been acted upon for many years in the Ct. of Bkpcy., but which did not appear to be a scale fixed in accordance with the provisions of any statute, & "upon consideration of the circumstances of the case," they reduced the sum allowed.—*Re* ARRANGING DEBTOR, K.'S CASE (1909), 43 I. L. T. 265.—**IR.**

t. —— *When right arises.*]—The right of the official assignee to commission under 11 & 12 Vict., c. 21, s. 19, does not arise until there are in his hands funds realised & available for distribution among the creditors. If at such time the adjudication is annulled, the right to commission subsists.—OFFICIAL ASSIGNEE *v.* RAMALINGA (1884), I. L. R. 8 Mad. 79. —**IND.**

w. —— *On what amount chargeable.*]—Where an order was made directing the official assignee to sell certain immovable properties subject to a mtge.:—*Held:* he was entitled to commission only on the amount coming to the insolvent's estate.—*Re* OFFICIAL ASSIGNEE'S COMMISSION (1909), I. L. R. 36 Calc. 990.—**IND.**

z. —— ——.]—An official assignee is not entitled to commission on assets which have not been realised by him in the bkpcy., excepting assets which he, at the request of the creditors, has handed to bkpt.—*Re* LOW, *Ex p.* LOW (1899), 20 N. S. W. B. 17.—**AUS.**

a. —— —— *Compromise by parties.*]—The official assignee is entitled to commission only on the amount of bkpt.'s estate actually realised by him. A compromise by the parties in the matter of damages awarded by a jury is not a composition within 1883 Act, & he is not entitled to any commission in respect of it.—THOMSON *v.* THOMSON (1892), 11 N. Z. L. R. 483.—**N.Z.**

PART VI. SECT. 2, SUB-SECT. 3.

b. *For expenses incurred for benefit of estate.*]—Where an official assignee has benefited surplus & unrealised assets by expending time & trouble thereon, the ct. may impose as a condition of discharging a sequestration order that the official assignee should be paid for that benefit.—*Re* LOW, *Ex p.* LOW (1899), 20 N. S. W. B. 17.—**AUS.**

c. *For expenses of obtaining possession of a policy—Not after notice of an equitable assignment.*]—*Re* LOWTHER BROAD ESTATE, *Ex p.* WELDON (1893), 12 N. Z. L. R. 666.—**N.Z.**

d. *For expenses as witness.*]—A deputy official assignee may be allowed expenses as a witness in a case in which he is a party.—BAYLY *v.* HUMPHRIES', OFFICIAL ASSIGNEE (1886), 5 N. Z. L. R. 213.—**N.Z.**

Sect. 2.—Rights, duties, and powers of official receiver: Sub-sect. 3. Sects. 3, 4 & 5.]

1837. For expenses incurred in carrying on debtor's business—Proper order where composition approved—Whether entitled to payment before delivering estate—Or to first charge on assets.]—Where the business of debtor is carried on by the official receiver, who makes advances for the purpose, & a composition is sanctioned, the right order is, that the official receiver shall forthwith deliver up possession of debtor's estate to the trustee under the composition, & that the trustee shall reimburse the official receiver out of the first money which comes to his hand from the realisation of the assets. *Semble:* the official receiver is not entitled, as a condition precedent to delivering debtor's estate into the hands of the trustee, to demand payment of the amount spent by him from the trustee, or an undertaking to pay same as a first charge upon the assets.—*Re* TAYLOR, *Ex p.* BOARD OF TRADE (1884), 51 L. T. 711; 1 Morr. 264, D. C.

See, now, 1915 Rules, r. 212.

1838. For all expenses incurred in carrying out his duties—As interim receiver—Notwithstanding deposit to cover expenses.]—The special provisions of 1886 Rules, rr. 170–175, relating to the appointment of the official receiver as "*interim* receiver," & providing for the deposit in advance of a sum for his expenses, do not deprive him of his subsequent right to reimbursement out of his receipts of all expenses incurred by him in carrying out the duties of his office. Such rules apply exclusively to an *interim* receiver, & not to a special manager at all.—*Re* A. B. & Co., [1900] 2 Q. B. 429; 69 L. J. Q. B. 568; 82 L. T. 544; 48 W. R. 485; 44 Sol. Jo. 448; 7 Mans. 268, C. A.

1839. For costs—As respondent on appeal against order setting aside payment by debtor—Costs in both courts—Postponement to appellant's costs.]—An order made by a county ct., on the application of the official receiver, setting aside a payment made by debtor as a fraudulent preference, having been reversed on appeal:—*Held:* the costs of the official receiver, in both cts., must be paid out of debtor's assets, the costs of applts. having priority.—*Re* DALE, *Ex p.* LEICESTERSHIRE BANKING CO. (1884), 14 Q. B. D. 48; 33 W. R. 354, D. C.

1840. —— Of respondent—In unsuccessful motion by official receiver.]—The official receiver, acting as trustee of an estate, being administered in a summary manner under 1883 Act, s. 121, on an unsuccessful motion by him was ordered personally to pay the costs of resp. with liberty to take the costs out of the estate, if any.—*Re* GLANVILLE, *Ex p.* JENKINS (OFFICIAL RECEIVER), HARRIS *v.* HAWKER (1885), 33 W. R. 523; 2 Morr. 71.

1841. —— As party to suit to test validity of bill of sale—For sums paid under indemnity to auctioneers.]—An official receiver, acting as *interim* receiver, instructed auctioneers to pay off a bill of sale given by debtor, & to take an assignment of it to themselves. The trustee sued the auctioneers in order to test the validity of the bill of sale, & the auctioneers brought in the official receiver as third party. The action was dismissed with costs:—*Held:* under the implied indemnity given by the official receiver, the auctioneers were entitled to receive from him the difference between the solr. & client & party & party costs, & the official receiver was entitled to be paid out of the estate his own costs & the amount he had paid under his indemnity.—*Re* WELLS & CROFT, *Ex p.* OFFICIAL RECEIVER (1895), 72 L. T. 359; 11 T. L. R. 300; 2 Mans. 41; 15 R. 169.

See, now, 1915 Rules, r. 326.

SECT. 3.—LIABILITIES OF OFFICIAL RECEIVER.

1842. To debtor—For damage to goods while in his possession—Action must be brought in bankruptcy.]—Any proceeding against a receiver appointed by the ct. of bkpcy. in respect of acts done *virtute officii* must be taken in that ct.

A liquidating debtor commenced an action in the High Ct. of Justice against the receiver in the liquidation, claiming damages done to his goods when in the possession of the receiver:—*Held:* debtor must be personally restrained from instituting any proceedings against the receiver elsewhere than in bkpcy.—*Re* POTTER, *Ex p.* DAY (1883), 48 L. T. 912, D. C.

For statements, omissions & errors in report.]—*See* Sect. 5, *post.*

1843. For omission of creditor from dividend list.]—Where by mistake one of the debts proved was omitted in the dividend list, & the fund was distributed:—*Held:* the official assignee was personally liable to pay the creditor the amount which he would have received had his debt been inserted in the list.—*Re* CAREY, *Ex p.* HALL (1847), De G. 555; 16 L. J. Bcy. 10; 9 L. T. O. S. 393; 11 Jur. 639.

Annotation:—Mentd. *Re* Lee, *Ex p.* Laurence, Mortimore (1862), 6 L. T. 402.

See, further, Part XIII., Sect. 2, *post.*

1844. Stay of execution pending appeal by official receiver—Judgment & costs against official receiver personally—To what court application should be made.]—The official receiver having been ordered by a county ct. judge to pay personally a sum of £50 & costs applied to the Divisional Ct. in Bkpcy. for a stay of execution pending an appeal from the order. No application for a stay had been made to the county ct. judge:—*Held:* (1) a stay ought to be granted pending the hearing of the appeal; (2) an immediate application should be made to the county ct. judge, & if he refused the application, an order granting a stay should be drawn up.—*Re* GREAVES, *Ex p.* OFFICIAL RECEIVER (1889), 5 T. L. R. 698, D. C.

For costs.]—*See* Sect. 6, *post.*

SECT. 4.—ACCOUNTS OF OFFICIAL RECEIVER—WHAT CHARGES ALLOWED.

1845. Accountant's charges—Necessarily incurred.]—On an application for the allowance out of bkpt.'s estate of the expenses of the preparation of the balance-sheet by an accountant:—*Held:* if bkpt. had failed to keep proper books,

1839 i. *For costs—Liability of attaching creditor.*]—Deft. placed a writ of attachment in the hands of pltf., as official assignee under Insolvent Act, 1875, who after the creditors' meeting, gave deft. notice of taxation. The balance of the amount, as taxed by the judge for the costs of the official assignee down to the appointment of the creditors' assignee, deft. promised to pay. In an action brought by pltf. for the amount:—*Held:* he could not recover.—GREENFIELD *v.* YORKE (1881), 3 R. & G. 19; 2 C. L. T. 601.—**CAN.**

PART VI. SECT. 3.

e. *For interest—On proceeds of goods wrongfully retained.*]—Proceedings were taken under 11 & 12 Vict., c. 21, & the proceeds of certain goods claimed by the official assignee paid by the assignee into the Bank of Bengal. In a suit brought in the High Ct. at Calcutta by A. against the official assignee claiming the proceeds of the goods paid into the Insolvent Ct.:—*Held:* on the ct. making a decree in favour of pltf., the High Ct. being a ct. of law & equity, had power to award interest on the amount as against the official assignee.—MILLER *v.* BARLOW (1871), 14 Moo. Ind. App. 209; 20 E. R. 765, P. C.—**IND.**

the ct. would not permit the estate to be put to expense for doing that which bkpt. was bound to have done himself, but if the books had been fairly kept, but the transactions in them were of a very voluminous or involved character, the ct. would make such allowance as the trade assignee & the official assignee should agree upon.—ANON. (1850), 14 L. T. O. S. 402.

1846. Solicitor's charges up to limit authorised by Board of Trade.]—When the official receiver is trustee without a committee of inspection, & is authorised by the Board of Trade to employ a solr., the Board have power to limit the amount of costs to be paid to him, & only the amount so sanctioned will be allowed out of the estate.—*Re* DUNCAN, *Ex p.* OFFICIAL RECEIVER, [1892] 1 Q. B. 879 ; 61 L. J. Q. B. 712 ; 66 L. T. 508 ; 40 W. R. 409 ; 8 T. L. R. 412 ; 36 Sol. Jo. 330 ; 9 Morr. 61, C. A.

Annotations :—**Consd.** *Re* Geiger (1914), 112 L. T. 562, C. A. ; *Re* Yeatman, *Ex p.* Yeatman, [1916] 1 K. B. 780, C. A.

1847. —— **Increase of limit.**]—When the Board of Trade, in sanctioning the employment of a solr. to act for the official receiver in a bkpcy., limit the amount of the costs to be incurred, they are at liberty to extend such limit, even after completion of the work on which the solrs. have been employed.—*Re* LAWRANCE & PORTER, *Ex p.* OFFICIAL RECEIVER (1910), 55 Sol. Jo. 94.

1848. Expenses incurred in protecting estate—By petitioning creditor.]—Where a petitioning creditor incurs costs in trying to protect the estate, & the official receiver comes to the conclusion that the estate has thereby received substantial benefit, such costs should, in general, be allowed & paid to petitioning creditor.—*Re* JOHNSTONE, *Ex p.* ANGIER (1884), 32 W. R. 1001 ; 1 Morr. 213.

1849. —— **By party employed to prepare statement of affairs.**]—In June, 1886, debtor executed an assignment for the benefit of his creditors, under which appct. was employed to prepare a statement of affairs, &, it appearing that the landlord was threatening a distress for rent, appct., upon the instructions of the creditors, paid the amount due. In July, 1886, a receiving order was made against debtor, & the official receiver declined to repay the money so advanced by appct. for the benefit of the creditors without an order of the ct. :—*Held :* in the circumstances, & looking to the fact that a majority of the creditors in number & value were of opinion that the payment made by appct. was beneficial & should be refunded, repayment ought to be allowed less the official receiver's costs.—*Re* AYSHFORD, *Ex p.* LOVERING (1887), 35 W. R. 652 ; 3 T. L. R. 604 ; 4 Morr. 164.

Annotation :—**Distd.** *Re* Craig, *Ex p.* Hinchcliffe, [1916] 2 K. B. 497.

1850. Costs of appellant against order setting aside payment by debtor—Appeal successful.]—An order made by a county ct., on the application of the official receiver, setting aside a payment made by debtor as a fraudulent preference having been reversed on appeal :—*Held :* the costs of applts. in both cts. must be paid out of the estate in priority to the official receiver's costs.—*Re* DALE, *Ex p.* LEICESTERSHIRE BANKING CO. (1884), 14 Q. B. D. 48 ; 33 W. R. 354, D. C.

See, further, Sect. 6, *post.*

SECT. 5.—REPORT BY OFFICIAL RECEIVER.

1851. General nature of.]—The report (of the official receiver) is to be considered as, & it has the character & the attributes of, a report by an officer of the ct., by a master, or any person, to whom the ct. delegates the inquiry into a very complicated matter, & the report of the receiver stands in the same position with regard to this ct. as any of those reports or certificates stand. (FIELD, J.).—*Re* COOK, *Ex p.* COOK (1889), 61 L. T. 335 ; 6 Morr. 224, D. C.

Annotation :—**Apprvd.** *Re* Bottomley, *Ex p.* Bottomley (1893), 10 Morr. 262.

1852. —— **Mere ex parte statement—May be challenged by bankrupt.**]—The report of the official receiver is merely an *ex p.* statement by him, which may be challenged by bkpt. himself, & even if not so challenged, will, if necessary, be examined by the ct., & the ct. will decline to act on the suggestions made, unless substantiated by evidence, on which bkpt. will have the opportunity of cross-examination.—*Re* HOOLEY, *Ex p.* HOOLEY (1899), 79 L. T. 706 ; 6 Mans. 44.

1853. —— **Absolutely privileged.**]—A report made by an official receiver to the ct. is absolutely privileged.—BOTTOMLEY *v.* BROUGHAM, [1908] 1 K. B. 584 ; 77 L. J. K. B. 311 ; 99 L. T. 111 ; 24 T. L. R. 262 ; 52 Sol. Jo. 225.

Annotations :—**Apprvd.** Burr *v.* Smith, [1909] 2 K. B. 306, C. A. **Refd.** *Re* Tweddle, [1910] 2 K. B. 697, C. A. ; Co-Partnership Farms *v.* Harvey-Smith, [1918] 2 K. B. 405.

1854. —— ——.]—No action for libel will lie against an official receiver in respect of statements contained in his report on matters within 1890 Act, s. 29 (2).—BURR *v.* SMITH, [1909] 2 K. B. 306 ; 78 L. J. K. B. 889 ; 101 L. T. 194 ; 25 T. L. R. 542 ; 53 Sol. Jo. 502 ; 16 Mans. 210, C. A.

Annotation :—**Refd.** *Re* Tweddle, [1910] 2 K. B. 697, C. A.

1855. Duty of court in regard to—Duty not to refuse summary administration—On report that assets less than £300.]—Where the official receiver reports to the ct. under 1883 Act, s. 121, that the property of debtor is not likely to exceed in value £300, such report is *primâ facie* to be acted upon, & the ct. ought not, at any rate without some definite reason, to refuse to make an order for summary administration.—*Re* HORNIBLOW, *Ex p.* OFFICIAL RECEIVER (1885), 53 L. T. 155 ; 2 Morr. 124.

1856. —— **Duty to consider & file.**]—When the official receiver in bkpcy. has reported to the ct. that bkpt. has committed offences under Bkpcy. Acts, it is the duty of the ct. to consider the report, & the report ought to be filed.—*Re* DUNN, *Ex p.* SENIOR OFFICIAL RECEIVER, [1902] 1 K. B. 107 ; 71 L. J. K. B. 83 ; 85 L. T. 567 ; 50 W. R. 183 ; 18 T. L. R. 67 ; 46 Sol. Jo. 68 ; 9 Mans. 1, C. A.

Prosecution of bankrupt for offences under Bkpcy. Acts, *see* Part XXII., *post.*

1857. What report should contain—Matters arising out of accounts—Reasons for approval—Judicial conclusions from bankrupt's conduct.]—Official assignees & accountants in their reports ought to confine themselves to the facts & matters arising out of the accounts & their reasons for approval or disapproval thereof, & they ought not to mix up portions of bkpt.'s conduct with such reports, nor express any judicial conclusions thereon.—*Re* FRYER, *Ex p.* FRYER (1864), 10 L. T. 73 ; 12 W. R. 583.

1858. —— **Definite statements—Mere opinions as to value of property.**]—Under 1890 Act, s. 8 (5) the official receiver's report is made *primâ facie* evidence of the value of the assets ; it must, however, contain a definite statement, & a mere expression of opinion that the value of his assets is uncertain is not evidence on which the ct. can act.—*Re* VAN LAUN, *Ex p.* INTERNATIONAL

Sect. 5.—Report by official receiver. Sects. 6 & 7.]

ASSETS CO., LTD. (1907), 23 T. L. R. 371; 14 Mans. 281, C. A.

1859. —— Facts & conduct enabling court to apply 1890 Act, s. 3 (7)—Notwithstanding favourable report on proposed arrangement.]—The fact that the official receiver in his report to the creditors under 1890 Act, s. 3 (2), has stated that, in his opinion, the proposal of debtor is reasonable & calculated to benefit the creditors, is no reason why in his report to the ct. under s. 3 (7) he should abstain from bringing forward the facts & conduct which he thinks the ct. ought to have before it in order to enable the ct. to apply the sect. It is the duty of the official receiver to report fully to the ct.; & that duty is in no respect limited or diminished by the fact that he approved the scheme & made a report to the creditors to that effect.—*Re* BOTTOMLEY, *Ex p.* BOTTOMLEY (1893), 10 Morr. 262.

Annotation:—**Mentd.** *Re* Webb, *Ex p.* Board of Trade, [1914] 3 K. B. 387, C. A.

1860. Report as evidence—Primâ facie evidence of statements contained in it.]—The report of the official receiver is *primâ facie* evidence of the statements contained in it.—*Re* WALLACE, *Ex p.* CAMPBELL (1885), 15 Q. B. D. 213; 54 L. J. Q. B. 382; 53 L. T. 208; 2 Morr. 167, C. A.

1861. —— —— Inquiry by court as to who prepared same.]—The official receiver's report is *primâ facie* evidence of its contents, & the ct. will not go behind it, or inquire by whom it was in fact prepared.—*Re* BULL (1885), 2 Morr. 59.

1862. —— —— Unless bankrupt disproves same.]—It stands that statements made in the report are accurate, unless bkpt. is able, by reference to the evidence, or by reference to proofs which he is able to furnish, to establish that those things are without foundation.—*Re* COOK, *Ex p.* COOK (1889), 61 L. T. 335; 6 Morr. 224, D. C.

Annotation:—**Consd.** *Re* Bottomley, *Ex p.* Bottomley (1893), 10 Morr. 262.

1863. —— —— Report of officer of court—No interference allowed in preparation of report.]—The report of the official receiver is *primâ facie* evidence of the facts therein contained, only because it is presumed to be the personal report of an officer of the ct., to whom a complicated matter has been referred, & the ct. will not allow any interference by any person whatever with the official receiver in his preparation of that document.—*Re* BOTTOMLEY, *Ex p.* BOTTOMLEY (1893), 10 Morr. 262.

Annotation:—**Mentd.** *Re* Webb, *Ex p.* Board of Trade, [1914] 3 K. B., C. A.

1864. —— Not conclusive—No notice of intention to dispute—Right of court to look into evidence.]—*Semble:* the report of the official receiver is not conclusive upon the ct., even though bkpt. has failed to give notice of his intention to dispute any of the statements therein contained, but the ct. is entitled to look into the evidence on which the findings in the report are based, & is not bound to act upon it unless the facts alleged are proved.—*Re* OSWELL, *Ex p.* BOARD OF TRADE (1892), 9 Morr. 202, D. C.

1865. Report disputed—Notice of intention to dispute—Must specify disputed statements.]—Where the official receiver's report contains detailed statements as to bkpt.'s conduct & affairs, & also the conclusions at which the official receiver has arrived, namely that bkpt. has been guilty of an offence under 1890 Act, s. 8 (3), bkpt. must in his notice under 1886 & 1890 Rules, r. 238a, specify the statements which he intends to dispute; it is not sufficient to give notice generally of his intention to dispute the conclusions.—*Re* WOOLF (1906), 22 T. L. R. 501.

1866. ——Appearing to defend report.]—An official receiver is not justified in appearing merely to defend his report.—*Re* REED & BOWEN, *Ex p.* REED & BOWEN (1886), 17 Q. B. D. 244; 55 L. J. Q. B. 244; 34 W. R. 493; 2 T. L. R. 458; 3 Morr. 90, C. A.

Annotation:—**Mentd.** *Re* Morris, James *v.* London & County Banking Co. (1899), 47 W. R. 324, C. A.

1867. Error in report—Liability to make good results of same.]—On an application to the ct. to approve a composition, the official receiver reported that he had a sufficient sum in his hands for payment thereof, such report being founded on the estimate given by debtor in his statement of affairs, which subsequently proved to be wrong. An order having been asked for against the official receiver personally to make up the required sum:—*Held:* appcts. were not entitled to such order.—*Re* WEBSTER, *Ex p.* FOSTER & CO. (1886), 3 Morr. 132.

SECT. 6.—COSTS OF OFFICIAL RECEIVER.

1868. Appearing by separate counsel—Petition by mortgagee for sale of mortgaged property.]—A petitioner in the matter of a petition for the sale of some property, which had been mortgaged to him by bkpt., employed the solr. who acted for the creditors' assignees. The official assignee appeared at the hearing of the petition by separate counsel:—*Held:* the official assignee was, in the circumstances, entitled to the costs of such separate appearance.—*Re* JONES, *Ex p.* BROMAGE (1846), De G. 375; 16 L. J. Bcy. 13; 10 Jur. 974, Ct. of R.

1869. Appearing on being served with petition.]—An official assignee, who is served with the petition, need not appear, unless there be something in it

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PART VI. SECT. 6.

f. *Claim to avoid bill of sale—Misleading statement by bill of sale holder.*]—On the hearing of the original motion that an unregistered bill of sale given over the whole of bkpt.'s property was void no order was made as to costs, on the ground that the bill of sale holder by his evidence given on examination under Bkpcy. Act, 1887, s. 30, had misled the official assignee. On appeal by the official assignee:—*Held:* the official assignee was not entitled to the costs of the original motion.—*Re* COOK, *Ex p.* OFFICIAL ASSIGNEE & MORRIS (1893), 14 N. S. W. B. 77.—**AUS.**

g. *Costs of successful appeal by bankrupt against order refusing discharge.*]—When a bkpt. successfully appealed against the decision of the judge in bkpcy., reversing a decision of the registrar by which bkpt. had been granted a certificate of discharge the official assignee was ordered to pay the costs of the appeal.—SCOTT FELL *v.* LLOYD (1911), 13 C. L. R. 230.—**AUS.**

h. *Costs occasioned by irregular conduct.*]—A., being tenant of B., gave to C. a bill of sale over his goods, who seized same. Subsequently B. put in a distress for rent due. A. then voluntarily sequestrated his estate, & by arrangement between C. & the official assignee the latter sold the goods, paid the amount of B.'s distress into a bank, & the overplus, less commission, to C.:—*Held:* to entitle the official assignee to claim the protection of Insolvency Act, 1871, s. 89, he should have paid the whole of the proceeds into the bank, & official assignee ordered to pay all B.'s costs in the Ct. of Insolvency & on appeal.—*Re* SWEENEY, *Ex p.* O'DIGGINS (1878), 4 V. L. R. 1.—**AUS.**

k. *Costs of unsuccessful motion.*]—A sale of property forming portion of the estate of certain insolvent debtors having been authorised by the ct., the official assignee moved to set it aside, relying in support of his application on affidavits which had been filed in ct. & in which the deponents alleged that the property was worth a great deal more than the price at which the sale had been authorised. The ct. having dismissed the motion, & ordered the deponents to pay the costs of the official assignee & the purchasers:—*Held:* the deponents could not be made liable for costs, but the official assignee should be made liable for the costs of such an unsuccessful application.—RAMANNA NAIDU *v.* BRAHMAYYA CHETTI (1899), I. L. R. 23 Mad. 26.—**IND.**

affecting him personally; if he does, he will not be paid his costs.—*Re* GOODWIN, *Ex p.* HENDRIE (1836), 3 Mont. & A. 20; 2 Deac. 76; 6 L. J. Bcy. 1, Ct. of R.

1870. Appearing on appeal—To consent to reversal of order.]—The costs of an official assignee, who appears by counsel on the hearing of an appeal merely to consent to the reversal of the order, ought not to be allowed out of the estate.—*Re* GRIFFITHS, *Re* GRIFFITHS & THORNEYCROFT, *Ex p.* CHURCHILL (1862), 3 De G. J. & Sm. 388; 1 New Rep. 140; 32 L. J. Bcy. 48; 7 L. T. 408; 9 Jur. N. S. 33; 46 E. R. 685, L. C.

1871. —— No special circumstances to be brought before court.]—If the official receiver is served with notice of appeal, &, although there are no special circumstances to be brought before the ct., appears, he will not have his costs of such appearance.—*Re* DIXON, *Ex p.* DIXON (1884), 13 Q. B. D. 118; 53 L. J. Ch. 769; 50 L. T. 414; 32 W. R. 837; 1 Morr. 98, C. A.

Annotations:—**Consd.** *Re* Webber, *Ex p.* Webber (1889), 24 Q. B. D. 313, C. A. **Mentd.** *Re* Watson & Smith, *Ex p.* Oram (1885), 52 L. T. 785, C. A.

1872. *S. P. Re* REED, *Ex p.* REED (1886), 17 Q. B. D. 244; 55 L. J. Q. B. 244; 34 W. R. 493; 2 T. L. R. 458; 3 Morr. 90, C. A.

Annotations:—**Mentd.** *Re* Hulsekoff & Marsden (1888), 4 T. L. R. 515; *Re* Morris, James *v.* London & County Banking Co. (1899), 47 W. R. 324, C. A.

1873. Application for opinion of court—As to whether transaction void as fraudulent preference—Transaction upheld.]—Where the official receiver asks the opinion of the ct. as to whether a conveyance is void as a fraudulent preference & the ct. upholds the transaction, he is nevertheless entitled to his costs.—*Re* WILKINSON, *Ex p.* OFFICIAL RECEIVER (1884), 1 Morr. 65.

1874. Opposing application by trustee to set aside compromise made by official receiver—Delay in attendance of official receiver.]—Where the official receiver successfully opposed an application by the trustee in bkpcy. to set aside a compromise made by the former, but until compelled to come to the ct. & say he had the necessary permission from the Board of Trade to enter into the compromise, kept away for some reason or another, so that the ct. were obliged in consequence to sit for two days to hear arguments which might have been avoided & to give adjournments for his attendance, the application was dismissed, but without costs.—*Re* JOHNSTONE, *Ex p.* SINGLETON (1885), 2 Morr. 206, D. C.

Annotations:—**Refd.** *Re* Duncan, *Ex p.* Duncan, [1892] 1 Q. B. 331. **Mentd.** *Re* Duncan, *Ex p.* Official Receiver, [1892] 1 Q. B. 879, C. A.

1875. Claim to set aside transaction as fraudulent preference—Same position as any unsuccessful trustee.]—The official receiver, acting as trustee of an estate, being administered in a summary manner under 1883 Act, s. 121, on an unsuccessful motion by him to set aside a transaction as a fraudulent preference was ordered personally to pay the costs of resps., the position of the official receiver being the same as that of any other unsuccessful trustee.—*Re* GLANVILLE, *Ex p.* JENKINS (OFFICIAL RECEIVER), HARRIS *v.* HAWKER (1885), 33 W. R. 523; 2 Morr. 71.

1876. Opposing application by trustee under assignment for creditors—For repayment of sum expended for benefit of estate.]—In June, 1886, debtor executed an assignment for the benefit of his creditors, under which appct. was employed to prepare a statement of affairs, &, it appearing that the landlord was threatening a distress for rent, appct., upon the instructions of the creditors, paid the amount due. In July, 1886, a receiving order was made against debtor, & the official receiver declined to repay the money so advanced by appct. for the benefit of the creditors without an order of the ct.:—*Held:* in the circumstances, & looking to the fact that a majority of the creditors in number & value were of opinion that the payment made by appct. was beneficial & should be refunded, repayment ought to be allowed, but the official receiver was entitled to deduct his costs of the hearing from the amount. —*Re* AYSHFORD, *Ex p.* LOVERING (1887), 35 W. R. 652; 3 T. L. R. 604; 4 Morr. 164.

Annotation:—**Distd.** *Re* Craig, *Ex p.* Hinchcliffe, [1916] 2 K. B. 497.

1877. Appeal against refusal of motion for order on official receiver to give up property—Official receiver giving notice of abandonment of claim before motion.]—On intimation of a receiving order against debtor, a claim was made by applt. to certain furniture in debtor's possession, an *interim* injunction being obtained restraining the official receiver from selling the goods so claimed. Notice of motion was subsequently served on the official receiver requiring him to give up the furniture in question, but previous to the motion being heard a further claim to the goods was made by a third party, & notice was thereupon given to applt. by the official receiver that he had abandoned all claims. At the hearing of applt.'s motion the official receiver did not appear, but the county ct. judge declined to make any order. Applt. having successfully appealed:—*Held:* the official receiver must pay the costs of applt. down to the notice of withdrawal, & must also pay the costs of the appeal. —*Re* GALEY, *Ex p.* CUNDY (1890), 7 Morr. 253, D. C.

1878. Application for adjudication against alleged partner—Of firm against which receiving order made.]—A receiving order having been made against a firm, the official receiver applied for an order of adjudication against an alleged partner. The registrar dismissed the application & made a personal order for costs against the official receiver:—*Held:* the official receiver in making the application was acting, not in discharge of any statutory duty, but merely in exercise of his powers under 1883 Act, & the registrar had jurisdiction to make the order, & had not improperly exercised that jurisdiction.—*Re* WILLIAMS & Co., *Ex p.* OFFICIAL RECEIVER, [1913] 2 K. B. 88; 82 L. J. K. B. 459; 108 L. T. 585; 29 T. L. R. 243; 57 Sol. Jo. 285; 20 Mans. 21, C. A.

See, also, COMPANIES.

1879. Costs in relation to appeal from decision of official receiver rejecting proof.]—*Held:* 1915 Rules, r. 263, provided that the official receiver should in no case be personally liable for costs in relation to an appeal from his decision rejecting any proof wholly or in part.—*Re* HUNTLY (MARQUIS), *Ex p.* GOLDSTEIN (1917), 87 L. J. K. B. 735; 117 L. T. 792; [1917] H. B. R. 209, D. C.

SECT. 7.—SPECIAL MANAGER.

Power to appoint.]—*See* Nos. 1817, 1818, *ante.*

1880. Right to reimbursement & indemnity—Appointment by official receiver acting as interim receiver—Petition eventually dismissed.]—Where, during the pendency of a petition ultimately dismissed without any receiving order having been made upon it, the official receiver, on being appointed *interim* receiver, appoints, in exercise of his power, a special manager of alleged debtor's business, the special manager is entitled to be reimbursed out of his receipts from

Sect. 7.—Special manager. Sect. 8. Part VII. Sect. 1.]

the business his expenses, including remuneration, properly incurred by him in carrying it on until the dismissal of the petition.

The fact that the special manager has, in such circumstances, been in possession of & carrying on the business does not entitle alleged debtor, on the petition being dismissed, to treat him as a wrong-doer nor to deprive him of his right to protection as an officer of the ct.; for, as the ct. has jurisdiction to entertain a petition against an alleged debtor, an order appointing the official receiver as *interim* receiver during the pendency of the petition, with the consequent right of appointing a special manager, continues valid until it is set aside, & thus imparts validity to everything done under it, even though it may turn out to have been erroneously made.—*Re* A. B. & Co., [1900] 2 Q. B. 429; 69 L. J. Q. B. 568; 82 L. T. 544; 48 W. R. 485; 16 T. L. R. 365; 44 Sol. Jo. 448; 7 Mans. 268, C. A.

1881. Order for accounts against.]—The ct. has jurisdiction under 1883 Act, s. 102 (5) to make a four-day order for accounts against a special manager of debtor's business appointed by an official receiver under s. 12.—*Re* JONES, *Ex p.* OFFICIAL RECEIVER, [1908] 1 K. B. 204; 77 L. J. K. B. 139; 98 L. T. 56; 52 Sol. Jo. 116; 15 Mans. 31.

SECT. 8.—INTERIM RECEIVER.

1882. Trustee for all creditors—Liability for allowing payment—To creditor suing out debtor's summons.]—A creditor sued out a debtor's summons, & the debt not having been paid or secured, he presented a petition for adjudication, & got a receiver appointed. Soon afterwards debtor, with the consent of the receiver, paid part of the debt to the creditor, who withdrew the petition for adjudication. Debtor had been adjudged bkpt. on the petition of another creditor after the part payment:—*Held:* the receiver was a trustee for all the creditors, & had no right to permit the payment to be made to the creditor who sued out debtor's summons, & the money must be paid over to the trustee in the bkpcy.—*Re* POWIS, *Ex p.* JAY (1873), 9 Ch. App. 133; 43 L. J. Bcy. 54; 29 L. T. 854; 22 W. R. 175, L. C. & L. J.

Annotations:—**Expld.** *Re* Whalley, *Ex p.* Boss (1874), L. R. 18 Eq. 375. **Consd.** *Re* Pellew, *Ex p.* Furber (1877), 6 Ch. D. 181. **Distd.** *Re* Moojen, *Ex p.* Bouchard (1879), 12 Ch. D. 26, C. A. **Refd.** *Re* Bonham & M'Donnell, *Ex p.* Postmaster-General (1879), 48 L. J. Bcy. 84, C. A.; *Re* McHenry, *Ex p.* McHenry (1883), 24 Ch. D. 35, C. A. **Mentd.** *Re* Hawes, *Ex p.* Howell (1874), 29 L. T. 859. L. JJ.; Furber *v.* Finlayson (1876), 24 W. R. 370.

1883. Agent for creditors—Not agent for mortgagee—Liability for damages to premises.]—A petition for liquidation having been presented, a receiver was appointed & ordered to take possession of the fixtures & stock-in-trade at debtor's brewery, & an injunction was granted restraining a mtgee., who was in possession of the brewery under a bill of sale, from intermeddling with the chattels in the brewery. When the injunction was granted the receiver & debtor gave undertakings to be answerable for damages. The mtgee. afterwards established his title to the brewery & the chattels in it, & applied for an inquiry as to damages sustained by the occupation of the receiver:—*Held:* the receiver must be treated as the agent of the creditors, & not of the mtgee., & could not charge the mtgee. with the expense of carrying on the business, & he was liable, under his undertaking, for damages for deterioration of the property, & for rent for use & occupation of the fixtures & stock-in-trade, & an inquiry must be directed accordingly.—*Re* JOYCE, *Ex p.* WARREN (1875), 10 Ch. App. 222; 32 L. T. 288; 23 W. R. 401, L. JJ.

1884. Right to reimbursement & indemnity—For money advanced with interest—To carry on business—Personal order against trustee.]—Under 1871 Rules, r. 5, the charges of a receiver & manager of a business for disbursements out of pocket, *e.g.*, travelling expenses & salaries of assistants, are liable to taxation.

A receiver & manager of a business, who desires to advance money of his own for the purposes of the business, may, before doing so, apply to the ct. for its authority, & the ct. will, as a general rule, allow him interest at 5 per cent. on the amount which it authorises him to advance, & will give him a charge on debtor's assets for the advance & the interest.

If the receiver & manager advances money without such a previous authority, he is entitled to an indemnity out of the assets, but he cannot obtain a personal order against the trustee for payment.—*Re* BUSHELL, *Ex p.* IZARD (1883), 23 Ch. D. 75; 52 L. J. Ch. 678; 48 L. T. 751; 31 W. R. 418, C. A.

Annotation:—**Apld.** Strapp *v.* Bull, Shaw *v.* London School Board, [1895] 2 Ch. 1, C. A.

1885. Right to appeal—Receiver nominated by creditors—Different person nominated by court.]—One receiver had been nominated by a majority of the creditors & another had been appointed by the ct. The former receiver appealed to obtain possession of debtor's effects:—*Held:* (1) the receiver had no right to appeal, as his only interest in the matter was his percentage; (2) it might have been otherwise had a creditor appealed.—*Re* JOSEPH, *Ex p.* COOPER (1877), 6 Ch. D. 255; 46 L. J. Bcy. 123; 37 L. T. 283; 25 W. R. 860, C. A.

Official receiver acting as interim receiver.]—*See* Nos. 1810, 1815, 1818, 1838, 1841, 1880, *ante*.

PART VI. SECT. 8.

l. *Court can review acts of.*]—*Held:* the ct. has inherent authority to review the conduct of a receiver appointed by it & to make an appropriate order so that a stranger may not be prejudiced by any act of the receiver in excess of his authority; it was competent to such stranger to bring any such act of the receiver to the notice of the ct. & it was the duty of the ct. to inquire into it.—HANSESHUR GHOSH *v.* RAKHAL DAS GHOSH (1913), 18 C. W. R. 366.—**IND.**

m. *Removal of.*]—On Mar. 3, 1841, petitioner obtained a conditional order for a receiver, under 5 & 6 Will. 4, c. 55, on a judgment entered in 1828 by warrant of attorney, against resp., who was then a trader, & against whom a commission of bkpcy. issued within two months after the conditional order in that matter was made absolute, on motion of the assignee:—*Held:* the case was within Bkpcy. Act, 1836 (c. 14), s. 125, & the receiver should be removed.—BURT *v.* BERNARD (1842), 4 I. Eq. R. 328.—**IR.**

1884 i. *Right to reimbursement & indemnity—Fee to counsel to approve deed.*]—The provisional assignee of insolvent deft. is not entitled to a fee for counsel to approve of a deed, which the assignee is called upon to execute under a decree.—WALLACE *v.* MACAN (1842), Fl. & K. 554.—**IR.**

Part VII.—The Trustee and Committee of Inspection.

SECT. 1.—GENERAL NATURE OF OFFICE AND POSITION OF TRUSTEE.

1886. Nature of office same as that of assignee—Effect of 1869 Act.]—Although the title "assignee" was changed to "trustee" by 1869 Act, there was no substantial change in the nature of the office, & the relative position of bkpt. & his trustee is the same as that which formerly existed between bkpt. & his assignee.—*Re* LEADBITTER (1878), 10 Ch. D. 388; 48 L. J. Ch. 242; 39 L. T. 286; 27 W. R. 267, C. A.

Annotations:—**Consd.** Bird *v.* Philpott, [1900] 1 Ch. 822; *Re* Jones & Everett, [1904] 2 Ch. 303.

1887. Officer of court—Duty to carry out court's orders—Inadequacy of assets.]—Assignees, being officers of the ct., are bound to carry out its orders, & cannot excuse themselves from responsibility by reason of the inadequacy of the assets.—*Re* ENGLEHEART (1864), 12 W. R. 387.

1888. —— Powers of court over.]—The Ct. of Bkpcy., as against assignees, or as against trustees, who are placed in the situation of assignees by 1861 Act, has extensive power as to controlling, regulating, &, if necessary punishing those assignees, who are officers of the ct., as to their conduct in the ordinary administration of assets.—MARTIN *v.* POWNING (1868), 4 Ch. App. 356, n.; 38 L. J. Ch. 212; 19 L. T. 474; 17 W. R. 250; *revsd.* on another point (1869), 4 Ch. App. 356, L. JJ.

Annotations:—**Mentd.** Hood *v.* N. E. Ry. Co. (1870), L. R. 11 Eq. 116; Stone *v.* Thomas (1870), 5 Ch. App. 219, L. C.; Graham *v.* Winterson (1873), L. R. 16 Eq. 243; Jenney *v.* Bell (1876), 2 Ch. D. 547; Eyre *v.* Smith (1877), 2 C. P. D. 435, C. A.

1889. —— Duty to return money paid under error of law.]—An execution creditor, upon the authority of a decision of the ct. which was afterwards reversed, paid a sum of money to the trustee under the bkpcy.:—*Held:* though this was a voluntary payment made under a mistake of law, yet the trustee, being an officer of the ct., was bound to repay the money to the person properly entitled to it.—*Re* CONDON, *Ex p.* JAMES (1874), 9 Ch. App. 609; 43 L. J. Bcy. 107; 30 L. T. 773; 22 W. R. 937, L. JJ.

Annotations:—**Distd.** *Re* Shackleton, *Ex p.* Whittaker (1875), 10 Ch. App. 447, n. **Consd.** *Re* McHenry, *Ex p.* McHenry (1883), 24 Ch. D. 35, C. A. **Folld.** *Re* Carnac, *Ex p.* Simmonds (1885), 16 Q. B. D. 308, C. A. **Apld.** *Re* Brown, Dixon *v.* Brown (1886), 32 Ch. D 597. **Consd.** *Re* Opera, [1891] 2 Ch. 154. **Expld.** Mercer *v.* Vans Colina (1897), 4 Mans. 363. **Consd.** *Re* Rhoades, *Ex p.* Rhoades, [1899] 2 Q. B. 347, C. A.; Hand *v.* Blow, [1901] 2 Ch. 721, C. A. **Distd.** *Re* Griffiths Cycle Corpn., Dunlop Pneumatic Tyre Co. *v.* Griffiths Cycle Corpn. (1901), 85 L. T. 675. **Apld.** *Re* Tyler, *Ex p.* Official Receiver, [1907] 1 K. B. 865, C. A. **Distd.** *Re* Hall, *Ex p.* Official Receiver, [1907] 1 K. B. 875, C. A. **Consd.** Tapster *v.* Ward (1909), 101 L. T. 503, C. A.; Wells *v.* Wells, [1914] P. 157, C. A.; *Re* Craig, *Ex p.* Hinchcliffe, [1916] 2 K. B. 497. **Apld.** *Re* Thellusson, *Ex p.* Abdy, [1919] 2 K. B. 735, C. A. **Refd.** *Re* Rhoades, *Ex p.* Rhoades, [1899] 1 Q. B. 905. **Mentd.** Crew *v.* Terry (1877), 2 C. P. D. 403; *Re* Collie, *Ex p.* Adamson (1878), 8 Ch. D. 807, C. A.; *Re* Ash (1913), 110 L. T. 48; *Re* Stokes, *Ex p.* Mellish, [1919] 2 K. B. 256.

1890. —— ——.]—The ordinary rule as between litigant parties, that money paid under a mistake of law cannot be recovered, does not apply to a payment made under such a mistake to a trustee in bkpcy. The trustee being an officer of the ct., the ct., when the mistake is discovered, will direct him to refund the money, if it is still in his hands; & if it has been applied in the payment of dividends to the creditors under the bkpcy., the ct. will direct the trustee to repay it out of other money coming to his hands, & applicable to the payment of dividends to the creditors.—*Re* CARNAC, *Ex p.* SIMMONDS (1885), 16 Q. B. D. 308; 54 L. T. 439; 34 W. R. 421; *sub nom. Re* RIVETT-CARNAC, *Ex p.* SIMMONDS, 55 L. J. Q. B. 74; 2 T. L. R. 18, C. A.

Annotations:—**Apld.** *Re* Brown, Dixon *v.* Brown (1886), 32 Ch. D. 597; *Re* Tyler, *Ex p.* Official Receiver, [1907] 1 K. B. 865, C. A. **Consd.** Wells *v.* Wells, [1914] P. 157, C. A. **Apld.** *Re* Thellusson, *Ex p.* Abdy, [1919] 2 K. B. 735, C. A.

1891. —— ——.]—A testator devised real estate to his nine children *nominatim* as tenants in common, giving a power to three of them to sell the whole to avoid the difficulties of partition. W., one of the three, conducted certain sales under the power, retained more than his share of the purchase-money, & went into liquidation. Further sales were effected, & out of the proceeds a further sum was paid to W.'s trustee in liquidation in respect of, & in excess of, his share:—*Held:* the payment to W.'s trustee in liquidation was made in mistake of law, & must be refunded by such trustee.—*Re* BROWN, DIXON *v.* BROWN (1886), 32 Ch. D. 597; 55 L. J. Ch. 556; 54 L. T. 789.

Annotations:—**Consd.** Wells *v.* Wells, [1914] P. 157, C. A. **Mentd.** *Re* Griffiths Cycle Corpn., Dunlop Pneumatic Tyre Co. *v.* Griffiths Cycle Corpn. (1901), 85 L. T. 675.

1892. —— Duty to return money under mistake of fact.]—A stockbroker applied to be & was annually re-elected a member of the Stock Exchange up to & including the year beginning Mar. 25, 1914. On July 29, 1914, he made a declaration in writing, in the firm name under which he carried on business, of his inability to comply with his bargains, & on the same day he was "hammered," *i.e.*, publicly declared a defaulter, & the official assignee proceeded to collect his assets in accordance with the rules & regulations of the Stock Exchange. On Nov. 7, or more than three months after the default, a petition in bkpcy. was presented against debtor, & a receiving order was subsequently made thereon. In 1915, the official assignee mistakenly thinking that the petition had been presented on Oct. 27, 1914, handed over to the trustee £6,869 14*s.* 10*d.* received since the default. On discovering the mistake the official assignee brought a motion against the trustee to recover the money:—*Held:* the assignment to the official assignee was not void as a fraud against the policy of the bkpcy. laws, & the money would have been recoverable on the ground of mistake, if the deed of arrangement constituted had been duly registered as required by law.—*Re* HALSTEAD, *Ex p.* RICHARDSON, [1917] 1 K. B. 695; 86 L. J. K. B. 621; 116 L. T. 386; 33 T. L. R. 191; [1917] H. B. R. 60, C. A.

1893. —— ——.]—In Oct., 1918, a bkpcy. notice was served on debtor, & on Jan. 2, 1919, a

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PART VII. SECT. 1.

1888 i. *Officer of court—Powers of court over.*]—The power given to the judge by 1864 Act, s. 4 (16), to control the assignee, is in the nature of giving him personal directions as to his duties, enforceable by imprisonment on default, but the judge has no power to enforce his orders by judgment & execution, though he might possibly compel an assignee to pay costs incurred by his disobedience, by making it a condition that he should pay them before he could be considered purged of his contempt.—*Re* CLEGHORN & MUNN, 2 C. L. J. 133.—**CAN.**

a. *Under 3 & 4 Vict. c. 107.*]—*Held:* the provisions of 3 Geo. 4, c. 124, s. 16, which vested the estate of an insolvent in the new assignee by relation to the time of the first assignment, were not continued by 3 & 4 Vict. c. 107.—M'KEON *v.* SMITH (1843), 5 I. L. R. 231.—**IR.**

b. *Whether "purchaser" within Acts for redocketing or registering judgments.*]—The assignee of an insolvent is not a purchaser within the above Acts.—BAYLEE *v.* BROWNE (1847), 10 I. Eq. R. 180.—**IR.**

Sect. 1.—*General nature of office and position of trustee. Sect.* 2: *Sub-sects.* 1 & 2.]

receiving order was, without his knowledge, made against him. On the following day appct., who was also ignorant of the receiving order having been made, or that debtor had committed an act of bkpcy. & a bkpcy. petition had been presented against him, lent debtor a sum of money. At the time the loan was made, debtor knew that the petition had been set down & that the hearing had been fixed for the preceding day. He had consulted his solrs., but, as he did not provide them with sufficient funds, they did not appear at the hearing of the petition. On an application by appct. that the loan transaction might be declared void & the official receiver, as the trustee of the property of debtor, ordered to repay to appct. the balance of the loan remaining in his hands:—*Held:* (1) the Ct. in Bkpcy. ought not to allow its officer to insist upon a rule of law or equity in the administration of an estate in bkpcy. under the control of the ct., where insistence would produce an unjust & dishonest result; (2) inasmuch as, if debtor had known on Jan. 3 of the receiving order, it would have been dishonourable of him to receive the money, the trustee ought to be directed to refund it.—*Re* THELLUSSON, *Ex p.* ABDY, [1919] 2 K. B. 735; 88 L. J. K. B. 1210; 35 T. L. R. 732; 63 Sol. Jo. 788, C. A.

1894. —— Duty not to take advantage of technical mistake.]—A trustee in bkpcy. ought not to take a technical advantage of a mistake *bonâ fide* committed by a creditor.—*Re* TRICKS, *Ex p.* CHARLES (1885), 3 Morr. 15.

1895. —— Ordered to do what is morally right—Refund of premiums paid by wife of bankrupt assured.]—In the administration of bkpt.'s estate the trustee, as an officer of the ct., will be ordered to do what the ct. considers to be morally right & honest, even in a case in which no claim can be sustained against him at law or in equity; & where to the knowledge of the trustee the wife of bkpt. continued, out of her own money, to pay the premiums on certain policies upon bkpt.'s life, the ct. on bkpt.'s death ordered the trustee to repay out of the policy money the amount so paid by the wife, independently of the question whether she was or was not entitled to any equitable lien.—*Re* TYLER, *Ex p.* OFFICIAL RECEIVER, [1907] 1 K. B. 865; 76 L. J. K. B. 541; 97 L. T. 30; 23 T. L. R. 328; 51 Sol. Jo. 291; 14 Mans. 73, C. A.

Annotations:—**Consd.** *Re* Hall, *Ex p.* Official Receiver, [1907] 1 K. B. 875, C. A. **Distd.** Tapster *v.* Ward (1909), 101 L. T. 25. **Consd.** *Re* Phillips, [1914] 2 K. B. 689; Wells *v.* Wells, [1914] P. 157, C. A. **Apld.** *Re* Thellusson, *Ex p.* Abdy, [1919] 2 K. B. 735, C. A. **Refd.** *Re* Stokes, *Ex p.* Mellish, [1919] 2 K. B. 256. **Mentd.** *Re* Craig, *Ex p.* Hinchcliffe (1916), 115 L. T. 157.

1896. —— —— Refund to trustee in second bankruptcy of premiums paid by bankrupt assured.]—Bkpt. the year before his discharge became operative effected a policy on his own life at an annual premium, & kept the policy on foot for six years, when he became bkpt. a second time & shortly afterwards died. The policy was disclosed in the second bkpcy., & the trustee in that bkpcy. received the policy money, which admittedly belonged to the trustee in the first bkpcy., who did not know of the existence of the policy:—*Held:* the trustee in the first bkpcy. as an officer of the ct. was under no obligation, legal, equitable, or moral, to allow out of the policy money to the trustee in the second bkpcy. the amount of the premiums debtor had paid.—*Re* PHILLIPS, [1914] 2 K. B. 689; 83 L. J. K. B. 1364; 110 L. T. 939; 21 Mans. 144.

1897. —— Application of Trustee Act 1888, (c. 59), s. 8—Limitation of actions.]—The provisions of the above sect., as to pleading Stat. Limitation, do not apply to a trustee in bkpcy., who is an officer of the ct.—*Re* CORNISH, *Ex p.* BOARD OF TRADE, [1896] 1 Q. B. 99; 65 L. J. Q. B. 106; 73 L. T. 602; 44 W. R. 161; 12 T. L. R. 69; 40 Sol. Jo. 100; 3 Mans. 48, C. A.

1898. Whether "person claiming through or under" bankrupt—Common Law Procedure Act, 1854, (c. 125).]—Assignees of bkpt. are not "persons claiming through or under bkpt." within the above Act, s. 11.—PENNELL *v.* WALKER (1856), 18 C. B. 651; 26 L. J. C. P. 9; 27 L. T. O. S. 237; 139 E. R. 1525.

1899. Whether "incoming tenant"—Under Metropolis Water Act, 1871, (c. 113)—Liability for arrears of water rate.]—A debtor having been adjudicated a bkpt., his trustee in bkpcy. took possession of his business & found that the water rate was in arrear. The trustee offered to pay in advance from the date of the adjudication for a supply of water, but the water co. declined to supply it, unless the arrears were paid, & cut off the water. Thereupon the trustee paid the arrears under protest:—*Held:* under s. 48 of the above Act, the trustee, being in the position of an "incoming tenant," was not liable for the arrears, & was entitled to recover from the water co. the amount paid under protest.—*Re* FLACK, *Ex p.* BERRY, [1900] 2 Q. B. 32; 69 L. J. Q. B. 458; 82 L. T. 503; 48 W. R. 446; 44 Sol. Jo. 348; 7 Mans. 141.

1900. Agreement by trustee to prevent objections to discharge of debtor.]—Debtor was adjudicated bkpt., his debts amounting to £3,500 & there being practically no assets. Since his adjudication he had entered into the service of a co. & was in receipt of a salary of £1,200 a year. He subsequently entered into an agreement with his trustee in bkpcy. to pay £360 a year by monthly instalments out of his salary until his debts should be paid in full, & the trustee agreed that when those payments should have amounted to a sufficient sum to pay the creditors 5*s.* in the pound, no objection would be raised by him, & he would use his best endeavours to prevent any objections by any creditors, to any application for an order of discharge or annulment:—*Held:* the agreement by the trustee binding himself, at the instance of bkpt. to prevent an objection by the creditors to an order of discharge, was most improper.—*Re* SHAW, [1917] 2 K. B. 734; 86 L. J. K. B. 1395; [1917] H. B. R. 214, C. A.

SECT. 2.—APPOINTMENT.

See, now, 1914 Act, ss. 19. 77, 78.

SUB-SECT. 1.—WHO MAY BE APPOINTED.

1901. Banker receiving money under bankruptcy.]—A banker, receiving money under a

PART VII. SECT. 2, SUB-SECT. 1.

c. *Bankrupt himself.*] — Although 1892 Act, s. 152, would warrant the appointment of an undischarged bkpt. as assignee of his own estate, where circumstances were shown to exist which excused the failure to apply for a discharge, or even the failure of an application for discharge, the judge applied to ought to insist upon proof of the existence of such circumstances. The judge has an absolute discretion.—*Re* ELI (1893), 11 N. Z. L. R. 789.—**N.Z.**

d. *Merchant trading in Ireland—No creditor in Ireland.*]—Where there were only English creditors, the ct. refused to appoint a Dublin merchant as trade assignee, but directed the estate to be administered by the official assignee, the solr. for petitioning creditor to have the carriage of the

bkpcy., ought not to be an assignee.—*Ex p.* LACEY (1802), 6 Ves. 625; 31 E. R. 1228, L. C.

Annotations:—**Mentd.** *Ex p.* James (1803), 8 Ves. 337; Morse *v.* Royal (1806), 12 Ves. 355; A.-G. *v.* Dudley (1815), Coop. G. 146; Greenlaw *v.* King (1841), 10 L. J. Ch. 129, L. C.; Benson *v.* Heathorn (1842), 1 Y. & C. Ch. Cas. 326; Hamilton *v.* Wright (1842), 9 Cl. & Fin. 111, H. L.; Aberdeen Ry. Co. *v* Blaikie (1854), 2 Eq. Rep. 1281, H. L.; Baker *v.* Peck (1860), 3 L. T. 656; De Cordova *v.* De Cordova (1879), 4 App. Cas. 692, P. C.; *Re* Worssam, Hemery *v.* Worssam (1882), 46 L. T. 584; Plowright *v.* Lambert (1885), 52 L. T. 646; Farrar *v.* Farrars (1888), 40 Ch. D. 395, C. A.; *Re* Postlethwaite, Postlethwaite *v.* Rickman (1888), 59 L. T. 58; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392, C. A.; *Re* Boles & British Land Co.'s Contract (1901), 71 L. J. Ch. 130; Rowland *v.* Chapman, Rowland *v.* Corrie, Rowland *v.* Corrie, Rowland *v.* Brandreth (1901), 17 T. L. R. 669.

1902. —— In partnership with commissioner—Also solicitor.]—The union of the characters of banker, comr., solr. & assignee strongly disapproved.—*Ex p.* EDWARDS (1801), 6 Ves. 3; 31 E. R. 909.

Annotations:—**Refd.** *Ex p.* Lacey (1802), 6 Ves. 625, L. C. **Mentd.** *Re* Bryant, *Ex p.* Paterson (1813), 1 Rose, 402.

See, also, Nos. 1907, 1908, *post*.

1903. Party to deed of assignment.]—Although a party to a deed of assignment by a trader cannot himself sue out a commission of bkpcy. against debtor, upon such act of bkpcy., he may act as an assignee under a commission sued out upon it by a third party.—JACKSON *v.* IRVIN (1809), 2 Camp. 48, N. P.

Annotations:—**Mentd.** Toussaint *v.* Hartop (1816) Holt, N. P. 335; *Re* Baldwin, *Ex p.* Foss (1858), 2 De G. & J. 230, L. JJ.

1904. Creditor with adverse interest—Appointment of co-assignee—Solely to investigate adverse claim.]—Where D., a creditor to a very large amount, had adverse interests, & he & another creditor had elected themselves assignees, but the ct. was unwilling to remove D., if his claims might be fairly and independently investigated otherwise:—*Held:* a creditor should be appointed a co-assignee, to act solely in the investigation of D.'s claims & for that purpose to bring actions & institute suits.—*Re* LATHAM & PARRY, *Ex p.* MARTELL (1813), 1 Rose, 325.

1905. Petitioning creditor.] — An order was granted that petitioning creditor might be at liberty to become an assignee.—*Re* ATKINSON (1839), 3 Jur. 1129, Ct. of R.

1906. Creditor obtaining declaration of insolvency—Subsequently receiving goods from debtor.]—A creditor obtained the signature of his debtor to a declaration of insolvency, & subsequently received from him two large parcels of wheat. Bkpcy. having ensued, the creditor was chosen assignee. The minority of the creditors objecting to the confirmation of the choice, applied for his removal under 1849 Act, s. 139:—*Held:* he was not a fit person for the office of assignee.—*Re* BASSET, *Ex p.* DIVES (1860), 9 W. R. 237.

1907. Solicitor to commission — Solicitor's partner.]—The ct. will not permit the solr. to the commission, nor his partner, to be assignee.—*Re* OLDFIELD, *Ex p.* RICE (1831), Mont. 259.

1908. —— Two firms appointed jointly by compromise.]—A compromise of a contest for the choice of assignees, by which the business of the bkpcy. was divided between two distinct firms of solrs., who were to be jointly appointed solrs. to the fiat, was strongly disapproved of by the ct.—*Re* MARTIN, *Ex p.* TURNER & HENSMAN (1844), 3 Mont. D. & De G. 523; 8 Jur. 223.

See, also, No. 1902, *ante*.

1909. Near relative.]—A creditor, who is a near relative of an insolvent, will not be appointed assignee.—ANON. (1848), 10 L. T. O. S. 351.

SUB-SECT. 2.—MODE OF APPOINTMENT—VOTING.

See, now, 1914 Act, s. 19, Sched. I., rr. 8–15.

1910. Failure to elect at first meeting—Fresh meeting.]—Where the first meeting of creditors has passed without the choice of creditors' assignee, by reason of the majority refusing to nominate any one for election, the ct. has power to appoint a fresh meeting to continue the proceedings for the election of an assignee.—*Re* TAYLOR, *Ex p.* BARNETT (1868), 4 Ch. App. 68; 19 L. T. 406; 17 W. R. 88, L. JJ.

1911. Who may vote—Creditor who has proved.]—The election of assignees must be made by those creditors, however few, who are in a condition to vote, & whose debts are immediately provable, although those not in that condition might have made a different choice.—*Re* DINGLE, *Ex p.* BUTTERFILL, *Ex p.* RASHLEIGH (1811), 1 Rose, 192, L. C.

Annotations:—**Distd.** *Re* Harrison, *Ex p.* Crowther (1871), 24 L. T. 330. **Mentd.** *Re* Ridsdale, *Ex p.* Marson (1837), 2 Deac. 245, Ct. of R.; *Re* Pickering, *Ex p.* Harding (1854), 5 De G. M. & G. 367.

1912. —— —— Sufficiency of proof.]—Comrs. upon the day for choosing assignees are not to examine critically into the debt, but to admit creditors for what they swear is due to them, as they are liable to an account afterwards.—*Re* BROWNING, *Ex p.* SIMPSON (1744), 1 Atk. 68; 26 E. R. 44.

Annotation:—**Consd.** *Re* Dummelow, *Ex p.* Ruffle (1873), 29 L. T. 384, L. JJ.

See, further, Part VIII., *post*.

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proceedings.—*Re* BROMFIELD (1874), 8 I. L. T. Jo. 137.—**IR.**

e. *Party not a creditor.*]—In special circumstances the ct. will appoint as creditors' assignee a person not himself a creditor.—*Re* BARRY & RUMLEY (1867), I. R. 1 Eq. 48.—**IR.**

f. ——.]—Assuming a person, who is not a creditor of insolvent, is not qualified to be appointed a trustee, the appointment is valid & effectual, unless the confirmation by the ct. of the choice of such person as trustee is appealed against.—HENDERSON *v.* MAIN (1916), 25 C. L. R. 358.—**AUS.**

g. *Party not official assignee.*]—*Re* HARRIS, 12 C. L. J. 251.—**CAN.**

h. *Party resident outside country.*]—*Re* HARRIS, 12 C. L. J. 251.—**CAN.**

PART VII. SECT. 2, SUB-SECT. 2.

1911 i. *Who may vote—Creditor who has proved.*]—*Held:* all creditors who had proved to the amount of £10 were entitled to vote in the choice of assignees.—*Ex p.* DEEY (1828), 2 Mol. 142.—**IR.**

k. —— *Creditor holding bond in which benefits renounced by surety.*]—Creditors holding bonds in which the surety & co-principal debtor has renounced the benefits of excussion & division, are not contingent creditors when the principal debtor has not surrendered or been excused, but are entitled to prove immediately on the surety's insolvent estate & to vote in the election of trustee.—*Re* DENEYS (1846), 3 M. 309.—**S. AF.**

l. —— *Creditor claiming on unstamped bond.*]—Where a creditor's claim to vote rested solely on an unstamped bond:—*Held:* (1) the vote was invalid; (2) the bond having been subsequently stamped, the vote was validated as at the date when it was given.—MORIES *v.* GLEN (1843), 6 Dunl. (Ct. of Sess.) 97; 16 Sc. Jur. 88.—**SCOT.**

m. —— *Creditor whose account has not been signed.*]—*Held:* unnecessary that the accounts of creditors claiming to vote in the election of trustee should be signed.—CULLEN *v.* M'FARLANE (1842), 14 Sc. Jur. 587.—**SCOT.**

n. —— *Creditor whose debt has been acknowledged by bankrupt.*]—Acknowledgment of debt by bkpt. on the eve of bkpcy., & sworn to by creditors, not sustained as a good title to vote in the election of trustee.—CULLEN *v.* M'FARLANE (1842), 14 Sc. Jur. 587.—**SCOT.**

o. —— *Agent for creditor—If authority in writing & filed.*]—The appointment of an agent for a creditor claiming to advise in the choice of an assignee must be in writing, & filed of record.—*Re* CAMPBELL, 1 C. L. J. 135.—**CAN.**

Sect. 2.—Appointment: Sub-sects. 2 & 3.]

1913. —— —— Deposition of petitioning creditor insufficient.]—*Held:* the deposition of petitioning creditor at the opening of the commission was not a proof to entitle him to vote for assignees.—*Re* DUNCAN, *Ex p.* RAWSON (1828), 2 Gl. & J. 353.

See, further, Parts VIII. & IX., Sect. 4, *post.*

1914. —— Creditor applying for leave to prove.]—A creditor & next of kin of an intestate, who applies for leave to prove against the estate of the administrator, who has become bkpt., cannot vote in choice of assignees, or sign the certificate.—ANON. (1833), 2 L. J. Bcy. 20.

1915. —— Creditor who has obtained order for admission of proof.]—The trustee of testator's residuary estate in trust for his widow for life or widowhood, & with remainder to his infant children, became bkpt., & the widow obtained on petition supported by evidence an order from the Ct. of Bkpcy., directing that she should be admitted to prove in respect of a breach of trust for a specified sum & such other amount as upon the accounts should appear due from bkpt. to the trust estate:—*Held:* she was entitled to vote at the choice of assignees.—*Re* JAMES, *Ex p.* CADWALLADER (1862), 4 De G. F. & J. 499; 31 L. J. Bcy. 66; 6 L. T. 485; 45 E. R. 1277, L. JJ.

Annotation:—**Apld.** *Re* Barfoot, *Ex p.* Prothero (1868), 3 Ch. App. 823.

1916. —— Creditor for debt under £10.]—*Held:* 1849 Act, s. 139, so far as it confined the right of choosing an assignee to creditors whose debts amounted to £10 or upwards was repealed by 1861 Act, s. 116, which gave all the creditors a right to vote.—*Re* COOPER, *Ex p.* MOSS (1867), 3 Ch. App. 29; 37 L. J. Bcy. 1; 17 L. T. 279; 16 W. R. 65, L. J.

Annotation:—**Mentd.** *Re* Taylor, *Ex p.* Barnett (1869), 4 Ch. App. 352, L. JJ.

1917. —— Creditor with adverse interest.]—Votes of creditors appointing assignees cannot be rejected, on the ground of an adverse interest to the general body of creditors.—*Re* FREELAND, *Ex p.* STALLARD (1842), 2 Mont. D. & De G. 469; 6 Jur. 112; 11 L. J. Bcy. 11, Ct. of R.

1918. —— Creditor who has assigned his debt.]—A creditor, who has assigned his debt, may vote in the choice of assignees.—*Re* HART (1850), 1 Fonbl. 57; 14 L. T. O. S. 549.

1919. —— Purchaser of creditor's debt—With intent to influence appointment.]—It is an abuse of the bkpcy. law to purchase a debt due by bkpt. in order to procure the appointment of a trustee favourable to bkpt., or to a creditor or a particular class of creditors.—*Re* POOLEY, *Ex p.* HARPER (1882), 20 Ch. D. 685; 51 L. J. Ch. 810; 47 L. T. 177; 30 W. R. 650, C. A.

Annotations:—**Consd.** *Re* Baker, *Ex p.* Baker (1887), 58 L. T. 233. **Mentd.** *Re* Humphreys, *Ex p.* Lloyd George & George, [1898] 1 Q. B. 520, C.A.

1920. —— Creditors in second bankruptcy—Bankrupt not surrendered under former bankruptcy.]—Where bkpt. has not surrendered under a former bkpcy. the ct. will not proceed to a choice of assignees under a second bkpcy., but will order it to be prosecuted by the assignees under the first bkpcy. In such a case, however, the creditors under the second bkpcy. may, if they desire it, appoint an inspector to take care of their interests.—*Re* JOHNSTONE, *Ex p.* KEEN (1860), 3 L. T. 218.

See, now, 1914 Act, s. 39, (1).

1921. —— On behalf of partner—Partner.]—One partner was allowed to act for another in bkpcy. for voting in the choice of assignees.—*Ex p.* MITCHELL (1808), 14 Ves. 597; 33 E. R. 650.

Annotation:—**Mentd.** Keppell *v.* Bailey (1834), 2 My. & K. 517.

See, generally, Part XI., Sect. 6, *post.*

1922. —— On behalf of lunatic—Brother.]—Circumstances in which the ct. allowed the brother of a lunatic to prove & vote in the choice of assignees.—*Re* FARRINGDON, *Ex p.* AYLWIN (1842), 11 L. J. Bcy. 31.

1923. —— On behalf of bank—Public officer.]—The public officer of a banking co. may vote, by attorney, on behalf of the co., at the choice of assignees.—*Re* MUNROE, *Ex p.* ACKROYD (1841), 1 Mont. D. & De G. 555.

Annotations:—**Apld.** *Re* White, *Ex p.* Western Bank of Scotland (1857), 30 L. T. O. S. 173. **Folld.** Naylor *v.* Mortimore (1864), 17 C. B. N. S. 207.

1924. —— —— Manager.]—The manager of a joint stock bank in Scotland, though not a shareholder, may vote by letter of attorney in the choice of assignees under an English bkpcy., in analogy to the ordinary practice as regards the public officer to a joint stock bank in England.—*Re* WHITE, *Ex p.* WESTERN BANK OF SCOTLAND (MANAGER) (1857), 30 L. T. O. S. 172.

1925. —— On behalf of Bank of England—Person specially authorised.]—A person authorised by the Bank of England, by a special power of attorney for that purpose, may vote for the Bank in the choice of assignees.—*Re* STEPHENS, *Ex p.* BANK OF ENGLAND (1818), 1 Wils. Ch. 296; 1 Swan. 10; 37 E. R. 129, L. C.

1926. —— On behalf of charitable society—Co-trustees of bankrupt.]—One of several trustees of a charitable society became bkpt. & his co-trustees tendered a proof for the amount due from him to the charity. On the comrs. refusing to admit a proof without an order of the ct., an order was obtained & the debt proved by the co-trustees in pursuance thereof:—*Held:* the co-trustees were not entitled to vote at the choice of an assignee.—*Re* ROWE, *Ex p.* ROWE (1845), De G. 111; 14 L. J. Bcy. 17; 4 L. T. O. S. 321, Ct. of R.

1927. —— Against joint estate—Separate creditors.]—Separate creditors are not entitled to vote in the choice of assignees under a joint commission.—*Re* LEIGH & ARMSTRONG, *Ex p.* PARR (1811), 18 Ves. 65; 1 Rose, 76; 34 E. R. 242.

Annotations:—**Mentd.** *Re* Plummer (1841), 1 Ph. 56, L. C.; *Re* Deane & Youle, *Ex p.* Goldsmid (1857), 1 De G. & J. 257, L. JJ.

1928. —— —— ——.]—Separate creditors have no right to vote in the choice of assignees under a joint commission (LORD ELDON, C.).—*Re* HAYMAN, *Ex p.* HAMER (1812), 1 Rose, 321.

See, generally, Part XI., *post.*

1927 i. ——*Joint & separate creditors.*]—LUXTON *v.* HAMILTON, 10 C. L. J. 334.—CAN.

q. *By court—On disagreement between majority in number & majority in value of creditors—Default of appointment.*]—*Re* HARRIS, 12 C. L. J. 251.—CAN.

r. —— *On failure of creditors to elect.*]—The ct. can appoint a trustee only where the creditors have failed to elect one & there is no probability of them electing one, & where creditors had failed to elect a trustee, but agreed informally as to the person to elect:—*Held:* the ct. could not appoint such person trustee but should appoint him provisional trustee pending election.—*Re* SIGGINS & WALKER'S INSOLVENT ESTATE, *Ex p.* AFRICAN BANKING CORPN. (1912), S. R. 87.—S. AF.

s. *Costs—Appeal as to validity of creditor's vote.*]—In a competition for the office of trustee on a sequestrated estate, the expenses of an appeal from a judgment of the sheriff repelling an objection to a vote, which was upheld on appeal, were awarded in favour of the ultimately successful competitor for the trustee-ship.—MORIES *v.* GLEN (1843), 6 Dunl. (Ct. of Sess.) 97; 16 Sc. Jur. 88.—SCOT.

See, now, 1914 Act, s. 116, & 1915 Rules, r. 294.

1929. —— —— ——.]—Separate creditors are not entitled to vote in the choice of assignees under a joint commission.—*Ex p.* JEPSON (1812), 19 Ves. 224 ; 34 E. R. 501, L. C.

1930. —— **Against separate estate—Joint creditors.**]—Joint creditors cannot vote or interfere in the choice of assignees under a separate commission.—*Ex p.* ALCOCK (1805), 11 Ves. 603 ; 32 E. R. 1222, L. C.

1931. *S. P. Ex p.* LONGMAN (1811), 18 Ves. 71 ; 34 E. R. 244, L. C.

1932. *S. P. Ex p.* WILSON (1811), 18 Ves. 439 ; 34 E. R. 383, L. C.

1933. —— —— ——.]—Though joint creditors have no right to vote in the choice of assignees under a separate commission, yet the ct. will in some cases appoint persons in the nature of assignees, to take care of the interest of the joint creditors, & to use the name of the assignees, indemnifying them. —*Re* HOLMES, *Ex p.* BASARRO (1812), 1 Rose, 266.

1934. —— —— —— **Separate creditors paid.**]—Under a separate commission on the petition of a joint creditor, the joint creditors will be permitted to prove for the purpose of voting in the choice of assignees & taking dividends, provided they pay the separate creditors.—*Ex p.* CHANDLER (1803), 9 Ves. 35 ; 32 E. R. 513, L. C.

Annotations :—**Folld.** *Ex p.* Hubbard (1807), 13 Ves. 424, L. C. **Distd.** *Ex p.* Taitt (1809), 16 Ves. 193, L. C.

1935. —— —— —— ——.]—Joint creditors cannot vote in the choice of assignees under a separate commission, unless they pay the separate creditors 20*s.* in the pound.—*Ex p.* HUBBARD (1807), 13 Ves. 424 ; 33 E. R. 353, L. C.

Annotation :—**Consd.** *Ex p.* Taitt (1809), 16 Ves. 194, L. C.

1936. —— —— —— **Devise to bankrupt & others for payment of debts.**]—Testator indebted on bond devised his real estate to bkpt. & two other trustees, for payment of his debts. The bond creditor, after testator's death, brought an action against bkpt. & the other devisees, & recovered a joint judgment against them :—*Held :* he could not prove under the separate commission against bkpt., even for the purpose of voting in the choice of assignees.—*Re* FOXWELL, *Ex p.* PEARSE (1832), 2 Deac. & Ch. 451 ; 1 L. J. Bcy. 109, Ct. of R.

1937. —— —— —— **Being petitioning creditor under separate commission.**]—A joint creditor, being petitioning creditor under a separate commission, is entitled to prove, & vote in the choice of assignees, etc., with the separate creditors, not being within the rule, excluding the other joint creditors.—*Ex p.* HALL (1804), 9 Ves. 349 ; 32 E. R. 637, L. C.

1938. —— —— —— **Petitioning creditor consenting.**]—Where petitioning creditor consented, joint creditors were permitted to vote in the choice of assignees under a separate commission.—*Ex p.* LAYCOCK (1810), 1 Rose, 32.

1939. —— —— **Of member of joint stock banking company—Joint creditor of company.**]—A joint creditor of a joint stock banking co. may prove the amount of his debt under a separate fiat against one of the members of the co., for the purpose of voting in the choice of assignees, & assenting to, or dissenting from, the certificate, notwithstanding, previous to the issuing of the fiat, several other members of the co. have become bkpts., & one has died.—*Re* MARSTON, *Ex p.* MARSTON, *Re* MARSTON, *Ex p.* BROOME (1839), Mont. & Ch. 576 ; 4 Deac. 191 ; 9 L. J. Bcy. 5 ; 3 Jur. 1079, Ct. of R.

Annotations :—**Consd.** *Re* Hayne & Shadwell, *Ex p.* Law (1840), 1 Mont. D. & De G. 16, Ct. of R. **Refd.** *Re* Dobbs, *Ex p.* County of Gloucester Bank (1866), 15 L. T. 53.

1940. —— —— —— ——.]—Bkpt. having taken shares in a joint banking co., a return was filed at the Stamp Office on Nov. 2, 1838, pursuant to Country Bankers Act, 1826 (c. 46), in which his name was entered as one of the members of the co. On Nov. 9, bkpt. agreed to sell his shares to B., but the deed of transfer of the shares was not executed till Mar. 9, 1839, nor was any fresh return sent into the Stamp Office, notifying the change of ownership, until Mar. 25, 1839, but notice of the sale of the shares to B. was given to the bank on Nov. 13, 1838, & in Dec., 1838, he was appointed one of the directors of the co., as the owner of such shares. On Feb. 19, 1839, the banking co. indorsed bills to petitioners :—*Held :* bkpt. was to be considered as a partner in the banking co. at the time of the indorsement of the bills, & petitioners might prove against his estate, for the purpose of voting in the choice of assignees, & assenting to or dissenting from his certificate.—*Re* PHILLIPS, *Ex p.* PRESCOTT (1839), 4 Deac. 253 ; Mont. & Ch. 611, Ct. of R.

1941. What constitutes quorum—One qualified creditor—Manner of counting.]—In calculating a *quorum* of creditors present at a first meeting of creditors, only those who have lodged proofs can be calculated, & if there is only one creditor present who has lodged a proof, he forms a *quorum* & can carry a resolution for the appointment of the trustee.—*Re* CARMEN THOMAS, *Ex p.* WARNER (1911), 55 Sol. Jo. 482.

See, now, 1914 Act, Sched. I., r. 24, & 1915 Rules, r. 249.

1942. Effect of voting—Exhausts power of attorney given for purpose.]—A power of attorney to vote on choice becomes extinct, when once executed.—*Re* HART (1850), 1 Fonbl. 57 ; 14 L. T. O. S. 549.

1943. Who may appeal against order admitting creditor to vote—Creditor proving before hearing of appeal.]—Where the first meeting of creditors has passed without the choice of a creditors' assignee, by reason of the majority refusing to nominate any one for election, & the ct. has appointed a fresh meeting to continue the proceedings a creditor, whose debt was not objected to at the meeting for choice of assignees, although not formally proved, may appeal from a decision come to at the meeting, allowing the right of another creditor to vote in the choice of an assignee, provided his debt be proved before the hearing of the appeal.—*Re* TAYLOR, *Ex p.* BARNETT (1868), 4 Ch. App. 68 ; 19 L. T. 406 ; 17 W. R. 88, L. JJ.

SUB-SECT. 3.—TIME FOR APPOINTMENT.

See, now, 1914 Act, s. 19 (6), (7).

1944. More than six months after filing petition—Liquidation petition void.]—A debtor, who traded both in London & Scotland, presented a petition for liquidation in England on July 12. The first meeting of his creditors was held, but was adjourned without passing any resolution till Feb. 10, in order to await the result of certain proceedings in Scotland. The English creditors met on Feb. 10 & passed a resolution for liquidation & appointed a trustee :—*Held :* the appointment of the trustee, being more than six months after the filing of the petition, was void.—*Re* WILSON & ARMSTRONG, *Ex p.* FENNING (1876), 3 Ch. D. 455 ; 35 L. T. 830 ; 25 W. R. 185, C. A.

Annotations :—**Dbtd.** *Re* McHenry, *Ex p.* Credit Co. (1883), 24 Ch. D. 353, C. A. When *Ex p. Fenning* is clearly understood it only comes to this, that it was too late to appoint a trustee effectually. There the creditors appointed the trustee so late that the property, which would have to be administered by him, had already gone

Sect. 2.—*Appointment: Sub-sects.* 3, 4, 5, 6 & 7. *Sect.* 3.]

to somebody else whose title could not be defeated by the trustee (COTTON, L.J.). **Mentd.** *Re* McCulloch, *Ex p.* McCulloch (1880), 14 Ch. D. 716, C. A.; *Re* McHenry, *Ex p.* McHenry (1883), 24 Ch. D. 35, C. A.

1945. —— —— Valid.]—A trustee can be appointed by the creditors under a liquidation petition, though more than six months have elapsed since the filing of the petition.—*Re* MCHENRY, *Ex p.* CREDIT CO. (1883), 24 Ch. D. 353; 53 L. J. Ch. 161; 49 L. T. 385; 32 W. R. 47, C. A.

SUB-SECT. 4.—OBJECTIONS BY BOARD OF TRADE.

See, now, 1914 Act, s. 19 (2), (3).

1946. Discretion of court—What court will decide.]—When the Board of Trade, at the request of a majority of the creditors, notify to the ct., their objection to the appointment of a trustee in bkpcy., the ct. will not exercise any discretion in the matter on the merits of the case, but will only decide whether the objection is on the facts valid in point of law.—*Re* MARDON, [1896] 1 Q. B. 140; 65 L. J. Q. B. 111; 73 L. T. 480; 44 W. R. 111; 12 T. L. R. 53; 40 Sol. Jo. 70; 2 Mans. 511.

Annotation:—**Mentd.** Davis *v.* Petrie, [1906] 2 K. B. 786, C. A.

1947. Grounds for objecting—Trustee nominee of bankrupt's brother.]—The nomination of the trustee by a brother of bkpt. is not a good reason for objecting to the appointment, even if there be no committee of inspection.—*Re* GAMES, *Ex p.* BOARD OF TRADE (1884), 1 Morr. 216.

Annotation:—**Consd.** *Re* Martin (1888), 21 Q. B. D. 29.

1948. —— Difficulty in acting impartially—Trustee accounting party.]—When creditors have appointed a trustee of the property of bkpt., & it appears that the person so appointed is an accounting party to the estate, & that questions will arise between him & the estate, which will render it difficult for him to act with impartiality by reason of the conflict between his own interests & his duty to the creditors, these circumstances will, as a general rule, justify the Board of Trade in objecting to the appointment.—*Re* MARTIN (1888), 21 Q. B. D. 29; 57 L. J. Q. B. 384; 58 L. T. 889; 36 W. R. 698; 5 Morr. 129.

Annotation:—**Mentd.** Davis *v.* Petrie (1905), 93 L. T. 511, D. C.

1949. —— —— ——.]—At the request of creditors, an accountant took possession of the business of debtor, who was insolvent, for the purpose of controlling his receipts & expenditure, the statement of account subsequently rendered showing a balance, which the accountant claimed to retain in respect of his charges. Bkpt. filed his own petition, & the accountant was appointed by the creditors the trustee in the bkpcy. The appointment was objected to by the Board of Trade, on the ground that the connection of the trustee with bkpt.'s estate made it "difficult for him to act with impartiality in the interest of the creditors generally":—*Held:* the objection must be sustained.—*Re* STOVOLD, *Ex p.* BOARD OF TRADE (1889), 60 L. T. 190; 37 W. R. 511; 5 T. L. R. 179; 6 Morr. 7.

Annotation:—**Apld.** *Re* Laughton (1892), 36 Sol. Jo. 800.

1950. —— —— ——.]—A notification of objection was made by the Board of Trade to the appointment of B. as trustee, on the ground that B.'s relation to bkpt. made it difficult for him to act with impartiality in the interests of the creditors generally. Bkpt. had employed B. to prepare a statement of his affairs, & B. had assisted him to carry on his business:—*Held:* whether all was right was a question for the trustee to investigate, & although B. might be impartial, it would be difficult for him to act in such a case, & the objection must be upheld.—*Re* LAUGHTON (A BANKRUPT) (1892), 36 Sol. Jo. 800.

1951. —— —— ——.]—The fact that the trustee appointed by the creditors is an accounting party to the estate, *e.g.*, trustee under a deed for creditors, & will as trustee have to investigate his own account, is of itself a valid objection by the Board of Trade.—*Re* MARDON, [1896] 1 Q. B. 140; 65 L. J. Q. B. 111; 73 L. T. 480; 44 W. R. 111; 12 T. L. R. 53; 40 Sol. Jo. 70; 2 Mans. 511.

Annotation:—**Mentd.** Davis *v.* Petrie, [1906] 2 K. B. 786, C. A.

1952. —— —— **Trustee appointed to two estates — Interests of estates conflicting.**] — E. having been adjudicated bkpt., the creditors appointed G. to be trustee in the bkpcy. L. was afterwards adjudicated bkpt., & the creditors appointed G. to be trustee. G. was a creditor of E. for £3,000, & he was also a creditor of L. for £400. The principal asset of L. consisted of a property, as to a moiety of which E. asserted that L. was a trustee for him. L. repudiated the claim. The Board of Trade certified that G. had been duly appointed trustee of E.'s estate, but they objected to his appointment as trustee of L.'s estate, on the ground "that his connection with or relation to L. & his estate makes it difficult for him to act with impartiality in the interests of the creditors of bkpt. generally." The objection was notified to the High Ct. under 1883 Act, s. 21 (3):—*Held:* if G. were appointed trustee of both the estates, there would be a serious conflict between his interest as a creditor of E. & his duty as trustee of L.'s estate, the objection of the Board of Trade was valid.—*Re* LAMB, *Ex p.* BOARD OF TRADE, [1894] 2 Q. B. 805; 64 L. J. Q. B. 71; 71 L. T. 312; 10 T. L. R. 575; 38 Sol. Jo. 667; 1 Mans. 373; 9 R. 636, C. A.

Annotation:—**Expld.** *Re* Mardon, [1896] 1 Q. B. 140.

1953. Appeal from decision of High Court on validity of objection.]—An appeal lies to the Ct. of Appeal by the Board of Trade from a decision of the High Ct. on the validity of an objection to the appointment of a trustee.—*Re* LAMB, *Ex p.* BOARD OF TRADE, [1894] 2 Q. B. 805; 64 L. J. Q. B. 71; 71 L. T. 312; 10 T. L. R. 575; 38 Sol. Jo. 667; 1 Mans. 373; 9 R. 636, C. A.

Annotation:—**Mentd.** *Re* Mardon, [1896] 1 Q. B. 140.

1954. Costs—Trustee declining to retire when asked.]—B., an accountant, whom it was proposed to appoint trustee, had been employed by bkpt. immediately before the petition in connection with a proposed composition with his creditors, under which B. was appointed trustee, & had also assisted bkpt. to carry on his business:—*Held:* the objection of the Board of Trade to his appointment must be sustained, with costs in favour of the Board, as B. had not retired when requested to do so.—*Re* LAUGHTON (A BANKRUPT) (1892), 36 Sol. Jo. 800.

1955. —— Objection notified to court—Creditors appearing to oppose objection.] — Where the Board of Trade object to the trustee appointed by the creditors, & at the request of the creditors notify that objection to the ct., & the creditors alone appear *bonâ fide* to oppose the objection of the Board of Trade, costs will not as a rule be given against the trustee, although the objection is upheld.—*Re* MARDON, [1896] 1 Q. B. 140; 65 L. J. Q. B. 111; 73 L. T. 480; 44 W. R. 111; 12 T. L. R. 53; 40 Sol. Jo. 70; 2 Mans. 511.

Annotation:—**Mentd.** Davis *v.* Petrie, [1906] 2 K. B. 786, C. A.

SUB-SECT. 5.—CERTIFICATE OF APPOINTMENT.

See, now, 1914 Act, ss. 19 (4), 143.

1956. Whether registration required.]—*Held:* 1 & 2 Will. 4, c. 56, s. 27, did not require the certificate of the appointment of assignees to be registered, in order to protect them against subsequent purchasers of bkpt.'s freehold property without notice, unless the property was situate in a register county.—*Ex p.* —— (1832), 1 Deac. & Ch. 349.

1957. Effect as evidence—Record of court.]—A certificate of the appointment of an assignee, dated before action, & sealed with the seal of the Ct. of Bkpcy., is conclusive evidence, in an action by the assignee so appointed, of his title to sue, even though it appears that the signature of the comr. was not affixed to the document until after the commencement of the action, the certificate of appointment being a record of the ct.—KELLY *v.* MORRAY (1866), L. R. 1 C. P. 667; Har. & Ruth. 684; 35 L. J. C. P. 287; 14 L. T. 624; 12 Jur. N. S. 769; 14 W. R. 939.

Annotation:—**Distd.** Bramble *v.* Moss (1868), 16 W. R. 649.

SUB-SECT. 6.—APPOINTMENT OF NEW TRUSTEE.

See, now, 1914 Act, ss. 77, 78, 95.

1958. Jurisdiction—Lords Justices in Lunacy—Trustee becoming insane.] — The Lords Justices sitting in Lunacy have jurisdiction, under Trustee Acts, to appoint a new trustee of a creditors' deed registered under 1861 Act, in the place of a trustee who has become of unsound mind.—*Re* DONISTHORPE, *Re* THOMSON'S TRUST DEED (1874), 10 Ch. App. 55; 44 L. J. Ch. 536; 31 L. T. 369; 23 W. R. 100, L. JJ.

1959. In what cases new trustee appointed—All trustees dead—Heir of survivor minor.]—Order under 5 Geo. 2, c. 30, s. 31, that new assignees may be chosen, & that the comrs. may execute a new bargain & sale & assignment, the former being vacated, all the assignees being dead, & the heir at law of the survivor an infant.—*Ex p.* BAINBRIDGE (1801), 6 Ves. 451; 31 E. R. 1139.

Annotations:—**Folld.** *Re* Leman, *Ex p.* Cooke (1807), 13 Ves. 271. **Consd.** Aldritt *v.* Kittridge (1822), 6 Moore, C. P. 569. **Mentd.** Abercrombie *v.* Hickman (1838), 8 Ad. & El. 683.

1960. —— One trustee removed—Option to creditors to appoint substitute.]—Where one of several assignees is removed for whatever cause, the ct. will give the creditors an option of choosing another in his room.—*Re* FOSSICK, *Ex p.* ROLLS (1836), 1 Deac. 618; 5 L. J. Bcy. 44.

—— **Trustee or trustees removed—Grounds for removal & appointment of new trustees.**]—*See* Sect. 9, sub-sect. 1, C., *post.*

1961. —— Trustee elected without his consent.]—When an assignee is elected without his consent, & he declines to act, there must be a new choice at the costs of the estate.—*Re* BALCHERN, *Ex p.* STEPHENSON (1838), 3 Mont. & A. 663, Ct. of R.

SUB-SECT. 7.—EFFECT OF INVALID APPOINTMENT.

See Sect. 9, sub-sect. 1, C. (*b*), *post.*

SECT. 3.—DISCRETION OF TRUSTEE—APPLICATION FOR DIRECTIONS.

See, now, 1914 Act, s. 79.

1962. Whether court will interfere—In regard to realisation of bankrupt's estate.]—*Held:* the ct. ought not to interfere to stay a sale by assignees of the stock-in-trade & lease of bkpts., as the assignees acted at their own risk & upon their own responsibility, & they & not the ct., were to be judges of the propriety & expediency of the sale.—*Re* RUSSELL, *Ex p.* MONTGOMERY (1822), 1 Gl. & J. 338.

Annotation:—**Folld.** *Re* Smith, *Ex p.* Smith (1865), 15 L. T. 451.

1963. —— ——.]—The ct. will not interfere with the creditors' assignee in the performance of his duty by disposing of bkpt.'s estate.—*Re* SMITH, *Ex p.* SMITH (1866), 15 L. T. 451.

See, further, Part XX., Sect. 18, *post.*

1964. —— In regard to time & manner of realisation—Sale of reversionary interest.]—Subject to resolutions of the creditors, a trustee in bkpcy. has a discretion as to when & how he will sell a contingent reversionary interest of bkpt., & the ct. will not interfere with the discretion at the instance of a creditor, unless it is shown that the trustee is acting as no reasonable man would.—*Re* PETERS, *Ex p.* LLOYD (1882), 47 L. T. 64, C. A.

1965. —— To make one of three assignees sign contract—Doubt as to whether sale advantageous.]—One of three assignees had not been consulted as to a sale, & he had reason to doubt whether it was beneficial to the estate:—*Held:* he ought not to be compelled to execute the conveyance as an officer of the ct., without an inquiry as to whether the sale was a proper one.—*Re* BISHTON, *Ex p.* UNDERHILL (1838), 3 Deac. 326; 3 Mont. & A. 660; 2 Jur. 520, Ct. of R.

1966. —— In regard to letting bankrupt's property—To vary rent.]—On the application of a tenant of the assignees a reference was made to the comr., who reported the rent should be reduced, which was done. On the application of some creditors, one of whom offered higher rent, the ct. refused to interfere.—*Re* CHAMBERS, *Ex p.* DE BEGNIS (1834), 1 Mont. & A. 277; 3 L. J. Bcy. 43, Ct. of R.

Annotation:—**Expld. & Distd.** *Re* Colnaghi, *Ex p.* Marks (1836), 6 L. J. Bcy. 25, Ct. of R.

PART VII. SECT. 2, SUB-SECT. 5.

t. *Failure to produce—Secondary evidence of appointment.*]—Where the assignee of bkpt. failed to produce in an action the certificate of his appointment as assignee, pursuant to a notice served on him for that purpose:—*Held:* evidence of his having acted as such assignee was sufficient secondary evidence of his appointment.—HEASLIP *v.* THOMPSON (1842), 2 Craw. & D. 404.—**IR.**

PART VII. SECT. 2, SUB-SECT. 6.

1959 i. *In what cases new trustee appointed—Trustee dead.*]—An insolvent, under 31 Geo. 3, c. 21, being entitled to a surplus of his property, his petition gave the ct. jurisdiction to appoint a new assignee, the old one having died without heir or representative, in order to give him an opportunity of seeing that his property was properly managed.—*Re* FLEMING (1801), Rowe, 411.—**IR.**

w. —— *Trustee absconding.*]—Where an assignee absconds, another will be appointed in his place.—*Ex p.* HIGGINS (1809), 1 Ball & B. 218.—**IR.**

a. *After long interval—Power of court to decide who might vote.*]—Fifteen years having elapsed, no dividend having been paid, & two of the three assignees originally appointed having died, it became necessary for the creditors to decide whether or not new assignees should be appointed. Great delay having taken place in ascertaining through the comrs. who could vote:—*Held:* the ct. would at once decide *seriatim* as to the right of each of the creditors to vote.—*Re* FRENCH (1831), 4 Ir. L. Rec. 1st ser. 111.—**IR.**

b. *Effect of—Vesting of estate in new trustee.*]—*Qu.:* whether on the death of the creditor's assignee, the estate, which was vested in him, vests, without any further conveyance, in the new assignee.—ATKINSON *v.* LEMON (1853), 5 Ir. Jur. 369.—**IR.**

PART VII. SECT. 3.

c. *Application for directions—Instructions to sell goods on leased premises—No provision made for payment of landlord.*]—Upon the insolvency of a lessee, if the creditors or inspectors order the assignee in insolvency to sell goods on the demised premises on credit, & do not provide him with the means of satisfying the landlord, he should apply to the judge for directions.—*Re* MCCRAKEN, DALLAS *v.* STINSON (1879), 4 A. R. 486.—**CAN.**

Sect. 3.—*Discretion of trustee—Application for directions. Sect.* 4: *Sub-sects.* 1 & 2.]

1967. Application for directions—Power of court—Form of order.]—A trustee in bkpcy. is entitled to apply to the ct. for directions in relation to any particular matter arising under the bkpcy., as to which the creditors have already by resolution at a general meeting given him directions, & the ct. has power for just cause shown to direct the trustee to disregard the directions of the creditors & to act contrary to them. In such a case the ct. ought not to order the resolution to be vacated or to declare it void, but simply to direct the trustee to disregard it.—*Re* POOLE, *Ex p.* COCKS (1882), 21 Ch. D. 397; 52 L. J. Ch. 63; 47 L. T. 496; 31 W. R. 105, C. A.

Annotation:—**Expld.** *Re* Ridgway, *Ex p.* Hurlbatt (1889), 61 L. T. 647.

1968. —— Right of debtor to be heard—Right of appeal from County Court.]—A trustee in a liquidation applied to the county ct. for directions as to the acceptance of an offer for the purchase of debtors' property. Notice was given to debtors, but at the hearing of the application the county ct. judge refused to hear the solr. for debtors or to receive evidence on their behalf:—*Held:* notice having been given to debtors they ought to have been heard, & an appeal lay from such refusal of the county ct. judge to do so. *Qu.:* whether when a trustee applies to the ct. for directions in any particular matter, debtor is in any event entitled to appear & be heard.—*Re* WEBB & SONS, *Ex p.* WEBB & SONS (1887), 4 Morr. 52.

1969. —— Instructions of committee opposed to those of creditors.]—In order to avoid litigation certain terms of compromise were agreed upon between the trustee in bkpcy. & persons making claims against the estate. The terms of compromise were approved by a majority of the committee of inspection. Subsequently a resolution was passed at a meeting of creditors refusing to sanction the terms of compromise. The trustee applied to the ct. for leave to carry out the compromise, notwithstanding the resolution of the creditors:—*Held:* as the creditors, in arriving at their view of the case, had acted *bonâ fide* & for their own interests, the compromise must be abandoned.—*Re* RIDGWAY, *Ex p.* HURLBATT (1889), 61 L. T. 647; 38 W. R. 432; 6 T. L. R. 21; 6 Morr. 277.

1970. —— ——.]—A committee of inspection representing the creditors were at variance with the family creditors of debtor as to the realisation of the assets, & the trustee received conflicting directions. On the application of the trustee:—*Held:* a "conflict" had arisen, & the trustee should be directed to follow the directions of the committee of inspection.—*Re* OBORNE, *Ex p.* MARILLIER (1896), 3 Mans. 238.

See, further, Sect. 10, *post.*

1971. —— Right of trustee to appeal without indemnity — Personal liability for costs.] — A trustee, who applies to the ct. for directions, should not appeal, except with a guarantee for the costs from the creditors. If he fails on the appeal, he will be ordered to pay the costs of the appeal personally.—*Re* MALDEN, GIBSON & CO., *Ex p.* JAMES (1886), 55 L. T. 708; 3 Morr. 185, D. C.

SECT. 4.—POWERS OF TRUSTEE.

SUB-SECT. 1.—IN REGARD TO ACTIONS, ARBITRATIONS, AND OTHER LEGAL PROCEEDINGS.

See Part XXI., *post.*

SUB-SECT. 2.—OTHER CASES.

See, now, 1914 Act, ss. 56, 58.

1972. To abandon bankrupt's rights—As damnosa hereditas.] — The assignees of bkpt. may be justified in relinquishing bkpt.'s interest in certain assets as a *damnosa hæreditas.*—*Re* GUNDRY, *Ex p.* BADCOCK (1829), Mont. & M. 231, L. C.

Annotations:—**Mentd.** *Re* Gundry, *Ex p.* Grylls, *Ex p.* Batten (1832), 2 Deac. & Ch. 290, Ct. of R.; *Re* Garbett, *Ex p.* Downes (1847), De G. 390, Ct. of R.; Farrar *v.* Farrars (1888), 40 Ch. D. 395, C. A.

See, further, Part XX., Sect. 16, *post.*

1973. Administration—To obtain letters of—Without security.]—Letters of administration may be granted to the trustee in bkpcy. of the next of kin without requiring sureties.—*In the Estate of* ASTBURY (1899), 80 L. T. 296.

See, further, EXECUTORS & ADMINISTRATORS.

1974. To advance money to bankrupt—For defence of prosecution—Consent of all assignees.]—Bkpt. being indicted for a conspiracy to obtain goods by false pretences swore that he was innocent of the charge, & that if he were convicted, the estate would be greatly damnified, as the prosecutor would be enabled to prove for a large sum under the fiat, & he applied for an order that his assignees might advance him £100 to defend himself against the indictment. One of the assignees objected to the application, & the two others merely expressed their willingness to submit to any order of the ct.:—*Held:* such an order could not be made without the consent of all the assignees.—*Re* SCHOLEFIELD, *Ex p.* SCHOLEFIELD (1842), 2 Mont. D. & De G. 644; 11 L. J. Bcy. 47; 6 Jur. 977, Ct. of R.

1975. Business—To carry on—What contracts—Contract of personal character.] — A contractor entered into an agreement for the completion of a building at a certain time, in a certain specified manner, & it was agreed that the contractor was to set out the works & be responsible for errors, to provide & employ workmen, to provide & keep at the building a competent general foreman, to provide materials, labour, etc., also that if the contractor should, from any cause, not comply with the terms of the contract within three days after being requested to do so in writing, the architect should have power to prevent his further execution of the works, & cause same to be finished by others. After he had received notice from the employer that he was neglecting & delaying to complete & finish the building, the contractor, on the following day, entered into a composition-deed for the benefit of his creditors under 1861 Act, s. 192, in the form prescribed by that Act:—*Held:* the trustees of the deed were not at liberty to adopt the contract, containing, as it did, obligations of a personal character.—KNIGHT *v.*

PART VII. SECT. 4, SUB-SECT. 2.

d. *To assert rights to estate unenforceable by execution creditor.*]—An assignee in insolvency may assert rights to insolvent's estate, which cannot be enforced at the instance of an execution creditor.—FISKEN *v.* BROOKE (1879), 4 A. R. 3.—**CAN.**

e. *To select solicitor.*]—The assignee has the sole right to select his own professional adviser, & cannot be made to change him, except upon reasonable ground.—*Re* LAMB (1866), 17 C. P. 173.—**CAN.**

f. *To waive protest on note.*]—The curator to an insolvent has the right to waive protest on a note upon which the latter was endorser.—*Re* BOUTIN, CANTIN & ARCAND (1897), Q. R. 12 S. C. 186.—**CAN.**

g. *To bind creditors—By personal undertaking.*]—An assignee is not competent to bind creditors by his undertaking to be himself bound.—*Re* FRENCH & CO., *Ex p.* SOMERS (1828), 1 Mol. 431.—**IR.**

BURGESS (1864), 33 L. J. Ch. 727; 10 L. T. 90; 10 Jur. N. S. 166.

1976. —— —— For what purpose—For winding up.]—The creditors of a bkpt. trader have no power to authorise the trustee to carry on the business of bkpt., except so far as may be necessary for the beneficial winding-up of the business, & if the majority of the creditors pass a resolution authorising the trustee to carry on the business for any other purpose, such as the hope of making a profit to increase the dividends, the resolution is not binding upon the non-assenting minority, & the ct. ought to interfere & to declare it invalid. —*Re* BATEY, *Ex p.* EMMANUEL (1881), 17 Ch. D. 35; 50 L. J. Ch. 305; 44 L. T. 832; 29 W. R. 526, C. A.

Annotations:—**Refd.** *Re* Poole, *Ex p.* Cocks (1882), 21 Ch. D. 397, C. A.; *Re* Genese, *Ex p.* Kearsley (1886), 55 L. J. Q. B. 325.

1977. —— —— When leave granted—After inquiry.]—The ct. will order a reference to inquire if it is proper to carry on bkpt.'s business, although some of the creditors dissent, but they will have the liberty to prosecute the order.—*Re* HUGHES, *Ex p.* MENDELL (1835), 4 Deac. & Ch. 725; 4 L. J. Bcy. 81, Ct. of R.

1978. —— —— Refusal—When not likely to be immediately beneficial.]—The assignees of bkpt. may be justified in declining to continue works in a mine, which do not appear likely to prove immediately beneficial to the estate.—*Re* GUNDRY, *Ex p.* BADCOCK (1829), Mont. & M. 231, L. C.

Annotations:—**Mentd.** *Re* Gundry, *Ex p.* Grylls, *Ex p.* Batten (1832), 2 Deac. & Ch. 290, Ct. of R.; *Re* Garbett, *Ex p.* Downes (1847), De G. 390, Ct. of R.; Farrar *v.* Farrars (1888), 40 Ch. D. 395, C. A.

1979. —— —— Termination of power—On what grounds order to cease may be obtained.]—Where the assignees are authorised by a majority of the creditors to carry on bkpt.'s trade, for the benefit of the estate, a dissenting creditor cannot obtain an order that they may cease to do so, without proving that he sustained some damage from the continuance of the business by the assignees.—*Re* STRUTTON, *Ex p.* HALL (1837), 2 Deac. 263, Ct. of R.

1980. To delegate — General authority.] — Assignees cannot delegate their general authority. —DOUGLAS *v.* BROWN (1831), 2 Dow & Cl. 171; Mont. 93; 6 E. R. 692, H. L.

1981. To renew lease—For purpose of carrying on business—Against wishes of creditors.]—The ct. cannot sanction the renewal of a lease by assignees, for the purpose of carrying on bkpt.'s business, if any creditors object to that arrangement, notwithstanding it has been determined upon by a majority of creditors present at a meeting duly convened for that purpose. A reference was directed to the comrs., in such circumstances, to appoint such time & place as might be thought most beneficial for the sale of bkpt.'s property.—*Re* MILLER, *Ex p.* MILLER (1840), 1 Mont. D. & De G. 39, Ct. of R.

1982. To apply for order for re-direction of bankrupt's letters.]—An application for an order for the re-direction of letters addressed to a bkpt. can only be made by the trustee in the bkpcy. Petitioning creditor has no *locus standi* either to make application, or to appeal from an order made on the application of the trustee if he thinks that order not sufficiently extensive. If the trustee refuses to apply for such an order, or to appeal from an order made on his application, petitioning creditor cannot apply to the ct. himself. *Semble:* he might obtain authority to use the name of the trustee.—*Re* HALBERSTAMM, *Ex p.* LISTER (1881), 17 Ch. D. 518; 29 W. R. 621, C. A.

See, now, 1914 Act, s. 24.

1983. Payment—Power to make—For services benefiting estate—Performed after act of bankruptcy.]—As a general rule a trustee in bkpcy. may, in the exercise of his discretion, adopt & pay for services rendered to a bkpt. after notice of an act of bkpcy., where such services have clearly resulted in a benefit or profit to bkpt.'s estate commensurate with the services rendered, but he must be very strict in the application of the rule.—*Re* SIMONSON, *Ex p.* BALL, [1894] 1 Q. B. 433; 63 L. J. Q. B. 242; 70 L. T. 32; 1 Mans. 30; 10 R. 107.

Annotations:—**Refd.** *Re* Charlwood, *Ex p.* Trustee (1894), 63 L. J. Q. B. 344, D. C.; *Re* Geen, *Ex p.* Parker, [1917] 1 K. B. 183. **Mentd.** *Re* Midgley (1913), 108 L. T. 45, D. C.

1984. Indemnity—Power to grant to agent—For selling goods seized for rent.]—A trustee in bkpcy. appointed by the Board of Trade has no authority, without the sanction of the Board, to give a personal indemnity to his agent against the consequences of selling goods seized for rent due to the estate.—BOARD OF TRADE *v.* PROVIDENT CLERKS & GENERAL GUARANTEE ASSOCN., LTD. (1895), 72 L. T. 562; 39 Sol. Jo. 428, D. C.

1985. Release of equity of redemption—Power to grant.]—A release of an insolvent's equity of redemption to the mtgee. is not *primâ facie* beyond the scope of an official assignee's authority.—MELBOURNE BANKING CORPN. *v.* BROUGHAM (1878), 4 App. Cas. 156; 48 L. J. P. C. 12; 40 L. T. 1, P. C.

Annotation:—**Mentd.** Teebay *v.* M. S. & L. Ry. Co. (1883), 24 Ch. D. 572.

1986. To require architect's certificate—In respect of work done by bankrupt contractor.]—Bkpt. had contracted to perform joiner's work, & to receive payment upon an architect's certificate. Certain stable fittings were by the contract to be supplied for £95 & to be procured from M. & Co. Subsequently, that amount was by the architect's direction increased to £137. Neither of the sums had been paid by bkpt. to M. & Co. who, on the bkpcy. occurring, applied to the building owner & received from him £95 upon their giving him an indemnity. The trustee then applied to the building owner for the whole £137, & refused to accept the balance, after deducting the £95 handed to M. & Co., which the building owner was ready to pay. The architects also refused to give their certificate for any sum other than the balance between the £95 & the £137. The trustee applied for an order directing the architects to certify that £137 was due from the building owner to bkpt.'s estate, & that he should be directed to pay it:—*Held:* the county ct. judge had jurisdiction to entertain such application.—*Re* HOLT, *Ex p.* GRAY (1888), 58 L. J. Q. B. 5, D. C.

1987. To take out summons under R. S. C. Ord., 54a, r. 1.]—A summons was taken out under the above Ord. by the trustee of bkpt., who claimed an interest under a contract for sale of real estate & option of repurchase conferred on bkpt., asking certain questions which involved the construction of the written document:—*Held:* the trustee was a "person interested" within the above rule.—MASON *v.* SCHUPPISSER (1899), 81 L. T. 147; 43 Sol. Jo. 718.

1980i. *To delegate—General authority.*]—A trustee may not give a general delegation of his powers so as to transfer to an agent the whole management of the estate in matters of discretion as well as in purely ministerial acts.—ALLAN *v.* ERLANK'S TRUSTEE (1908), T. S. 1187.—**S. AF.**

Sect. 4.—*Powers of trustee: Sub-sects.* 2 & 3. *Sect.* 5: *Sub-sect.* 1, *A. & B.* (*a*) & (*b*).]

1988. Withdrawal of sequestration—Power to agree to on conditions.]—Where bkpt. is a beneficed clergyman & his living is sequestrated, the trustee may agree to withdraw the sequestration on payment of a proper amount. Where the profits of the sequestrated benefice were insufficient to pay the curate & dilapidations, the ct. approved such an arrangement, the consideration being £300.—*Re* BARRATT (1906), 22 T. L. R. 427, D. C.

1989. To pool English & foreign assets—By agreement with official assignee abroad.]—Where a firm is bkpt. in England & abroad, and has English & foreign assets & English & foreign creditors, the ct. has jurisdiction to sanction an agreement between the trustee in bkpcy. in England and the official assignee abroad for pooling all the assets & distributing them ratably amongst the English & foreign creditors, notwithstanding that 1883 Act contains no express provisions authorising such a scheme.—*Re* MACFADYEN & Co., *Ex p.* VIZIANAGARAM CO., LTD., [1908] 1 K. B. 675; 77 L. J. K. B. 319; 98 L. T. 220; 24 T. L. R. 254; 15 Mans. 28.

See 1914 Act, s. 56 (6), (7), (8).

To sell.]—*See* Part XX., *post.*

SUB-SECT. 3.—ONE OR MORE TRUSTEES CEASING TO ACT OR NOT ACTING.

See, now, 1914 Act, s. 77.

1990. To withdraw money from bank—One trustee dead & another abroad.]—Part of bkpt.'s estate was paid into the bank in the names of the five assignees. One of them died, & another went abroad. The remaining assignees applied to the bank for the money for the purpose of making a dividend, but the bank refused to pay it without proof of the two other assignees being dead. The ct. made the order on the bank to pay the money to the three remaining assignees.—*Ex p.* COLLINS (1797), 2 Cox, Eq. Cas. 427; 30 E. R. 198.

Annotation :—**Folld.** *Re* Becher, *Ex p.* Hunter (1816), 1 Mer. 408.

1991. —— One trustee absconding.]—Part of bkpt.'s estate having been paid into the bank in the names of three assignees, one of whom subsequently absconded, the bank was ordered to pay the money to the names of the two remaining assignees.—*Re* BECHER, *Ex p.* HUNTER (1816), 1 Mer. 408; 35 E. R. 724.

1992. To execute release by deed—Special authority necessary from trustee not acting.]—A general authority from one of several assignees of bkpt.'s estate to the others to act for him, & use his name, is not sufficient to enable the others to execute a release by deed; there must be a special authority for that purpose.—WILLIAMS *v.* WALSBY (1802), 4 Esp. 220.

1993. To give receipt—Whether receipt from one sufficient.]—Payment of a debt due to a bkpt. estate to one assignee, is not a discharge, but debtor should have taken a receipt likewise from the co-assignee.—CAN *v.* READ (1749), 3 Atk. 695; 26 E. R. 1199.

Annotation :—**Consd.** Jones *v.* Smith (1849), 18 L. J. Ex. 145.

1994. —— ——.]—Where there are more assignees than one of a bkpt. estate, one of them may receive money belonging to bkpt. estate, & give a good discharge for it.—SMITH *v.* JAMESONS (1794), 1 Esp. 113; Peake, 279.

1995. —— —— Express dissent of other.]—One assignee of a bkpt. estate cannot give a valid receipt for money due to the estate, where the express dissent of the other assignee appears.—BRISTOW *v.* EASTMAN (1794), 1 Esp. 172.

Annotations :—**Mentd.** Stikeman *v.* Dawson (1847), 1 De G. & Sm. 90; Bartlett *v.* Wells (1862), 1 B. & S. 836; *Re* Seager, Seeley *v.* Briggs (1889), 60 L. T. 665; Cowern *v.* Nield, [1912] 2 K. B. 419, D. C.; Stocks *v.* Wilson, [1913] 2 K. B. 235; Leslie *v.* Sheill, [1914] 3 K. B. 607, C. A.

1996. To convey real estate—One trustee having resigned.]—Upon a liquidation petition by two partners, two persons were by three several resolutions appointed trustees of the joint estate, & of the two separate estates, respectively. One of the trustees resigned, whereupon the continuing trustee was by a resolution of the joint creditors appointed "sole trustee of the property of debtors," but no resolution was passed appointing any one to be trustee of either of the separate estates:—*Held:* the continuing trustee was able to convey real property, part of one of the separate estates, to a purchaser, for all the interest of debtor at the commencement of the liquidation.—*Re* WADDELL'S CONTRACT (1876), 2 Ch. D. 172; 45 L. J. Ch. 647; *sub nom. Re* VENDOR & PURCHASER ACT, 1874, *Ex p.* WADDELL, 34 L. T. 237.

1997. To change solicitors—One trustee not appearing to petition.]—Whenever two of three assignees direct the solr. to be changed, the third not concurring has a right to know, whether such change will be beneficial, & he not appearing on a petition for that purpose, the order was made.—*Ex p.* —— (1812), 1 Rose, 207.

1998. Survivor remains trustee—One trustee dead.]—Where two persons are appointed joint trustees in a liquidation by arrangement under 1869 Act, s. 125, & one of them dies, the survivor continues to be trustee in the liquidation.—*Re* BARTON, TOMLINS *v.* LATIMER, [1909] 2 K. B. 841; 79 L. J. K. B. 29; 101 L. T. 407; 16 Mans. 269, C. A.

SECT. 5.—RELATIONS BETWEEN TRUSTEE, ESTATE AND CREDITORS.

SUB-SECT. 1.—DUTIES AND LIABILITIES OF TRUSTEE.

A. Duties generally.

1999. Prior to public examination—To examine accounts—To require production of books, etc.]—It is the duty of the trustee, prior to the public examination of bkpt., to examine into the accounts, & require the production of his books & all such

PART VII. SECT. 4, SUB-SECT. 3.

h. *To obtain order for payment of money.*]—The ct. will not entertain an application for payment of money to one of the assignees of bkpt., although the other two have declined to act as assignees, & have been released by the creditors, unless they be first removed as assignees.—PASLEY *v.* ABRAHAM (1853), 4 Ir. L. Rec. N. S. 32.—**IR.**

PART VII SECT. 5, SUB-SECT. 1.—A.

j. *To call meetings of creditors.*]—*Held:* the obligation under Ord. 6 of 1843 (Cape), s. 56, to call a meeting was not exhausted by the calling of one meeting, but from time to time creditors might require a meeting to be called.—LIPSCHITZ *v.* OLIVIER'S ESTATE (1917), C. P. D. 582.—**S. AF.**

k. *To choose bank.*]—If the creditors do not choose a bank, the trustee, under Ord. 6 of 1843, s. 101, is bound to choose one & pay estate money into it.—LOUW & DUMMER *v.* FAGAN (1914), C. P. D. 630.—**S. AF.**

l. *As regards signing cheques.*]—All cheques for the payment by a bank of money belonging to an insolvent estate, must be signed by all the trustees, or by one of them for himself & co-trustees.—MARAIS' TRUSTEE *v.* QUEENSTOWN BANK (IN LIQUIDATION) (1876), Buch. 219.—**S. AF.**

m. *As regards creditors' resolutions.*]—A trustee is not bound by a creditors' resolution to take proceedings subject to the condition that if the action fail the estate shall not be liable for costs.—ALLAN *v.* ERLANK'S TRUSTEE (1908), T. S. 1187.—**S. AF.**

information as may be necessary for the explanation of bkpt.'s affairs.—*Re* LAWRENCE (1870), 22 L. T. 246.

Annotations:—**Refd.** *Re* Denton, *Ex p.* Milne (1873), 28 L. T. 175; *Re* Hendry, *Ex p.* Crump (1876), 34 L. T. 12, C. A.

See, further, Part XIX., *post.*

2000. On taking over estate from official receiver—If dissatisfied with accounts.]—If a trustee in bkpcy. is dissatisfied with the accounts rendered by the official receiver, he should report to the Board of Trade, & if the Board refuse or neglect to act, he should apply to the ct. for directions.—*Re* SMITH, *Ex p.* FOX (1886), 17 Q. B. D. 4; 55 L. J. Q. B. 288; 54 L. T. 307; 34 W. R. 535; 3 Morr. 63.

See, now, 1914 Act, s. 79 (3).

2001. To realise to best advantage—Not to clog sale with conditions.]—Assignees are not justified in clogging a sale with covenants, which reduce the value of the property, which it is their duty to make the most of for the benefit of the creditors.—WILKINS *v.* FRY (1816), 1 Mer. 244; 2 Rose, 371; 35 E. R. 665.

Annotations:—**Refd.** Levi *v.* Ayers (1878), 3 App. Cas. 842, P. C. **Mentd.** Fenn *v.* Craig (1838), 3 Y. & C. Ex. 216.

See, further, Part XX., *post.*

2002. To distribute equally.]—It is the duty of the trustee to distribute the whole funds collected by him equally amongst the creditors.—*Re* ELSWOOD (1855), 26 L. T. O. S. 96.

2003. To pay proceeds of seized goods sold into Bankruptcy Estates Account.]—When goods seized for rent are sold, it is the statutory duty of the trustee to require that the proceeds of the sale should be at once paid into the above account.—BOARD OF TRADE *v.* PROVIDENT CLERKS & GENERAL GUARANTEE ASSOCN., LTD. (1895), 72 L. T. 562; 39 Sol. Jo. 428, D. C.

Not to purchase.]—*See* sub-sect. 1, E., *post.*

See, furtr , Sects. 3 & 4, *ante.*

B. Duty in regard to Accounts.

See, now, 1914 Act, ss. 89–92, 105 (5).

(a) Duty to account.

2004. Right of Board of Trade to enforce order for account—Conditional order.]—On an application, on behalf of the Board of Trade, for an order of the ct. to enforce an order previously made by the Board of Trade upon a trustee to furnish accounts, a conditional order will not be granted, but the ct. will grant an order to comply with the order of the Board, & application must subsequently be made for a committal, if the order of the ct. is not complied with.—*Re* MARGETTS, *Ex p.* BOARD OF TRADE (1884), 32 W. R. 1002; 1 Morr. 211.

2005. —— Without proving trustee had funds in hand.]—The fact that there is no evidence of any money remaining in the hands of a trustee, who is ordered by the Board of Trade to furnish an account under 1883 Act, s. 162, will not justify such trustee in refusing to comply with the requirements of the order so made.—*Re* CALDERWOOD, *Ex p.* BOARD OF TRADE (1889), 6 Morr. 104.

2006. —— Without proving trustee had unclaimed or undistributed funds.]—The Board of Trade is entitled to enforce an order for an account against a trustee, without proving that he has had at any time since the passing of 1883 Act, any unclaimed or undistributed funds or dividends.—*Re* CORNISH, *Ex p.* BOARD OF TRADE, [1896] 1 Q. B. 99; 65 L. J. Q. B. 106; 73 L. T. 602; 44 W. R. 161; 12 T. L. R. 69; 40 Sol. Jo. 100; 3 Mans. 48, C. A.

2007. —— Committal to prison—Not without previous order requiring obedience.]—An ex-trustee in bkpcy. had failed to render an account showing what he had done while trustee, & to account for the property of bkpt., & had not given satisfactory explanation of his conduct. The trustee was summoned to attend at the ct., & did not do so. The ct. committed him for contempt. Upon application for a *habeas corpus* to discharge him out of custody:—*Held:* the rule directing the ct. to "enforce obedience" to the requisitions of the rule, did not justify a committal without a previous order of the ct. requiring obedience to such requisitions, & prisoner must be discharged out of custody.—*Re* POOKES ROYLE (1881), 7 Q. B. D. 9; *sub nom. Re* ROYLE, 50 L. J. Q. B. 656; *sub nom. Re* ROYAL, 44 L. T. 314.

—— **After release of trustee.**]—*See* Sect. 9, sub-sect. 3, *post.*

(b) What Charges allowed.

2008. Trustee's charges for professional services—Accountant.]—An assignee, who is an accountant, cannot charge the estate for his professional services. It makes no difference whether the accountant assignee be a partner in a house of accountants, by whom the charges are made, or whether he acts as such on his own separate account.—*Re* SOWERBY, *Ex p.* READ (1821), 1 Gl. & J. 77.

PART VII. SECT. 5, SUB-SECT. 1.—B. (a).

n. *Within what time.*]—It is the imperative duty of trustees to file their accounts within six months, unless further time has been allowed by the ct.—SIEG'S TRUSTEES *v.* SPILHAUS & CO. & SIEG (1911), C. P. D. 750.—**S. AF.**

o. *How accounts should be kept.*]—The only account of a trustee consisted of a bank passbook & of an account in the books of a firm of estate & general agents & auctioneers, of which the trustee was a partner, & which firm was authorised to act for him in the administration & liquidation of the estate. The books containing the account were allowed to fall into arrear for several months, & there was no account available & open for the inspection of creditors at all reasonable times:—*Held:* the mere fact the account was kept in the books of the firm gave rise to no good objection, but the account actually kept was not a compliance with Ord. 6 of 1843, s. 108.—LOUW & DUMMER *v.* FAGAN (1914), C. P. D. 630.—**S. AF.**

p. *"Fully accounted"—What amounts to.*]—An assignee has not "fully accounted" within 1864 Act by rendering an account merely; the expression necessarily means accounting & paying over.—*Re* BOTSFORD (1871), 22 C. P. 65.—**CAN.**

q. *Where accounts ordered.*]—A. & B., bankers, stopped payment in 1815, & their property was vested in trustees, by a deed dated in 1816. In May, 1822, A. being dead, a commission of bkpcy. issued against B. for debts contracted by him as a corn factor subsequent to the execution of the trust deed. C. a creditor, by judgment of Trinity term, 1815, filed a bill against the trustees of the deed & the assignees of B., & charged that B. had been allowed to continue carrying on the trade of a corn-factor. An account having been decreed of the real & personal estate of B. on Dec. 16, 1816, & of the debts due & how circumstanced, & what sums were due at that time on petition for re-hearing the bill was dismissed with costs.—VINCENT *v.* HACKETT (1829), 2 Ir. L. Rec. 1st ser. 258, 265, 295, 451.—**IR**

PART VII. SECT. 5, SUB-SECT. 1.—B. (b).

2008 i. *Trustee's charges for professional services—Auctioneer.*]—A trustee was not allowed to charge commission as an auctioneer, where, without authority from the creditors, he had acted for the estate in that capacity.—BLAND *v.* EKSTEIN'S TRUSTEES (1880), F. 103.—**S. AF.**

2008 ii. *S. P.* BENNETT & WEBSTER *v.* COETZEE'S TRUSTEE (1889), 6 S. C. 317.—**S. AF.**

2008 iii. —— *Broker.*]—A trustee is not permitted to charge for his services as broker in any matter connected with his office.—*Re* RIDLEY & SONS (1872), 5 Nfld. L. R. 456.—**NFLD.**

2008 iv. *S. P. Re* COMMERCIAL BANK & TRUSTEES' REMUNERATION (IN LIQUIDATION) (1899), 8 Nfld. L. R. 257.—**NFLD.**

2009 i. —— *Solicitor.*]—Where the trustee of an insolvent estate does work for the estate as an attorney, he cannot, without being authorised thereto by a resolution of creditors, charge fees for such work.—AFRICAN

Sect. 5.—Relations between trustee, estate and creditors: Sub-sect. 1, B. (b) & (c).]

2009. —— Solicitor—Charge for clerk's time.]—An assignee, who had acted as solr. to the fiat, was allowed to charge for his clerk's time employed in the business of the bkpcy., as costs out of pocket, but not any profit thereupon.—*Re* NEWTON, *Ex p.* NEWTON (1849), 3 De G. & Sm. 584; 64 E. R. 617.

2010. Travelling expenses.] — Assignees are entitled to the expenses of journeys solely and properly undertaken for the benefit of the estate.—*Re* SHARPE, *Ex p.* JOYNER (1832), 2 Mont. & A. 1, L. C.; *revsg.* S. C. *sub nom. Re* JOYNER, *Ex p.* ELSEE (1829), 1 Mont. 1.

2011. —— Incurred subsequent to choice of assignees.]—An assignee is entitled to his travelling expenses incurred by him subsequent to the choice of assignees.—*Re* COOPER, *Ex p.* LOVEGROVE (1834), 3 Deac. & Ch. 763, Ct. of R.

2012. Stamp on affidavit of no receipts or payments—No assets in hands of trustee.]—Where no money on account of debtor's estate has come into the hands of a trustee, he must, at his own expense, provide the stamp for the affidavit of no receipts or payments required to be forwarded to the Board of Trade in such case.—*Re* ROWLANDS, *Ex p.* BOARD OF TRADE (1887), 35 W. R. 457; 4 Morr. 70.

2013. Costs of unnecessary meeting—Tavern expenses of bidders at sale.]—The assignees are not entitled to be allowed, in their accounts, the expense of a meeting of creditors, which they had called to consider what they should have determined on themselves, nor the tavern expenses of the bidders at a sale of bkpt.'s property.—*Re* DENNIS, *Ex p.* MOLINEUX (1836), 2 Deac. 33.

2014. Petitioning creditor's law charges—Of benefit to assignees.]—Law charges incurred by petitioning creditor, of which the assignees afterwards have the benefit, may be allowed the assignees as just allowances.—*Re* BARROW, *Ex p.* CHRISTY, *Ex p.* HADFIELD (1837), 3 Mont. & A. 88; 6 L. J. Bcy. 68, Ct. of R.

2015. Double sitting—Two clerks.]—Assignees applied to be allowed to charge for a double sitting; they had two clerks in attendance:—*Held:* double sittings for public meetings could not be allowed, but extra charges for clerks might be made.—*Re* CHISHOLM & CHISHOLM (1850), 1 Fonbl. 50.

2016. Extraordinary expenses in capturing bankrupt abroad—Resulting in benefit to estate.]—The ct. will sanction, & direct payment out of the estate on petition of, extraordinary expenses incurred by the assignees in the payment of a reward for bkpt.'s capture & sending an officer abroad, when the expenditure has resulted in a great accession of property to the estate.—*Re* WOOD (1852), 19 L. T. O. S. 275.

2017. Costs of unsuccessful action—Authority of court.]—The Ct. of Bkpcy. has authority, independently of 1849 Act, s. 153, to allow the assignees in their accounts the costs of an unsuccessful action brought by them.—*Re* THOMSON, *Ex p.* EDMONDSON (1862), 4 De G. F. & J. 486; 31 L. J. Bcy. 32; 6 L. T. 234; 45 E. R. 1272, L. JJ.

Liability for costs in action with third parties.]—*See* Part XXI., *post.*

2918. Costs of solicitor—Employed with consent of committee—Basis of taxation.]—*Re* PRYOR, *Ex p.* BOARD OF TRADE, No. 2028, *post.*

2019. —— —— Resolutions authorising employment invalid.]—*Re* GEIGER, No. 2146, *post.*

2020. —— Depend on right of trustee—Not chargeable where misconduct of either trustee or solicitor.]—The right of the solr. of a trustee in bkpcy. to be paid his costs out of bkpt.'s estate is only the right of his client, the trustee; he has no independent right. If either the trustee or the solr. has been guilty of misconduct, the ct. can refuse to allow the solr.'s costs to be paid out of the estate, & this, notwithstanding they have been taxed & an *allocatur* made.—*Re* POOLEY, *Ex p.* HARPER (1882), 20 Ch. D. 685; 51 L. J. Ch. 810; 47 L. T. 177; 30 W. R. 650, C. A.

Annotations:—**Refd.** *Re* Humphreys, *Ex p.* Lloyd-George & George, [1898] 1 Q. B. 520, C. A. **Mentd.** *Re* Baker, *Ex p.* Baker (1887), 5 Morr. 5, D. C.

See, also, Part XII., Sect. 1, sub-sect. 10, *post.*

MUTUAL TRUST & ASSURANCE CO., LTD. *v.* RAUBENHEIMER'S TRUSTEES (1912), C. P. D. 439.—**S. AF.**

r. *Expenses attending protest of bills—Drawn for wages.*]—The sanction of the ct. was given to the payment of the expenses attending the protest of bills drawn for the payment of servants' wages, where it appeared that a suit for recovery of the amount of such bills had been relinquished upon an express undertaking by the trustees to pay same, together with the expenses thereon.—*Re* STABB, PRESTON, PROWSE & CO.'S INSOLVENTS, *Ex p.* HOGAN (1823), 1 Nfld. L. R. 338.—**NFLD.**

s. *Expenses of prosecuting bankrupt.*]—A trustee has no statutory authority to interfere in & spend money upon the furtherance of a prosecution of insolvent undertaken by the Crown.—FEW *v.* HARTLEY'S TRUSTEE (1887), 5 S. C. 255.—**S. AF.**

t. *Rates on property sold by trustee.*]—Where the trustee of an insolvent estate in selling landed property, in respect of which one year's rates were due to the Cape Town Town Council, warranted the property as free from encumbrances:—*Held:* he was entitled to charge the amount of such rate, which he had paid to free the property, to costs of administration.—KRACHMAL'S TRUSTEE & CAPE TOWN TOWN COUNCIL *v.* EPSTEIN (1900), 17 S. C. 317.—**S. AF.**

w. *Services of partner of bankrupt.*]—If after the provisional order of sequestration of a partnership estate, a salaried partner of the firm performs valuable services in the administration which he is not legally bound to perform the trustees may with the sanction of the ct. award him a fair remuneration for his services as part of the costs of sequestration.—WALKER *v.* RECEIVERS GRAND JUNCTION RYS. (1905), 22 S. C. 86; 15 C. T. R. 93.—**S. AF.**

a. *Advances for benefit of estate.*]—W. was ranked on the sequestrated estate of R., on behalf of W. & Son, of which he was a partner, & as mandatory for two other creditors. Afterwards he was appointed trustee &, by the instruction of the creditors, advanced money to bkpt. to enable a coal-pit to be worked:—*Held:* he was entitled to repayment of his advances, subject to "deduction of the proportion of loss effeiring to the sum for which pursuer ranked upon the estate of H. & others."—WILSON *v.* DUNFERMLINE MAGISTRATES (1822), 1 Sh. (Ct. of Sess.) 417.—**SCOT.**

b. —— *Under resolution not binding on all creditors—Apportionment.*]—A trustee acting in accordance with a resolution of creditors, which pltfs., who were concurrent creditors, opposed, expended a sum of £81 in repairs to the mortgaged property:—*Held:* the resolution was not binding on creditors who were not consenting parties thereto, & the trustee's account should be amended by striking out the portions of the sum of £81, which were charged upon the concurrent claims of pltfs. & the creditor represented by one of them.—LOUW & DUMMER *v.* FAGAN (1914), C. P. D. 630; W. R. 506.—**S. AF.**

c. *Allowance to bankrupt—Made without authority.*]—If an allowance is made by the trustee to bkpt. without authority:—*Semble:* the trustee will not be allowed credit for it in his account.—EWING *v.* LAWRIE (1824), 3 Sh. (Ct. of Sess.) 234.—**SCOT.**

d. *Trade discounts.*]—The practice of newspaper proprietors to allow a trustee a commission on the sum spent by him in advertising sales of estate property, is highly objectionable, & should be discontinued.—LOUW & DUMMER *v.* FAGAN (1914), C. P. D. 630.—**S. AF.**

e. *Fee to counsel—To approve deed decreed to be executed.*]—*Held:* not allowed.—WALLACE *v.* MACAN (1842), Fl. & K. 554; *sub nom.* WALLACE *v.* MCCANN, 4 I. Eq. R. 522.—**IR.**

f. *Payment by volunteer subsequently elected trustee.*]—If a person who has paid out a distress on bkpt.'s estate is subsequently elected trustee, a ratification by himself & the creditors relates back to the date of payment.—MCINTYRE'S CREDITORS' TRUSTEE *v.* LETT (1883), 2 N. Z. L. R. 198.—**N. Z.**

(c) *Audit and Taxation.*

See, now, 1914 Act, s. 92.

2021. Assignee unable to attend audit—Audit on affidavit.]—An assignee who, being unable to attend the audit, makes an affidavit, must personally pay the costs thereof. *Qu.:* as to the validity of an audit passed on affidavit.—*Re* BARROW, *Ex p.* CHRISTY, *Ex p.* HADFIELD (1837), 3 Mont. & A. 88, 101 ; 6 L. J. Bcy. 68, Ct. of R.

2022. Audit of Board of Trade may be revised.]—On July 2, 1889, the remuneration of the trustee appointed in the bkpcy. was fixed by resolution of the committee of inspection at the rate of 10 per cent. on the assets realised, & 7½ per cent. on the amount distributed in dividend, at which rate remuneration was allowed to the trustee on the assets then realised at the fourth audit of his accounts. In Jan., 1890, a further asset of bkpt. consisting of a reversion to a share of certain residuary estate was realised for the sum of £1,200, upon which remuneration was claimed by the trustee at the same rate. Objection was taken by the committee of inspection to the claim, on the ground that the resolution passed by them on July 2, 1889, had reference only to the assets realised at the time such resolution was passed & did not include any future assets ; & they subsequently passed another resolution by which the remuneration of the trustee was fixed at a percentage calculated at the rate of 6 per cent. on the assets realised, & 2½ per cent. on the amount distributed in dividend. The claim of the trustee having been disallowed by the Board of Trade on the fifth audit of his accounts :—*Held :* in the circumstances the Board of Trade would be acting rightly in revising their audit, or in allowing the remuneration at the rate claimed.—*Re* MARSDEN, *Ex p.* BOARD OF TRADE (1892), 36 Sol. Jo. 309 ; 9 Morr. 70.

2023. Jurisdiction to tax trustee's charges—Notwithstanding audit by committee.] — The creditors of a liquidating debtor resolved on a liquidation by arrangement, & appointed a trustee & a committee of inspection, & they resolved that the remuneration of the trustee should be such as the committee of inspection should from time to time determine. Afterwards the creditors authorised the trustee to accept an offer made by debtor, under 1869 Act, s. 28, to pay a composition, he also paying the costs, charges, & expenses of the solrs., receiver, & trustee in relation to the settlement of his affairs & of the scheme of arrangement. The arrangement was approved by the ct. :—*Held :* after the confirmation of that scheme the ct. had jurisdiction to tax the trustee's charges, notwithstanding his account had been audited & approved by the committee of inspection subsequently to the confirmation of the composition arrangement.—*Re* RANBY, *Ex p.* RANBY (1880), 14 Ch. D. 467 ; 43 L. T. 11 ; 28 W. R. 804, C. A.

2024. Scale of charges—Agent—Selling bankrupt's property by tender.]—The scale of charges of an agent, employed by the assignees to sell bkpt.'s stock by tender, is properly settled by the rule adopted by the Ct. of Bkpcy. in London at an intermediate rate between that applicable to a sale by auction & that applicable to a sale by valuation.

It is not incumbent on the appellate ct. to decide such a question, although both parties submit to its jurisdiction.—*Re* MACKENNA, *Ex p.* HUNT (1854), 5 De G. M. & G. 387 ; 23 L. J. Bcy. 43 ; 24 L. T. O. S. 29 ; 2 W. R. 682 ; 43 E. R. 920, L. C.

2025. Taxation of costs—Right of trustee to attend.]—Solrs. to assignees had their bills of costs taxed in Mar., 1851, by the registrar of the District Ct., *ex p.*, without notice to the assignees, but in the presence of the official assignee, who afterwards died. In Apr., 1853, the assignees & some of the creditors applied to the district ct. for a re-taxation of the bills, which, save £100, had not been paid :—*Held :* such bills must be re-taxed.—*Re* BARBARY, *Ex p.* BATEMAN (1854), 23 L. J. Bcy. 8, L. JJ.

2026. —— —— New trustee appointed.]—A trustee passed his solr.'s bill of costs subject to taxation, & the solr. lodged the bill with the taxing officer & obtained an appointment to tax. Before the date fixed for the taxation arrived a new trustee was appointed, but the solr. did not give notice of the appointment to tax either to the official receiver or to the new trustee, & the taxing officer gave his *allocatur* for the amount of the taxed bill :—*Held :* "the trustee" who, under 1886 & 1890 Rules, r. 120, ought to have had notice of the appointment to tax was the person who was trustee at the time when the taxation took place, *i.e.*, the new trustee, & that notice should also have been given to the official receiver, & a re-taxation of the solr.'s bill must be directed with liberty to the new trustee to attend, the *allocatur* in the meantime to be suspended.—*Re* SMITH, *Ex p.* WILSON, [1910] 2 K. B. 346 ; 80 L. J. K. B. 16 ; 102 L. T. 861 ; 26 T. L. R. 492 ; 17 Mans. 290.

2027. —— Application to tax by one only of several trustees—Bill reduced by one-sixth—Costs.]—An assignee presented a petition for the taxation of the bill of the solr. to the fiat, but the prayer was opposed by the other assignees & the solr. The usual order for taxation having been made, & the bill having been reduced by more than one-sixth, the solr. paid petitioner the costs of taxation. Petitioner then applied to the comrs. to be allowed out of the estate his extra costs incurred on the proceeding, but the comrs. refused to allow him any further costs, although they allowed the other assignees out of the estate costs as between solr. & client :—*Held :* petitioner was entitled to the extra costs paid out of the estate.—*Re* FISHER, *Ex p.* FOSBROOKE (1841), 1 Mont. D. & De G. 533 ; 5 Jur. 370, Ct. of R.

See, also, No. 2184, *post.*

2028. Basis of taxation of solicitor's charges—Employed with consent of committee.]—When a trustee in bkpcy. has, with the authority of the committee of inspection, employed a solr. to assist him in the performance of his duties as trustee in

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PART VII. SECT. 5, SUB-SECT. 1.—B. (c).

g. *When review ordered.*]—An account passed by the comrs. may be ordered to be reviewed before a master.—*Re* FRENCH, *Ex p.* TOWNSEND (1828), 1 Mol. 139.—IR.

h. *Creditor's right to surcharge & falsify accounts.*]—The ct. will not allow a creditor a sum of money to go before a master to surcharge & falsify the accounts of bkpt.'s assignees.—*Re* [FRENCH (1828), 2 Ir. L. Rec. 1st ser. 5.—IR.

j. —— *Burden of proof—Delay in proceeding—Costs.*]—The ct. will, at the instance of a creditor, refer to the master the accounts of assignees in bkpcy. which have been passed by the comrs., with liberty to surcharge & falsify them.

The person who surcharges an account settled, must commence by having it assumed that every item is proper, unless he is able by sufficient evidence to displace a credit or superadd a charge by proof, &, as to falsifying an item, he must by *primâ facie* evidence make out a case to show that it is falsely introduced.

If the person seeking to surcharge or falsify the account, delays in proceeding, he may be called upon by notice to show the disputed items, otherwise the master will make his report *ex p.*, & if he fails he will have to pay costs.—*Re* FRENCH & CO., *Ex p.* TOWNSEND (1828), 2 Mol. 242.—IR.

Sect. 5.—Relations between trustee, estate and creditors: Sub-sect. 1, B. (c) & C. (a) & (b).]

reference to the distribution of bkpt.'s estate, the giving of notices, & winding-up the bkpcy., the costs of such solr. must be taxed upon the principle that a solr. is not to charge solr.'s charges for administrative work, but only such charges as are fair & reasonable, having regard to the work done. —*Re* PRYOR, *Ex p.* BOARD OF TRADE (1888), 59 L. T. 256; 5 Morr. 232.

2029. —— Authority of taxing master.]—In reply to a petition by the solr. & messenger to a commission, praying that the assignees might be ordered to pay the solr.'s bill of costs & the messenger's bill as allowed by the comrs. the assignees alleged that the comrs. had made improper allowances in taxing the bills, whereupon they were ordered to be taxed by a master. The master thought he had no authority to tax the bills between the opening of the commission & the choice of assignees. Another petition having been preferred praying that the master be directed to proceed with the taxation:—*Held:* the master should review his certificate.—*Ex p.* CLARKE & COGAN (1791), 1 Cooke's Bankrupt Laws, 8th ed., p. 17.

Annotation:—**Consd.** *Re* Wooding, *Ex p.* Coates (1834), 3 L. J. Bcy. 62, Ct. of R.

2030. —— Counsel's retainers—In special circumstances.]—On the taxation of the bill of costs of a solr. to a trustee, the taxing master has a discretion to allow retainers to counsel, but unless in very exceptional circumstances, such retainers will not be allowed.—*Re* NORDMANN, *Ex p.* HASLUCK (1898), 67 L. J. Q. B. 996; 47 W. R. 151; 5 Mans. 327.

2031. —— Amount of costs limited by committee or Board of Trade.]—When the amount of costs to be incurred has been limited, either by the committee of inspection or by the Board of Trade, the taxing master, on taxing the solr.'s bill of costs, cannot allow as against bkpt.'s estate a larger sum than the amount so limited.—*Re* DUNCAN, *Ex p.* OFFICIAL RECEIVER, [1892] 1 Q. B. 879; 61 L. J. Q. B. 712; 66 L. T. 508; 40 W. R. 409; 8 T. L. R. 412; 36 Sol. Jo. 330; 9 Morr. 61, C. A.

Annotations:—**Consd.** *Re* Geiger, [1915] 1 K. B. 439, C. A.; *Re* Yeatman, [1916] 1 K. B. 461. **Mentd.** *Re* Yeatman, *Ex p.* Yeatman, [1916] 1 K. B. 780, C. A.

2032. Appeals in taxation—To judge in bankruptcy.]—An appeal lies to the judge in bkpcy. from a decision of the bkpcy. taxing master, who has, at the instance of the Board of Trade, reviewed the taxation of a county ct. registrar.—*Re* ALISON, *Ex p.* JAYNES, [1892] 2 Q. B. 587; 66 L. T. 688; 36 Sol. Jo. 526; *sub nom. Re* ALLINSON, *Ex p.* JAYNES *v.* BOARD OF TRADE, 61 L. J. Q. B. 526; *sub nom. Re* ALLISON, *Ex p.* JAYNES, 40 W. R. 624; 9 Morr. 180.

Annotation:—**Mentd.** *Re* Beeston, *Ex p.* Board of Trade (1899), 68 L. J. Q. B. 344, C. A.

2033. —— In regard to what costs.]—The right of the Board of Trade to have costs & charges, which have been taxed by a registrar of a county ct., reviewed by a bkpcy. taxing master of the High Ct., does not apply to the costs of persons litigating with the trustee outside the bkpcy.—*Re* HUNT, *Ex p.* BOARD OF TRADE, [1898] 1 Q. B. 287; 67 L. J. Q. B. 247; 46 W. R. 384; 4 Mans. 315.

See, generally, Parts XVI., XVII., *post.*

C. Duty in regard to Money collected.

(a) Enforcement of Payment.

2034. Order for payment—To whom application should be made.]—An order having been made by the county ct. judge against a trustee in a liquidation, directing him to credit the estate of debtor with certain moneys, such trustee appealed to the bkpcy. judge, by whom the decision of the county ct. was substantially affirmed, & a special order was made as to costs, & as to the required payments to be made by the trustee. The trustee having failed to comply with the order, the comptroller in bkpcy. reported the default to the bkpcy. judge, & applied to enforce his report:—*Held:* the application ought to have been made to the county ct. & must be refused.—*Re* THOMAS, *Ex p.* COMPTROLLER IN BANKRUPTCY (1886), 3 Morr. 49.

2035. —— When granted—Undistributed funds & dividends.]—Trustees in bkpcy., appointed in 1877, collected £199, the whole assets. No dividend was declared, but the money was retained by the trustees, who claimed £150 as their remuneration under an alleged resolution of the committee of inspection. On an application, on behalf of the Board of Trade, for an order directing the trustees to pay the funds & dividends into the Bank of England:—*Held:* the order must be granted, with costs against the trustees.—*Re* PEARCE, *Ex p.* BOARD OF TRADE (1884), 1 Morr. 56.

2036. Order to commit to prison—No money in trustee's hands.]—One of two partners was appointed trustee under a liquidation, &, before the affairs were wound up, died. At the time of his death he was indebted to the estate in a sum of £201. The surviving partner was then appointed trustee, on his giving an undertaking in writing to make good any deficiency. The latter never received anything on behalf of the estate. An order of ct. was made for payment of the £201, & on its being disobeyed an application was made to commit the surviving partner:—*Held:* no order to commit could be made because it was not shown that debtor had ever had the money in his possession.—*Re* HINCKS, *Ex p.* CUDDEFORD (1876), 45 L. J. Bcy. 127; 24 W. R. 931.

2037. —— —— Costs of motion.]—A trustee in liquidation was ordered to pay the taxed costs of the solr., & "the costs of the motion" upon which the order was made. On default, he was committed to prison for his contempt of ct. in "disobeying the order":—*Held:* the order of committal was wrong, for "the costs of the motion" could not be said to be money in his hands as a trustee within 1869 Act, s. 4 (3).—*Re* HIND, *Ex p.* SHARP (1877), 37 L. T. 168.

2038. —— Stay to allow time for payment.]—A trustee failed to pay into the Bkpcy. Estates Account certain money, which had come into his hands in respect of the estate of which he was trustee, or to comply with an order of the Board of Trade, directing him forthwith to pay over the money together with a further sum as interest at the rate of 20 per cent. charged under 1883 Act, s. 74 (6). The Board of Trade applied for an order of committal:—*Held:* an immediate order of committal must be made in respect of the principal sum, but such order would not issue for a week & not go out at all if within that time the trustee should pay into the Bkpcy. Estates Account the amount due, together with the costs of the motion, & an order would be made directing the trustee to comply with the order of the Board of Trade requiring him to pay the sum charged as interest within a fortnight.—*Re* TATUM, *Ex p.* TATUM *v.* HARKER (1889), 60 L. T. 896; 6 Morr. 107.

2039. —— ——.]—A trustee having failed to pay money in respect of the estate into the Bkpcy. Estates Account, or to comply with an order of the Board of Trade forthwith to pay over such

money, the Board of Trade applied for an order to commit:—*Held:* an immediate order of committal must be made, but the order should lie in the office for a week, in order that the trustee might have opportunity within that time to pay over the money.—*Re* NICHOLSON, *Ex p.* BOARD OF TRADE (1888), 37 W. R. 239; 5 Morr. 278; *subsequent proceedings* (1890), 63 L. T. 322; 7 Morr. 257.

Annotations:—**Refd.** *Re* Tatum, *Ex p.* Tatum *v.* Harker (1889), 60 L. T. 896. **Mentd.** Board of Trade *v.* Employers' Liability Assce. Corpn. (1909), 79 L. J. K. B. 434.

2040. —— Trustee becoming bankrupt before time limited for payment.]—A trustee in bkpcy. was ordered by the ct. to pay a sum of money into the Bkpcy. Estates Account. Before the time limited for payment, he was adjudicated bkpt., without obeying the order:—*Held:* in the absence of evidence that he had improperly dealt with the money, there was no evidence of wilful disobedience to the order to justify committal.—*Re* CALDERWOOD, *Ex p.* BOARD OF TRADE (1891), 8 Morr. 135.

2041. —— Trustee released on undertaking to pay by instalments.]—A trustee in a liquidation, who had been committed to prison for non-compliance with an order directing him to pay a sum of money, part of debtor's property received by the former in his character of trustee, into ct., was ordered to be released upon his undertaking to pay the amount due by quarterly instalments.—*Re* FRANK, *Ex p.* HEDGER (1880), 42 L. T. 192.

2042. —— Discharge on payment by surety.]—An order was made against a trustee, who had failed to pay into the Bkpcy. Estates Account certain moneys which had come into his hands in respect of the estate, ordering him to be committed to prison in the event of his not paying the amount specified within a week. The terms of the order not being complied with, a warrant was issued against the trustee, but the amount in question was subsequently paid by a guarantee society. The trustee applied that the order of committal might be rescinded:—*Held:* the money having been paid, there was no longer any default on the part of the trustee, & the order for committal must be discharged.—*Re* TATUM, *Ex p.* HARKER (1889), 5 T. L. R. 574; 6 Morr. 179.

2043. Trustee dying before accounting without personal property—Lien of creditors on real estate.]—Where an assignee dies before he has accounted for what he has received, & leaves no personal assets, the creditors have a lien upon his real estate.—PRIMROSE *v.* BROMLEY (1739), 1 Atk. 89; 26 E. R. 58, L. C.

2044. Trustees absconding with dividends—Whether remedy against estate or only against trustee.]—Comrs. of bkpcy. appointed a dividend to be made of bkpt.'s estate. A creditor under the commission neglected to receive of the assignees his proportion of that dividend, & the assignees afterwards absconded with the dividend that was in their hands:—*Held:* the creditor should not be allowed to come upon bkpt.'s estate for that money, but must take his remedy against the assignees as well as he could.—ANON. (undated), cited Barn. Ch., at p. 419; 27 E. R. 703.

Annotation:—**Distd.** Smith *v.* Chandos (1740), Barn. Ch. 412, L. C.

(*b*) *Liability to pay Interest and Penal Interest. See, now,* 1914 Act, s. 89 (5).

2045. Duty to submit accounts—Without application therefor—Liability for interest.]—Assignees are chargeable with interest if they do not actively bring forward their accounts without waiting for an application.—*Ex p.* EDWARDS (1801), 6 Ves. 3; 31 E. R. 909.

Annotations:—**Mentd.** *Ex p.* Lacey (1802), 6 Ves. 625; *Re* Bryant, *Ex p.* Paterson (1813), 1 Rose, 402.

2046. Money retained—Rate of interest.]—*Held:* an assignee of a bkpt. was never to be charged with interest for money retained in his hands at a higher rate than 4 per cent., unless a special case was made for it.—*Ex p.* STRUTT (1788), 1 Cox, Eq. Cas. 439; 29 E. R. 1239, L. C.

2047. Money applied for private advantage of trustee.]—Where assignees do not divide bkpt.'s effects in a proper time, but are making a private advantage to themselves, the ct. will charge them with interest.—*Ex p.* LANE (1741), 1 Atk. 90; 26 E. R. 59.

Annotation:—**Mentd.** *Re* Wharton, *Ex p.* Crowe (1829), 1 Mont. & M. 281.

2048. —— Rate of interest.]—Assignees kept the fund eight years without dividing, & one admitted he had lent the share received by him at 5 per cent., the other that he had lent his share to a partnership, in which he was engaged, with his own money without any distinct charge of interest:—*Held:* they should pay such interest, as should appear to have been made, &, where none, 4 per cent.—HANKEY *v.* GARRATT (1792), 1 Ves. 236; 3 Bro. C. C. 457; 29 E. R. 641.

Annotations:—**Consd.** Morgan *v.* Mather (1792), 2 Ves. 15. **Mentd.** *Ex p.* Ruffin (1801), 6 Ves. 119; Everett *v.* Backhouse (1804), 10 Ves. 94; Thompson *v.* Derham, Thompson *v.* Goodman (1842), 1 Hare, 358; Brett *v.* Beckwith (1856), 3 Jur. N. S. 31; Martin *v.* Powning (1868), 4 Ch. App. 356, n.

2049. —— ——.]—An assignee in bkpcy. was removed, & charged with interest at 5 per cent. (before 49 Geo. 3, c. 121, s. 4) for money paid in at his banker's to his account, & used as his own property.—*Ex p.* TOWNSHEND (1809), 15 Ves. 470; 33 E. R. 832.

Annotation:—**Mentd.** Moons *v.* De Bernales (1826), 1 Russ. 301.

2050. Failure to make dividend—Rate of interest.]—Money having been kept by the assignee of bkpt. in his hands for several years, & no dividend made, was ordered to be paid with 5 per cent. interest, & all costs.—TREVES *v.* TOWNSHEND (1783), 1 Bro. C. C. 384; 1 Cox, Eq. Cas. 50; 28 E. R. 1191.

Annotations:—**Consd.** *Ex p.* Strutt (1788), 1 Cox. Eq. Cas. 439, L. C. **Distd.** Rocke *v.* Hart (1805), 11 Ves. 58. **Consd.** Docker *v.* Somes (1834), 2 My. & K. 655. **Refd.** Board of Trade *v.* Employers' Liability Assce. Corpn., [1910] 1 K. B. 401. **Mentd.** Thompson *v.* Derham, Thompson *v.* Goodman (1842), 1 Hare, 358.

2051. —— ——.]—Interest at 4 per cent. against assignees of bkpt. for not making a dividend, when they ought, will be increased upon circumstances.—*Re* HILLIARD (1790), 1 Ves. 89; 30 E. R. 244.

See, further, No. 2137, *post.*

2052. Money paid into bank in which assignee partner—Money left there unreasonable time.]—Assignee in bkpcy. charged with interest, not as partner in the bank, into which the money was paid by direction of the creditors, but for keeping it there too long.

The assignee resists the claim of interest on the ground, that the money really is, where the creditors directed it to be; & though, as a general regulation, it may be prudent in creditors never to order their money to be paid into a bank in which an assignee is a partner, yet, if they do, it would be too much to say, he shall be charged with interest merely on the ground that he has, as a banker, that possession, which the creditors have sanctioned.

Here is, however, another circumstance deserving attention. The assignee in this particular case is bound to use as much expedition for the benefit of the creditors by taking the money out of his

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own hands, as if it was in any other bank. He has in fact been making a profit of 5 per cent. about three years; & gives no satisfactory reason for keeping it so long. On that ground therefore, being an assignee, he must account with interest, to be computed upon the annual balances (ELDON, L.C.).—*Ex p.* BAKER (1811), 18 Ves. 246; 34 E. R. 310.

2053. Liability for penal interest—In what circumstances—Money received by agent misappropriated & then replaced.]—Assignees gave cheques upon the banker of the estate to an agent to enable him to purchase exchequer bills for the estate. The agent received the money & converted it to his own use. The money was subsequently replaced:—*Held:* the assignees were not under 49 Geo. 3, c. 121, s. 4, chargeable with 20 per cent. upon the money so misapplied by their agent, as the act gave interest only where the assignees wilfully retained, or otherwise employed the money for their own benefit.—*Re* WILKINSON & GOODALL, *Ex p.* WILKINSON (1818), Buck, 197.

2054. —— —— Money retained owing to fear of solvency of bank.]—An assignee received money, apprehensive of the solvency of the bank, he retained it for over three months:—*Held:* though it was impossible in the particular case to say that the assignee had not acted meritoriously, & with the best intentions, yet, as it appeared that he had wilfully retained the sum in his hands, he must pay 20 per cent., 49 Geo. 3, c. 121, being imperative.—*Re* LEE, *Ex p.* BRAY (1810), 1 Rose, 144.

Annotation:—**Refd.** *Re* Aaron, *Ex p.* Lowe (1832), 1 L. J. Bcy. 54, Ct. of R.

2055. —— —— Money retained or employed for trustee's benefit.]—If an assignee retain in his hands, or employ for his benefit, any sum to the amount of £100, part of the estate of bkpt., he is not only liable to refund same, but to pay 20 per cent. interest thereon.—*Re* ELSWOOD (1855), 26 L. T. O. S. 96.

2056. —— To whom payable—To creditor—Dividend separated.]—The creditors of bkpt. appointed the Bank of England as the place where the estate should be deposited. A dividend was declared. Two of the three assignees signed drafts for dividends, which they forwarded to the other assignee for his signature. He also signed them, & received the money, which he applied for his own purposes. Upon his death a creditor's suit was instituted by the assignees & the comrs. for the administration of his assets:—*Held:* the estate of the assignee was not liable under 49 Geo. 3, c. 121, to pay 20 per cent. upon the funds misapplied.

When the order for dividend separates the particular aliquot parts to be paid to each creditor from the mass of the personal estate of the bkpt., the assignees then become debtors to him, & there is nothing in the Acts of Parliament authorising him to ask for 20 per cent. as long as he chooses to leave the money in their hands (LORD ELDON, C.).—*Re* POWELL, *Ex p.* WACKERBATH (1826), 2 Gl. & J. 151; 5 L. J. O. S. Ch. 9, L. C.

Annotations:—**Refd.** *Re* Aaron, *Ex p.* Lowe (1832), 1 L. J. Bcy. 54, Ct. of R.; Green *v.* Weston (1837), 3 My. & Cr. 385.

2057. —— —— Whether to estate or treasury.]—The penal interest of 20 per cent. chargeable against a trustee in bkpcy. under 1883 Act, s. 74 (6), for improperly retaining money belonging to the estate is payable to bkpt.'s estate, & not to the Treasury.—*Re* SIMS, *Ex p.* OFFICIAL RECEIVER, [1907] 2 K. B. 36; 76 L. J. K. B. 849; 96 L. T. 713; 51 Sol. Jo. 345; 14 Mans. 169.

Annotation:—**Folld.** Board of Trade *v.* Employers' Liability Assce. Corpn., [1910] 1 K. B. 401.

2058. —— Against whom chargeable—Only against solvent assignee.]—*Held:* under 49 Geo. 3, c. 121, s. 4, the penal interest of 20 per cent. applied against a solvent assignee only, & was not intended to prejudice the creditors of a bkpt. assignee.—*Re* WILLETT, *Re* KENT, *Ex p.* GOLDSMITH (1824), 1 Gl. & J. 405; 2 L. J. O. S. Ch. 150.

2059. —— —— Trustee in liquidation.]—*Held:* 1869 Act, s. 30, charging a trustee with interest at 20 per cent. *per annum* upon the excess above £50 of any money retained in his hands for more than ten days, did not apply to a trustee under a liquidation.—*Re* FASTNEDGE, *Ex p.* BROOKER (1876), 2 Ch. D. 57; 45 L. J. Bcy. 51; 34 L. T. 604; 24 W. R. 655, C. A.

2060. —— To what date—After removal to date of repayment.]—Where an official assignee, who had been removed from that office, neglected to pay over a sum of money, which he had received under the fiat, he was ordered forthwith to pay same together with interest at the rate of 20 per cent. for the time of his retention of the money.—*Re* TURNER, *Ex p.* TURNER (1842), 2 Mont. D. & De G. 481; 11 L. J. Bcy. 25, Ct. of R.

2061. —— —— ——.]—Where a trustee, who retains money belonging to the estate, has been removed from office, interest may be charged during the time he so retains the money in his hands & not merely up to the time of his removal.—*Re* TATUM, *Ex p.* TATUM *v.* HARKER (1889), 60 L. T. 896; 6 Morr. 107.

2062. —— Set off against remuneration & disbursements.]—The amount of the trustee's remuneration forfeited under 1883 Act, s. 74, cannot be set off against the penal interest, but sums due to the trustee for proper disbursements made by him on account of the estate can be deducted by him.—BOARD OF TRADE *v.* EMPLOYERS' LIABILITY ASSURANCE CORPN., LTD., [1910] 1 K. B. 401; 79 L. J. K. B. 434; 101 L. T. 862; 26 T. L. R. 167; 54 Sol. Jo. 136; 17 Mans. 81; *revsd.* on another point, [1910] 2 K. B. 649, C. A.

—— Effect of failure to pay on liability of surety.]—*See* No. 2300, *post.*

2063. —— Enforcement of—Jurisdiction of court to commit.]—A trustee in bkpcy. having failed to comply with an order to pay penal interest, & also having failed to pay the costs of two motions brought against him by the Board of Trade, application was made by the Board of Trade to commit him:—*Held:* (1) the ct. had jurisdiction to commit for disobedience to the order as to the interest, but not as to the costs; (2) the convenient course in the circumstances was for the Board of Trade to issue a judgment summons for the whole amount, & to apply afterwards to commit in case of non-compliance with the summons.—*Re* NICHOLSON, *Ex p.* BOARD OF TRADE (1890), 63 L. T. 322; 7 Morr. 257.

PART VII. SECT. 5, SUB-SECT. 1.—C. (b).

2053 i. *Liability for penal interest—In what circumstances—Money retained—No direction to lodge in bank.*]—An assignee is not chargeable with penal interest for detention of money of the estate, if direction was not given by the creditor or comr., to lodge such money in bank.—*Re* FAHY (1841), 3 I. Eq. R. 585.—**IR.**

2053 ii. —— —— —— *Evidence.*]—Where the assignee of bkpt. is sought to be charged with 20 per cent. under 49 Geo. 3, c. 121, s. 4 (6 Will. 4, c. 14, s. 122), it must be shown that he had the money actually in his possession; & it is not sufficient that he held it by inference, or through his agent.—*Re* BELL (1827), Ir. L. Rec. 1st ser. 63.—**IR.**

Annotation :—**Mentd.** *Re* Tatum, *Ex p.* Tatum *v.* Harker (1889), 60 L. T. 896.

D. Duty to allow Creditors to use his Name.

See Part XXI., Sect. 7, *post.*

E. Duty not to purchase or lease from Estate.

(a) For himself without Leave of Court.

See, now, 1914 Act, s. 55 (1), & 1915 Rules, rr. 347, 348.

2064. General rule.]—As to a purchase by a trustee of the trust property the rule is, that it shall not prevail in any circumstances, unless the connection appears satisfactorily to have been dissolved (a transaction to be viewed with great jealousy from the opportunity of acquiring knowledge as trustee), or by universal consent. But as against him it shall stand ; as, if more cannot be obtained. The rule applies most strictly to assignees in bkpcy. from their great power.—*Ex p.* LACEY (1802), 6 Ves. 625 ; 31 E. R. 1228, L. C.

Annotations :—**Consd.** Baker *v.* Peck (1860), 3 L. T. 656 ; *Re* Worssam, Hemery *v.* Worssam (1882), 46 L. T. 584 ; Plowright *v.* Lambert (1885), 52 L. T. 646 ; Farrar *v.* Farrars (1888), 40 Ch. D. 395, C. A. **Mentd.** *Ex p.* James (1803), 8 Ves. 337, L. C. ; Morse *v.* Royal (1806), 12 Ves. 355, L. C. ; A.-G. *v.* Dudley (1815), Coop. G. 146 ; Greenlaw *v.* King (1841), 10 L. J. Ch. 129, L. C. ; Benson *v.* Heathorn (1842), 1 Y. & C. Ch. Cas. 326 ; Hamilton *v.* Wright (1842), 9 Cl. & Fin. 111, H. L. ; Aberdeen Ry. Co. *v.* Blaikie (1854), 2 Eq. Rep. 1281, H. L. ; De Cordova *v.* De Cordova (1879), 4 App. Cas. 692, P. C. ; *Re* Postlethwaite, Postlethwaite *v.* Rickman (1888), 59 L. T. 58 ; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392, C. A. ; *Re* Boles & British Land Co.'s Contract (1901), 71 L. J. Ch. 130 ; Rowland *v.* Chapman, Rowland *v.* Corrie, Rowland *v.* Corrie, Rowland *v.* Brandreth (1901), 17 T. L. R. 669.

2065. —— Motive immaterial.]—However pure their motives, neither assignees nor comrs. can be permitted to possess themselves, by purchase or otherwise, of any part of bkpt.'s interest in a property.—*Re* GUNDRY, *Ex p.* BADCOCK (1829), Mont. & M. 231, L. C.

Annotations :—**Consd.** *Re* Gundry, *Ex p.* Grylls, *Ex p.* Batten (1832), 2 Deac. & Ch. 290, Ct. of R. **Apld.** *Re* Garbett, *Ex p.* Downes (1847), De G. 390, Ct. of R. **Consd.** Farrar *v.* Farrars (1888), 40 Ch. D. 395, C. A.

2066. —— Purchase on behalf of third party—Subsequent purchase from third party—Fairness immaterial.]—An assignee purchased as trustee for B. mining shares belonging to bkpt., & after retaining them for a year in that character, repurchased them of B. for his own use :—*Held :* an assignee could not purchase part of bkpt.'s property either for himself or another, & although the whole transaction was perfectly honest & fair, he must be taken to hold the shares as trustee for the creditors.—*Re* GUNDRY, *Ex p.* GRYLLS, *Ex p.* BATTEN (1832), 2 Deac. & Ch. 290, Ct. of R.

2067. Trustee purchasing—Confirmation of sale—All creditors approving.]—The ct. will never, after sale, confirm a purchase by an assignee of part of bkpt.'s property without leave, though all the creditors consent.—*Re* KNOWLES, *Ex p.* THWAITES (1834), 1 Mont. & A. 323 ; 3 L. J. Bcy. 48, Ct. of R.

2068. —— With several others—Before assets claimed on behalf of estate.]—A contract for the sale of part of testator's property, the subject of an administration action, to the exor.'s solr. & another person, was made by leave of the ct. The contract was made by the purchasers on behalf of themselves & some other persons, one of whom was the trustee in the joint bkpcy. of testator's surviving partners. The joint estate had a claim for a large amount against the separate estate of testator, but that claim was not ascertained & admitted in the administration action until several years after the contract for purchase :—*Held :* in the circumstances the trustee in the joint bkpcy. did not stand in any fiduciary position which could prevent his joining in the purchase.—COAKS *v.* BOSWELL (1886), 11 App. Cas. 232 ; 55 L. J. Ch. 761 ; 55 L. T. 32 H. L. ; *subsequent proceedings* (1894), 86 L. T. 365, n., H. L.

Annotation :—**Mentd.** Davis *v.* Ohrly (1898), 14 T. L. R. 260.

2069. —— Resale ordered—Trustee accountable for profit of resale—Conditional discharge.]—One of the assignees had purchased bkpt.'s estates under the commission for himself. A resale was directed, the purchaser to account for a profit gained by him upon a resale of part, but he was discharged from the purchase only conditionally, in case the resale should produce more.—*Ex p.* REYNOLDS (1800), 5 Ves. 707 ; 31 E. R. 816.

Annotation :—**Consd.** *Re* Saunders, *Ex p.* Treherne (1860), 3 L. T. 458, C. A.

2070. —— —— Even though trustee mortgagee—Rights under mortgage reserved.]—An assignee, who was also a mtgee. of bkpt.'s freehold property, having purchased it for himself when it was put up for sale, the estate was ordered to be resold, subject to any claims of the assignee by virtue of his mtge.—*Re* MILLER, *Ex p.* TURVILL (1833), 3 Deac. & Ch. 346, Ct. of R.

2071. —— —— —— At price paid by assignee—Purchase to stand if more not bid.]—Where a trustee had bought part of bkpt.'s estate, another sale was directed, the premises to be put up at the price he gave, & if no more bid, his purchase to stand.—*Ex p.* LACEY (1802), 6 Ves. 625 ; 31 E. R. 1228, L. C.

Annotations :—**Consd.** Baker *v.* Peck (1860), 3 L. T. 656 ; *Re* Worssam, Hemery *v.* Worssam (1882), 46 L. T. 584 ; Plowright *v.* Lambert (1885), 52 L. T. 646 ; Farrar *v.* Farrars (1888), 40 Ch. D. 395, C. A. **Mentd.** *Ex p.* James (1803), 8 Ves. 337, L. C. ; Morse *v.* Royal (1806), 12 Ves. 355, L. C. ; A.-G. *v.* Dudley (1815), Coop. G. 146 ; Greenlaw *v.* King (1841), 10 L. J. Ch. 129, L. C. ; Benson *v.* Heathorn (1842), 1 Y. & C. Ch. Cas. 326 ; Hamilton *v.* Wright (1842), 9 Cl. & Fin. 111, H. L. ; Aberdeen Ry. Co. *v.* Blaikie (1854), 2 Eq. Rep. 1281, H. L. ; De Cordova *v.* De Cordova (1879), 4 App. Cas. 692, P. C. ; *Re* Postlethwaite, Postlethwaite *v.* Rickman (1888), 59 L. T. 58 ; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392, C. A. ; *Re* Boles & British Land Co.'s Contract (1901), 71 L. J. Ch. 130 ; Rowland *v.* Chapman, Rowland *v.* Corrie, Rowland *v.* Corrie, Rowland *v.* Brandreth (1901), 17 T. L. R. 669.

2072. —— —— —— —— Addition of sum for improvements.]—If an assignee purchases part of bkpt.'s property without the leave of the ct., it must be resold & put up at the price given by the assignee, adding the sum laid out in improvements.—*Re* JOHNSTON, *Ex p.* HEWIT (1835), 2 Mont. & A. 477, Ct. of R.

2073. —— —— Trustee liable for loss.]—An assignee having bought in without an order, a creditor presented a petition, praying that the assignee might be ordered to complete the purchase, or that the premises might be resold & the assignee ordered to bear any loss. The assignee stated in an affidavit that he himself was not of ability to complete the purchase, & in answer to

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PART VII. SECT. 5, SUB-SECT. 1.—E. (a).

2069 i. *Trustee purchasing—Resale ordered.*]—Bkpt.'s assets included a policy of insurance on a life for £1,000 which was sold for £30 to J. The assignee asked J. to let him purchase one-half of the policy, which J. sold him. In a few months the life dropped, when the full amount of the policy was paid to J. & the assignee :—*Held :* the assignee should refund, for the benefit of the estate, his portion of the proceeds.

The assignee also purchased, in the name of bkpt.'s son, other portions of bkpt.'s property :—*Held :* he must resell all of it for the benefit of the estate, if the creditors believed it worth more than the sum paid for it. —*Re* WALSH (1861), 13 Ir. Jur. 297. —IR.

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an inquiry by the chief judge, whether the assignee would consent to a resale, his counsel replied in the affirmative. The ct. ordered a resale by the assignee's consent, with a declaration that he was liable to make good any loss to arise thereby, & as to all other matters, the petition was ordered to stand over.—*Re* HUMPHRYES, *Ex p.* GOVER (1846), De G. 349.

2074. —— Trustee of profits on resale.]—An assignee in bkpcy., having purchased an estate of bkpt. under the commission:—*Held:* a trustee of the profit upon a resale, in the first instance for an equitable mtgee. by possession of the deeds, who had delivered them up on receiving the produce of the first sale, & in the circumstances had not lost his lien for the deficiency.—*Ex p.* MORGAN (1806), 12 Ves. 6; 33 E. R. 3, L. C.

Annotation:—**Apld.** *Re* Tyrie, *Ex p.* Morris (1866), 14 L. T. 606.

2075. —— —— Set-off of loss on resale of part against profit on resale of remainder.]—Property of bkpt. was offered for sale by auction in two lots, on different days, & both lots were bought in by the assignee, without the authority of the creditors. On a resale there was a loss on one lot & a gain upon the other, but the balance was in favour of the estate:—*Held:* the assignee should be charged with the loss on the lot undersold.

An assignee who buys in the bkpt.'s property, without the consent of his creditors, does so at his peril. He will be held strictly to his bargain, when it is for the benefit of the estate, & will not be allowed to set off the profit in one purchase against the loss in another (LORD ELDON, C.).—*Re* LEONARD, *Ex p.* LEWIS (1809), 1 Gl. & J. 69, L. C.

Annotation:—**Distd.** *Re* Thompson, *Ex p.* Buxton (1823), 1 Gl. & J. 355.

2076. —— Accountable for profits.]—Where an assignee, without leave of the ct., purchases any portion of bkpt.'s property, it is the invariable rule, on the complaint of any creditor, to order him to account for the profits he has made by such purchase.—*Re* HOBBS, *Ex p.* ALEXANDER (1835), 1 Deac. 273; 2 Mont. & A. 492; 5 L. J. Bcy. 12, Ct. of R.

2077. —— Enquiry ordered—As to what course most beneficial to estate.]—On a petition by one of the assignees, stating that the purchaser of part of bkpt.'s effects at a sale under the fiat was in fact an agent for petitioner, & praying that the sale might nevertheless be ordered to be carried into effect, or, if the ct. should think proper, that the property might be put up again for sale by public auction & resold, petitioner offering to complete his purchase after such auction, in case no advance was procured upon his bidding, & offering to pay all costs, the matter was referred to the comr. to inquire what course it would be most for the benefit of the estate to take. Form of order.

This is a case of a concealed purchase by one of the acting assignees in the name of a stranger, a case to which the ct. cannot have its attention called, without dealing with it fairly & seriously, not only for the sake of the parties concerned, but with regard to the interest of the public in general (KNIGHT BRUCE, C. J.).—*Re* STEVENS, *Ex p.* GORE (1842), 3 Mont. D. & De G. 77; 6 Jur. 1118; *subsequent proceedings* (1843), 7 Jur. 136, Ct. of R.

2078. —— —— ——.]—A creditors' assignee bought in a portion of bkpt.'s estate, which had been put up to sale by public auction under an order of the comrs. On his petitioning that the premises might be again put up for sale, the ct. directed an inquiry before the comr. as to the particulars of the sale, & the circumstances in which the biddings by petitioner were made, & as to what course it would be most for the benefit of the estate to take.—*Re* COCK, *Ex p.* CUDDON (1843), 3 Mont. D. & De G. 302; 1 L. T. O. S. 338; 7 Jur. 334.

2079. —— Court may refuse to set aside sale—At instance of bankrupt after discharge—Delay & sums still due to assignee.]—Real estate of pltf. was sold by his assignee by order of the Insolvent Debtors Ct. & a dividend paid out of the proceeds, the purchaser being the assignee's brother, who afterwards devised it to the assignee himself. Pltf. subsequently, without having been discharged in insolvency, became bkpt. & obtained his discharge under the bkpcy., all creditors who proved being paid in full & a small surplus being paid over to himself. A bill, twenty-four years after the sale, to set it aside, for collusion & undervalue, was dismissed with costs, it appearing there were still debts due to the assignee, proved in insolvency, though not in bkpcy., which might prevent any surplus coming to pltf.—ROBERTS *v.* MORETON (1869), 17 W. R. 397.

2080. —— Subsequently becoming bankrupt—Redelivery of goods remaining in specie—Proof for balance.]—An assignee having purchased goods at a sale, under the commission, became bkpt.:—*Held:* such of the goods as remained in *specie* should be redelivered, & what he had re-sold should be proved as a debt.—*Re* BALL, *Ex p.* SPONG (1811), 1 Rose, 133, L. C.

See, further, Nos. 2256 *et seq.*, *post.*

2081. —— Through puffer—Bound by bargain.]—Property of bkpt. was put up at auction by mtgees. It was knocked down to a puffer appointed by the assignees, without the leave of the ct.:—*Held:* the assignees must be held to their bargain.—*Ex p.* TOMKINS (1816), cited Sugden's Vendors and Purchasers, 14th ed., p. 815.

Annotation:—**Mentd.** *Re* Oldham, *Re* Edge, *Ex p.* Lucas (1833), 3 Deac. & Ch. 144, Ct. of R.

2082. —— Shares in new firm—Taking over property previously disclaimed.]—Bkpts. were the owners of shares in a mine, but the mine was liable to debts, which had been incurred in working it. The assignees renounced their interest in the mine, & by a decree in the Stannaries Ct., the mine was ordered to be sold, & the purchase-money applied in payment of the debts. Certain new adventurers agreed to become the purchasers, & paid the purchase-money in shares. One of the assignees subscribed for some of the new shares, in the name of "himself & friends." Four of the shares thus subscribed for by the assignee were taken by deft.:—*Held:* deft. was a trustee of the shares, & the subsequent profits, for the benefit of the creditors of bkpts.—TURNER *v.* TRELAWNY (1841), 12 Sim. 49; 10 L. J. Ch. 249; 5 Jur. 698; 59 E. R. 1049.

Annotation:—**Distd.** Farrar *v.* Farrar's (1888), 40 Ch. D. 395, C. A.

2083. Trustee leasing—Answerable for profit or loss.]—An assignee instead of selling, taking a lease himself, is answerable for profit or loss.—*Re* DUMBELL, *Ex p.* HUGHES, *Ex p.* LYON (1802), 6 Ves. 617; 31 E. R. 1223, L. C.

Annotations:—**Apld.** Greenlaw *v.* King (1841), 10 L. J. Ch. 129, L. C. **Mentd.** *Re* Johnston, *Ex p.* Hewit (1835), 2 Mont. & A. 477, Ct. of R.; Delves *v.* Delves (1875), L. R. 20 Eq. 77.

2084. Trustee landlord—Resuming & reletting—Benefit of estate.]—An assignee, happening also to

be a landlord, cannot resume possession & relet, unless for the benefit of creditors (LORD ELDON, C.). —*Re* SHUTTLEWORTH, *Ex p.* WRIGHT (1815), 2 Rose, 244, L. C.

(b) Application for Leave.

2085. Consent of creditors necessary.]—An assignee, desirous of becoming a purchaser of the estate of bkpt., must first obtain the consent of the creditors, & then petition.—*Re* WICKSTEAD, *Ex p.* BAGE (1819), 4 Madd. 459; 56 E. R. 774.

2086. —— Consent of some not enough.]—An assignee can have leave to bid in very special circumstances only. The consent of a meeting of some of the creditors is not sufficient.—*Re* EDMONSTON, *Ex p.* BEAUMONT (1834), 3 Deac. & Ch. 549; 1 Mont. & A. 304; 3 L. J. Bcy. 45, Ct. of R.

2087. Meeting of creditors necessary.]—Before an assignee applies for leave to bid at the sale of bkpt.'s property, he must call a meeting of the creditors for the purpose of assenting to, or dissenting from, such proposed bidding.—*Re* BRIGHT, *Ex p.* MOLINEUX (1835), 4 Deac. & Ch. 460, Ct. of R.

2088. On whom petition must be served.]—An assignee, desirous of becoming a purchaser of the estate of bkpt., must serve the other assignees & bkpt. with the petition for leave.—*Re* WICKSTEAD, *Ex p.* BAGE (1819), 4 Madd. 459; 56 E. R. 774.

2089. Reference for inquiry & report.]—On an application by an assignee for leave to purchase bkpt.'s effects at a valuation, though the creditors had consented, the ct. refused to make the order without a reference to the comrs., to enquire whether the effects could be more advantageously disposed of.—*Re* ROSSITER, *Ex p.* SERLE (1822), 1 Gl. & J. 187.

2090. When granted—Court satisfied sale advantageous to estate.]—The ct. allowed the assignee to become the purchaser, on a report by the comrs. that the sale to the assignee at the amount of a stated valuation would be of advantage to the estate.—*Re* ROSSITER, *Ex p.* SERLE (1822), 1 Gl. & J. 187.

2091. —— Sale sanctioned by meeting of creditors.]—Leave was given to assignees to bid for part of bkpt.'s estate, a meeting of the creditors having previously given their sanction to the application.—ANON. (1826), 2 Russ. 350; 38 E. R. 367.

2092. Restriction as to conduct of sale—Independent solicitor must manage sale.]—Where an assignee is allowed to bid at a sale of bkpt.'s property, his solr. must not have the conduct or management of the sale.—*Re* PYNE, *Ex p.* MORLAND (1828), Mont. & M. 76.

2093. —— —— Application by mortgagee trustee.]—On a petition for the sale of an estate mortgaged by bkpt., presented by his assignees, one of whom was the mtgee., & that the sale might be concluded by the other assignee with the usual leave for the mtgee. to bid at the sale:—*Held:* as the same solr. was concerned both for the assignees & the mtgee., for the purposes of the sale a separate solr. should be employed.—*Re* JOHNSON, *Ex p.* ROLFE & MILNE (1832), 1 Deac. & Ch. 77; Mont. 515, Ct. of R.

2094. —— —— ——.]—On the petition of equitable mtgees. for the sale of the mortgaged premises, & for leave to bid, one of the mtgees. being also one of the assignees under the fiat:—*Held:* the comr. should appoint a separate solr. for the purposes of the sale, & the assignees should not have the conduct of it.—*Re* JOY, *Ex p.* GREENWOOD (1832), 1 Deac. & Ch. 542, Ct. of R.

2095. Form of order—Mortgagee trustee of estate to be sold—Right to apply to open biddings.]—Equitable mtgees. of a public house belonging to bkpt. petitioned for a sale with liberty to bid at the sale. One of petitioners was the sole creditors' assignee. A written consent to petitioners being allowed to bid had been signed by all the creditors who had proved:—*Held:* an order for sale should be made, & the assignee was not to bid, but might apply to open the biddings. Form of order.—*Re* WORTH, *Ex p.* YOUNG (1845), De G. 146, Ct. of R.

F. Duty not to sell to Parties with whom interested in Common.

See, now, 1915 Rules, rr. 347, 348.

2096. To partner—Refusal of court to affirm sale—Fairness immaterial.]—Where a partner of one of the assignees of bkpt. purchased part of bkpt.'s property at a sale by public auction, an application to the ct. for the purpose of protecting the purchaser, supported by strong evidence that the transaction was perfectly fair, was refused.—*Re* LINDELL (1842), 12 L. J. Bcy. 23; *sub nom. Re* LINDON, *Ex p.* BURNELL, 7 Jur. 116, Ct. of R.

2097. —— Being also brother—Purchase through agent.]—The book debts & goodwill of bkpt., a medical man, were put up for sale by auction by the trustee, who was also a medical man, & purchased by an agent for the brother & partner of the trustee, another intending purchaser being present, but neglecting to bid, thinking that the sale was a sham:—*Held:* the sale was void.—*Re* MOORE, *Ex p.* MOORE (1881), 51 L. J. Ch. 72; 45 L. T. 558; 30 W. R. 123.

Annotation:—**Consd.** *Re* Gallard, *Ex p.* Gallard, [1897] 2 Q. B. 8.

2098. To employer.]—Where the sole assignee was the managing clerk of a solr., who had bought an estate of bkpt., & had neglected to complete the purchase, the ct. ordered the assignee to be removed, & that there should be a new choice.—*Re* LUCAS, *Ex p.* ASHMORE (1843), 3 Mont. D. & De G. 461.

2099. To minor son & nephew of partner.]—A trustee agreed to sell a policy on bkpt.'s life to two purchasers, one the trustee's son, who was a minor, & the other the nephew of the trustee's partner. The committee of inspection had consented, without knowing the relationship between the trustee & the purchasers. The policy had been offered for sale by tender without result, & the purchase price was more than the surrender value. A creditor disapproved of the sale & offered an increased price, which was refused:—*Held:* the sale was void, as apart from the objection that one of the purchasers was a minor, the case was within the principle that a trustee could not sell to his partner.—*Re* SPARKS, *Ex p.* FORDER, [1881] W. N. 117, C. A.

Annotation:—**Mentd.** *Re* Moore, *Ex p.* Moore (1881), 51 L. J. Ch. 72.

2100. To private company—Promoted by trustee & committee—& being shareholders & directors.]—The trustee in bkpcy. may, with the leave of the

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PART VII. SECT. 5, SUB-SECT. 1.—F.

2099 i. *To son.*]—An assignee undertook to demise insolvent's real estate to his own son, & then sold the property subject to the lease, which was thereby confirmed:—*Held:* notwithstanding the confirmation, the assignee must be charged with the letting value of the lands during the whole term of the lease, must lodge that amount in ct., with interest at 5 per cent., & must be disallowed his poundage & expenses, & must pay the creditor's costs of making the application against him.—*Re* COMYN (1862), 14 Ir. Jur. 226.—IR.

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ct., sell bkpt.'s business to a private co., notwithstanding such co. has been promoted by the trustee & the committee of inspection, & such persons are interested in such co. as shareholders or directors or officers of the co.—*Re* SPINK, *Ex p.* SLATER (1913), 108 L. T. 572; 29 T. L. R. 420; 57 Sol. Jo. 445.

G. Duty not to buy Dividends from, sell Estate to, or share Remuneration with Creditors.

2101. Purchase of dividends—For own use.]—A purchase by an assignee under a commission of bkpcy. of dividends cannot be for his own benefit. —*Ex p.* JAMES (1803), 8 Ves. 337; 32 E. R. 385.

Annotations:—**Refd.** Oliver *v.* Court (1820), Dan. 301; Aberdeen Ry. Co. *v.* Blaikie (1854), 1 Macq. 461; Luddy's Trustee *v.* Peard (1886), 33 Ch. D. 500. **Mentd.** Austin *v.* Chambers (1838), 6 Cl. & Fin. 1; Carter *v.* Palmer (1842), 8 Cl. & Fin. 657; Imperial Mercantile Credit Assocn. *v.* Coleman (1871), 6 Ch. App. 562, n.; Panama & South Pacific Telegraph Co. *v.* India Rubber, Gutta Percha & Telegraph Works Co. (1875), 10 Ch. App. 515; Hickley *v.* Hickley (1876), 2 Ch. D. 190; Nugent *v.* Nugent, [1908] 1 Ch. 546, C. A.

2102. —— —— Through third party—Fairness immaterial.]—A creditor under a bkpcy. sold the dividends to be received upon the proof of his debt. The purchaser bought them on behalf of one of the creditors' assignees:—*Held:* the transaction was void.

Even a fair, *bonâ fide* purchase by an assignee cannot be upheld for the benefit of the estate, if the creditor vendor questions it (TURNER, L. J.). —POOLEY *v.* QUILTER (1858), 2 De G. & J. 327; 27 L. J. Ch. 374; 31 L. T. O. S. 64; 4 Jur. N. S. 345; 6 W. R. 402; 44 E. R. 1016, L. JJ.

2103. Sale to creditor—Advising trustee as to conduct of sale—Resale ordered.] — Assignees under a bkpcy. sold by auction to one of the creditors, previously consulted as to the mode of the sale, & contrary to an order that a receiver should be appointed to sell. Another sale was directed, the estate to be put up at the aggregate amount of the purchase-money & the sum laid out in substantial improvements & repairs, which were to be allowed in case of a sale at an advance, but, if no further bidding, the purchaser to be held to his purchase.—*Re* DUMBELL, *Ex p.* HUGHES, *Ex p.* LYON (1802), 6 Ves. 617; 31 E. R. 1223, L. C.

Annotations:—**Folld.** *Re* Johnston, *Ex p.* Hewit (1835), 2 Mont. & A. 477, Ct. of R. **Consd.** Greenlaw *v.* King (1841), 10 L. J. Ch. 129, L. C.; Delves *v.* Delves (1875), L. R. 20 Eq. 77.

2104. Contract to share remuneration—Illegal.]—By an agreement of employment between a firm of land agents & their manager it was provided that the manager should be entitled, with the consent of the firm, to undertake any factorship or trusteeship, & that all fees which he derived from any such office should be pooled with all fees which the firm derived as salesmen or valuators in connection with any such estate, & that the proceeds, after payment thereout to the firm of the balance of any debt due to them from such estate, after giving credit for any sums received by them on account of such debt, should be divided equally between the parties. Under such agreement the manager was appointed trustee of several bkpt. estates, including an estate on which his firm had a claim as creditors. In an action of accounting against their manager, the firm sought to recover a proportion of the fees earned by the manager as such trustee & the balance of the debt due to them after deducting the amount received by them by way of dividend from bkpt.'s estate:—*Held:* the agreement was illegal & the action was not maintainable.—FARMERS' MART, LTD. *v.* MILNE, [1915] A. C. 106; 84 L. J. P. C. 33; 111 L. T. 871; [1915] H. B. R. 33, H. L.

H. Liability for Misconduct or Negligence.

2105. General rule.]—An assignee must indemnify bkpt.'s estate for his own misconduct.—*Ex p.* TOMKINS (1816), cited Sugden's Vendors and Purchasers, 14th ed., p. 815.

Annotation:—**Expld.** *Re* Oldham, *Ex p.* Lucas (1833), 3 Deac. & Ch. 144.

2106. ——.]—For any loss occasioned to the estate of bkpt. by the default of the trustee therein, he & his sureties are liable to the Board of Trade upon a bond given by them guaranteeing to make good any loss or damage to bkpt.'s estate occasioned by the default of the trustee in the performance of his statutory duties.—BOARD OF TRADE *v.* PROVIDENT CLERKS & GENERAL GUARANTEE ASSOCN., LTD. (1895), 72 L. T. 562; 39 Sol. Jo. 428, D. C.

See, further, Sect. 11, *post*.

2107. —— Failure to attend court—Liability for costs of adjournment.]—An assignee omitted to render his accounts, & neglected to attend on two occasions the sittings of the ct. under the bkpcy.:—*Held:* he had been rightly ordered to pay the costs of an adjournment occasioned by his non-attendance.—*Re* RAWLINGS, *Ex p.* RAWLINGS (1863), 9 L. T. 275; 9 Jur. N. S. 1183; 12 W. R. 3, L. C.

2108. —— No liability unless negligent.]—*Held:* assignees of bkpt. were not responsible for a loss sustained in the disposal of bkpt.'s effects, where,

PART VII. SECT. 5, SUB-SECT. 1.—G.

2103 i. *Sale to creditor.*]—*Semble:* a private sale by an assignee to any creditor, without the consent of the others, would be open to objection.—THOMPSON *v.* CLARKSON (1891), 21 O. R. 421.—**CAN.**

PART VII. SECT. 5, SUB-SECT. 1.—H.

2105 i. *General rule.*]—In Oct., 1884, the trustees of an insolvent estate sold land to E. upon the condition that he should provide two sufficient securities. E. refused to give sureties, promising to pay cash, & the trustees did not press the performance of the condition. Had they done so, E. would have been in a position to pay any loss which would have occurred on a re-sale. He subsequently became insolvent without having paid any part of the price. The land was re-sold for a less amount, & the estate being insufficient to pay M., the holder of a mtge. on the said land for a less amount than that for which the land was sold to E., he sued the trustees for the difference:—*Held:* the trustees had been guilty of gross negligence, & were liable for the difference.—MARSH *v.* BARRY (1887), 5 S. C. 217.—**S. AF.**

2105 ii. —— *Loss of money received.*]—A trustee is liable for loss of rent paid to him & held in another character. —OFFICER *v.* HAYNES (1877), 3 V. L. R. 115.—**AUS.**

2105 iii. —— *Failure to draw cheques properly.*]—Where a trustee failed to express under Ord. 6 of 1843, s. 100, the cause of payment on cheques drawn by him on the banking account of the estate:—*Held:* in the circumstances proved he had not been guilty of misconduct.—LOUW & DUMMER *v.* FAGAN (1914), C. P. D. 630.—**S. AF.**

2108 i. —— *No liability unless negligent.*]—A firm of auctioneers, in which the sole trustee of an insolvent estate was partner, was authorised by resolution of creditors to sell the movables in the estate. The trustee did not pay the proceeds into the estate's banking account until four days after the lapse of four months after the date of the sale. A creditor brought an action against the trustee for an order that the trustee had forfeited under Ord. 6 of 1843, s. 101, double the amount of the net proceeds of the immovables:—*Held:* as the trustee's omission to bank the amount in the estate's account for four days after the date on which it was due was due to an oversight, the ct. should not, in the exercise of its discretion, decree a forfeiture.—LOUW & DUMMER *v.* FAGAN (1914), C. P. D. 630.—**S. AF.**

2108 ii. —— —— *Payment of debts contracted after bankruptcy—By order of court.*]—Assignees of bkpt. paying debts contracted after bkpcy., but before the commission, under orders of the ct. & of the comrs., are not liable to repay the amount to prior creditors. —O'BRIEN *v.* GRIERSON (1813), 2 Ball & B. 323.—**IR.**

in the circumstances, it could be inferred that there had been no blamable negligence in their conduct.—*Re* EVANS, *Ex p.* TURNER (1828), Mont. & M. 52.

2109. —— —— Degree of negligence—Failure of bank.]—A., being assignee of the estate of W., deposited money in the bank of N., which bank failing, the money was lost:—*Held:* if the assignee exercised the same care of the trust property as he would of his own, & was not guilty of negligence, & did not in depositing or distributing the funds deviate from the ordinary course of business or practice, & debited himself with the trust funds as a separate account, he was not liable to make good the loss & refund the money.—*Re* WILLIAMS (1852), 18 L. T. O. S. 350.

2110. —— —— Liability for difference in amount of biddings.]—Where bkpt.'s reversionary estate was offered for sale by auction & £950 bid, & was bought in for £1,000 upon a reserved bidding to that amount, & afterwards when reduced into possession sold for £510:—*Held:* in the circumstances, it was not within the rule established in *Re Leonard, Ex p. Lewis*, No. 2075, *ante*, so as to make the assignee liable for the difference.—*Re* THOMPSON, *Ex p.* BUXTON (1823), 1 Gl. & J. 355.

2111. —— —— —— Waiver of claim against trustee.]—Petitioner, an equitable mtgee. of leasehold property, obtained an order for a sale, at which £950 was bid, but the property was bought in by the assignees. Petitioner afterwards applied for another order, but the order as made being unsatisfactory to him as to the time of the sale, he refused to accept it. The assignees afterwards obtained another order, at which the highest bid was £650:—*Held:* petitioner by applying for a second sale had waived any claim against the assignees for the difference in the amount of the biddings, but he was entitled to be indemnified from the ground rent & all expenses incurred since the first sale.—*Re* MOORE, *Ex p.* BALDOCK (1832), 2 Deac. & Ch. 60, Ct. of R.

—— **Improperly instituting or defending actions against third parties—Personal liability for costs.**]—*See* Part XXI., Sect. 2, sub-sect. 6, & Sect. 3, *post.*

—— **Improperly applying to court—Personal liability for costs.**]—*See* No. 1971, *ante.*

2112. Trustee absconding—Creditor's remedy.]—Comrs. having appointed a dividend to be made of bkpt.'s estate, a creditor under the commission neglected to receive of the assignees his proportion of that dividend, & the assignees absconded with the dividend that was in their hands:—*Held:* the creditor should not be allowed to come upon bkpt.'s estate for that money, but must take his remedy against the assignees as well as he could.—ANON. (undated) cited Barn. Ch. at p. 419; 27 E. R. 703.

Annotation:—**Expld. & Distd.** Smith *v.* Chandos (1740), Barn. Ch. 412, L. C.

2113. Trustee misapplying funds—& becoming bankrupt—Creditor's remedy.]—At a dividend meeting under a commission against A., a claim was entered on behalf of B., & a sum ordered to be appropriated in the hands of C., the sole assignee, to answer eventually the amount of the several sums proved & claimed. Before the claim of B. was perfected into a proof, C. misapplied the money so placed in his hands, & became bkpt.:—*Held:* B. was not entitled to recover from the estate of A. his proportion of the sum appropriated in the hands of C. & misapplied by him.—*Re* GRANT, *Ex p.* GRANT (1828), Mont. & M. 77.

See, further, No. 2044, *ante*, 2188 *et seq.*, *post.*

2114. How enforced.]—When the ct. has refused to act on a report by the Comptroller in Bkpcy. that the trustee in a bkpcy. has been guilty of a misfeasance, neglect, or omission, by which the estate has sustained a loss which the trustee ought to make good, neither bkpt. nor any of the creditors is entitled to appeal from the refusal. The Comptroller alone is entitled to appeal.

If the trustee has been guilty of a misfeasance, either bkpt. or any of the creditors, is entitled to make an application of his own to the ct., &, if the person so applying is dissatisfied with the order made, he has a right to appeal from it.—*Re* SIDEBOTHAM, *Ex p.* SIDEBOTHAM (1880), 14 Ch. D. 458; 49 L. J. Bcy. 41; 42 L. T. 783; 28 W. R. 715, C. A.

Annotations:—**Mentd.** *Re* Reed, Bowen, *Ex p.* Official Receiver (1887), 19 Q. B. D. 174, C. A.; *Re* Webb, *Ex p.* Webb (1887), 4 Morr. 52; *Re* Jameson & Sandys, *Ex p.* Cresswell & Jameson (1891), 8 Morr. 278, C. A.; *Re* Hosking, *Ex p.* Hosking *v.* Davies (1912), 106 L. T. 640, D. C.

See, now, 1914 Act, s. 80.

See, further, No. 2266, *post.*

J. Liability for Acts of Agents or Employees.

See, now, 1914 Act, s. 56 (3), & 1915 Rules, r. 369.

2109 i. —— —— *Degree of negligence.*]—A firm of estate & general agents & auctioneers of which deft. was a partner, & upon whose banking account he had power to draw, acted for the trustee in the administration & liquidation of the insolvent estate, & the account of the estate was kept in the books of the firm:—*Held:* the money received by the firm on account of the estate must be treated as money in the hands of the trustee, & as the trustee had not paid into the banking account of the estate under Ord. 6 of 1843, s. 101, certain money so received by the firm, & no just or lawful reason for the retention had been shown by the trustee, he must forfeit a sum not exceeding the deficiency in the estate, & pay costs *de bonis propriis.*—MARAIS *v.* FAGAN (1914), C. P. D. 654.—**S. AF.**

2109 ii. —— —— —— *Payment of claim in error.*]—Where the trustee in insolvency paid a claim believing it was preferential, & it appeared from the schedule sworn to in ct. that it was, the ct. refused to make an order that the trustee was liable in his own estate for such error.—*Re* FOLEY'S INSOLVENCY (1866), 5 Nfld. L. R. 166.—**NFLD.**

2114 i. *How enforced.*]—In case of a sale by an assignee in insolvency being open to objection on the part of the creditors, the remedy of objecting creditors is by an application to the county ct. judge, not by suit in Ch. in the first instance.—O'REILLY *v.* ROSE (1871), 18 Gr. 33.—**CAN.**

2114 ii. ——.]—An order for payment forthwith of a claim for wages, with costs, was made against an assignee, who paid the claims, but refused to pay any costs. The order having been made a rule of ct. & execution having issued thereon:—*Held:* (1) the assignee should not have been ordered to pay costs; (2) his only remedy was to apply for a prohibition to prohibit further proceedings on the order.—*Re* CLEGHORN & MUNN, 2 C. L. J. 133.—**CAN.**

2114 iii. —— *Trustee ordered to account.*]—The ct., on the petition of creditors alleging that the assignee was negligent, ordered him to account, before the officer of the ct., for all money he had received, or any one for him, & all costs he had incurred.—*Re* HAWKINS (1801), Rowe, 729.—**IR.**

k. *By whom enforceable — Creditor who has become bankrupt.*]—A creditor, against whom, after he had proved his debt, a commission issued, is, although he dispute his bkpcy., not competent to call for an order upon a petition presented by him charging the assignees of his debtor with mismanagement & is not rendered competent by joining with his assignee.—*Re* FRENCH & CO., *Ex p.* SOMERS (1828), 1 Mol. 431.—**IR.**

PART VII. SECT. 5, SUB-SECT. 1.—J.

l. *Bailiff's wrongful & unauthorised acts.*]—An assignee of an insolvent estate is not liable for wrongful acts of his bailiff, not authorised by his warrant, & not afterwards ratified by him.—WILLETT *v.* TURNER (1875), 1 V. L. R. 294.—**AUS.**

m. *Solicitor employed to recover debts—Misappropriation by.*]—The assignee of bkpt. employing an attorney to sue for & recover debts due to the estate, is answerable for his receipts, & if he misapplies the money, must make it good, although no proof or allegation of fraud or negligence.

The assignee may relieve himself from such responsibility, by obtaining the assent of the creditors, or by having the approval of the master in respect to the person appointed agent.—*Re* FRENCH, *Ex p.* TOWNSEND (1828), 1 Mol. 139.—**IR.**

Sect. 5.—Relations between trustee, estate and creditors: Sub-sect. 1, J. & K.; sub-sect. 2, A.]

2115. Agent employed without consulting creditors — Respondeat superior.] — Where an assignee employs an agent, without consulting the creditors, he is in the same position as any other trustee employing an agent without the consent of his *cestuis que trust*. In which case if his agent deceive him, *respondeat superior* to the *cestuis que trust*.—*Re* LITCHFIELD (EARL) & WILLIAMS (1737), 1 Atk. 87; West *temp.* Hard. 201; 26 E. R. 57.

Annotation:—**Consd.** Raw *v.* Cutten (1832), 9 Bing. 96.

2116. Agent sent to take possession of effects absconding—Trustee not liable unless negligent.]—Deft. was appointed provisional assignee of the estate of bkpt. He sent an agent to take possession of bkpt.'s effects. The agent received a considerable sum of money, & absconded. In an action for money had & received:—*Held:* deft. was not liable for the amount, no negligence or want of proper caution being attributable to him.—RAW *v.* CUTTEN (1832), 9 Bing. 96; 2 Moo. & S. 123; 1 L. J. C. P. 171; 131 E. R. 551.

Annotations:—**Consd.** Jobson *v.* Palmer, [1893] 1 Ch. 71. **Mentd.** *Re* Williams (1852), 18 L. T. O. S. 350.

2117. Broker employed to sell—Bankruptcy after receipt of proceeds—Before payment over to trustee.]—The assignee of bkpt. employed a broker to sell a quantity of tobacco. The broker received the money, & failed before he had paid it over:—*Held:* the assignee was not bound to make it good.—*Re* PARSONS, *Ex p.* BELCHIER, *Ex p.* PARSONS (1754), Amb. 218; 27 E. R. 144.

Annotations:—**Consd.** The Prima Vera (1808), Edw. 23; Raw *v.* Cutten (1832), 9 Bing. 96; Speight *v.* Gaunt (1883), 9 App. Cas. 1, H. L.; Robinson *v.* Harkin, [1896] 2 Ch. 415. **Refd.** Fry *v.* Tapson (1884), 28 Ch. D. 268; Magnus *v.* Queensland National Bank (1887), 36 Ch. D. 25; Colchester Union Grdns. *v.* Moy (1893), 68 L. T. 564. **Mentd.** Scurfield *v.* Howes (1790), 3 Bro. C. C. 90.

2118. Auctioneer employed to sell—Unauthorised sale on credit—Bankruptcy of auctioneer—No reason to doubt solvency.]—The assignees found goods in the hands of auctioneers, & in the ordinary course of business continued to employ them to sell them by auction. They sold them on credit without the knowledge or sanction of the assignees. The auctioneers subsequently became bkpt., but the assignees had no reason to doubt their responsibility:—*Held:* the assignees were not responsible for the loss, there being no blamable negligence on their part.—*Re* EVANS, *Ex p.* TURNER (1828), Mont. & M. 52.

Banker failing.]—*See* No. 2109, *ante*.

K. Liability for Acts of Co-trustees.

See, now, 1914 Act, s. 77.

2119. Trustee giving co-trustee dividend cheques for signature—Cheques taken by co-trustee's clerk.]—B., one of two assignees, signed the cheques for the dividends, & delivered them to S., his co-assignee, who undertook to distribute them to the creditors. The cheques were signed by S., & the money was fraudulently received on some of them by a clerk of S. who became bkpt. before the actual demand of the dividends:—*Held:* B. was not liable for the cheques, the credit of S. not being impeached at the time of the delivery of the cheques.—*Re* DIXON, *Ex p.* GRIFFIN (1826), 2 Gl. & J. 114.

Annotation:—**Consd.** Hanbury *v.* Kirkland (1829), 3 Sim. 265.

2120. One trustee employing agent—Co-trustees not privy to employment.]—One of several assignees employed the clerk to the commission, a person of very little credit, to pay dividends. He embezzled £1,000 of the money he received:—*Held:* no liability attached to the other assignees, who were not privy to the employment of the clerk.—*Re* LITCHFIELD (EARL) (1737), 1 Atk. 87; West *temp.* Hard. 201; 26 E. R. 57, L. C.

Annotation:—**Consd.** Raw *v.* Cutten (1832), 9 Bing. 96.

2121. One trustee acting on behalf of himself & three others—Notice that dividends receivable on application to trustees—Account overdrawn by acting trustee.]—Four persons were chosen assignees, but at the choice it was verbally agreed that one should act, & notice was given to the banker to pay the drafts of the one. A dividend was declared, & notice was given to the creditors, that they might "receive the dividend upon application to the assignees," & the acting assignee paid the dividends by cheques which were dishonoured, he having overdrawn the account, & absconded:—*Held:* the other three assignees were liable.—*Re* MILES, *Ex p.* BOOTH (1831), 1 Mont. 248.

2122. Direction that funds in hands of one be invested in name of all—Money not forthcoming—Power of court to order that money in hands of all & for division.]—Where a former memorandum of comrs. finds that a sum of money is in the hands of one assignee, & directs it to be invested in the names of all three assignees, which, however, could not be done, as the money was not forthcoming, the comr. is not warranted in finding by a subsequent memorandum that the money is in the hands of all three assignees, & thereupon ordering them to divide it, & the ct. has no jurisdiction to enter on the liability of the co-assignees to answer the consequences of trusting the assignee in default.—*Re* THOMPSON & KNIGHT, *Ex p.* LEARMOUTH (1832), 1 Deac. & Ch. 491; 1 L. J. Bcy. 84, Ct. of R.

2123. One assignee in charge of paying dividend—To wrong party.]—One of the assignees, having the sole charge of paying the dividends, paid the dividend of a creditor to a person who was not duly authorised to receive it:—*Held:* the two other assignees were equally responsible to the creditor for the amount of the dividend.—*Ex p.* WINNALL (1833), 3 Deac. & Ch. 22.

2124. Order finding sum in hands of one trustee & ordering division—Other trustee never having interfered in management.]—An order of dividend found that a certain balance was in the hands of one of the assignees, & directed that assignee to divide same among the creditors:—*Held:* the other assignee, having never interfered with the control & application of the trust fund, was not liable to the creditors for the payment of the dividend.—*Re* FINDEN, *Ex p.* DAWSON (1835), 4 Deac. & Ch. 130; 4 L. J. Bcy. 42.

See, further, Sect. 8, *post*.

SUB-SECT. 2.—RIGHTS OF TRUSTEE.

A. Remuneration.

See, now, 1914 Act, ss. 82, 83, 89 (5), & 1915 Rules, rr. 296, 334-336.

2125. How fixed—Discretion of Board of Trade.]—The Board of Trade, in fixing the remuneration

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n. *In general.*]—Upon the application of trustees of an insolvent estate for remuneration:—*Held:* a trustee could not make a profit out of the estate other than that allowed by the ct.—*Re* DUDER (1904), 9 Nfld. L. R. 60.—**NFLD.**

2125 i. *How fixed—What amount.*]—In the circumstances the assignee's remuneration was fixed at 5 per cent.—*Re* LEY, 7 B. C. R. 94.—**CAN.**

2125 ii. —— —— *Net amount "realised."*]—A trustee having collected the assets & paid the amount into a

of a trustee, must exercise its discretion with the greatest care. The discretion is in substance judicial, & it is important that the remuneration should be fixed on such a scale that persons of experience & probity will willingly act as trustees in bkpcy.—*Re* SHIRLEY, *Ex p.* BOARD OF TRADE (1892), 8 T. L. R. 557; 9 Morr. 147, D. C.

2126. —— Power of Board of Trade—Remuneration fixed by creditors—Or by committee of inspection.]—The Board of Trade has power, on the application of the prescribed number of dissentient creditors, to fix the remuneration of the trustee not only when the remuneration has been fixed by resolution of the creditors, but also when it has been fixed by a resolution of the committee of inspection in pursuance of authority delegated to them by a resolution of the creditors.—*Re* GALLARD, *Ex p.* HARRIS, [1892] 1 Q. B. 532; 61 L. J. Q. B. 425; 66 L. T. 452; 40 W. R. 385; 36 Sol. Jo. 295; 9 Morr. 52, C. A.

Annotations:—**Consd.** *Re* Shirley, *Ex p.* Board of Trade (1892), 9 Morr. 147, D. C. **Mentd.** *Re* Garner, *Ex p.* Pedley, [1906] 2 K. B. 213.

2127. —— By resolution of committee—Variation — Application to court necessary.] — The remuneration of the trustee may be fixed by resolution of the committee of inspection, if the creditors so resolve. Where the remuneration has been so fixed, the committee of inspection has no right to alter it, but must apply to the ct. to set aside the resolution.—*Re* MARSDEN, *Ex p.* BOARD OF TRADE (1892), 36 Sol. Jo. 309; 9 Morr. 70.

See, further, Sect. 10, *post*.

Charges by trustee for professional services—Whether allowed.]—*See* Nos. 2008, 2009, *ante*.

2128. Loss of remuneration—Power of court to disallow — Failure to perform duties.] — If a trustee in bkpcy. fails to perform the duties imposed on him, the ct. has power to disallow his remuneration.—*Re* LISTER, *Ex p.* SIMMONS (1876), 2 Ch. D. 749; 45 L. J. Bcy. 113; 34 L. T. 744.

2129. —— Misconduct.] — *Re* POOLEY, *Ex p.* HARPER, No. 2020, *ante*.

2130. Appeal by Board of Trade—Against order setting aside order of board.]—The Board of Trade can appeal from an order of a county ct. in bkpcy., setting aside an order of the Board varying the remuneration of a trustee as fixed by the committee of inspection.—*Re* SHIRLEY, *Ex p.* BOARD OF TRADE (1892), 8 T. L. R. 557; 9 Morr. 147, D. C.

Contract to share remuneration with creditors.]—*See* No. 2104, *ante*.

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bank into a trust account, a new trustee was appointed, who merely obtained payment out of the money from such trust account, opened a new account, & proceeded to distribute the money for the benefit of creditors:—*Held*: (1) the word "realised" in 1897 Act (No. 1513), s. 20, meant an actual getting in of the assets of the estate as they originally existed, & converting them into money; (2) the new trustee had not "realised" the assets, & was not entitled to deduct his commission therefrom.—*Re* NATION (1899), 25 V. L. R. 288.—**AUS.**

2125 iii. —— —— —— *& "available for distribution."*]—The words "available for distribution" in the above sect. are a mere redundancy upon the words preceding, & a trustee's remuneration is to be calculated upon the net amount realised by him.—*Re* WOOD (1900), 26 V. L. R. 1.—**AUS.**

2125 iv. —— —— *Net assets.*]—The commission or percentage which may, under 1903 Act (No. 1836), s. 4 (iii), be allowed to the assignee of an insolvent estate, is to be calculated on the net assets of the estate after all charges of realisation have been paid & not on the whole fund available for payment & application under 1890 Act, s. 123.—*Re* O'NEILL, [1905] V. L. R. 64.—**AUS.**

2125 v. —— —— *Realised assets.*]—A trustee in insolvency is entitled to a commission, not merely on the proceeds of goods of the insolvent estate sold by him, but also on property of any description of an ascertained value, which by his care & labour he has made available for the benefit of the creditors, & as to which he has incurred responsibility. He is not entitled to commission on bank shares held under a lien by third parties for their full value, nor on landed or other property in which under the vesting order the title is in him, & which by reason of a deed of composition with creditors is reconveyed by the trustee to the insolvent.—*Re* RIDLEY & SONS (1872), 5 Nfld. L. R. 456.—**NFLD.**

2125 vi. —— —— ——.]—On an application by trustees for remuneration:—*Held*: money in insolvent's hands at the date of the insolvency was not a realised asset.—*Re* UNION BANK OF NEWFOUNDLAND (IN LIQUIDATION) (1904), 9 Nfld. L. R. 1.—**NFLD.**

2125 vii. —— —— ——.]—Where there had been delay (not unnecessarily protracted) in the distribution of the estate, interest had accumulated upon the deposit in the bank:—*Held*: on an application by trustees for remuneration such interest was a realised asset.—*Re* DUDER (1904), 9 Nfld. L. R. 60.—**NFLD.**

2125 viii. —— —— *Proceeds of sale paid over to mortgagee.*]—An assignee charged commission on $7,400, the gross proceeds of real estate sold under foreclosure, the whole of which, with the exception of $14 surplus, was paid over to the attorney of the mtgee:—*Held*: the assignee was not entitled to such commission.—*Re* GRANT'S ESTATE (1879), 3 R. & C. 538; 12 N. S. R. 538.—**CAN.**

2125 ix. —— —— *Sale at percentage.*]—An offer by a creditor to purchase the estate at twenty cents in the dollar, exclusive of the claim of a bank, was accepted. The bank was fully secured by the purchaser's indorsation:—*Held*: the assignee was not entitled to a commission on the bank's claim.—*Re* SMITH & CO. (1877), 1 A. R. 480.—**CAN.**

2125 x. —— —— *Securities valued.*]—A secured creditor, who had valued his security:—*Held*: not liable to pay commission to the trustee on the sale, & in the absence of special contract.—*Ex p.* MITCHELL BROTHERS (1883), 17 I. L. T. Jo. 439.—**IR.**

2125 xi. —— —— ——.]—Where a secured creditor has valued & retained his securities with the consent of the trustee, the latter is not entitled to charge commission on the value of such securities.—STANDARD BANK *v.* BIDEN'S TRUSTEE, 2 H. C. 222.—**S. AF.**

2125 xii. —— —— *Securities realised.*]—A bank, holding securities for a debt were allowed by the trustee to realise them at the value they had placed upon them. The master fixed the remuneration of the trustee in connection with the realisation of the securities at £75:—*Held*: the remuneration was reasonable, & the trustee was not entitled to a commission on the value of the securities realised.—NATAL BANK *v.* KURANDA'S TRUSTEE (1904), T. S. 586.—**S. AF.**

2125 xiii. —— —— *Trustee replaced —Reasonable amount.*]—*Re* LEVESQUE (1911), 13 Q. P. R. 53.—**CAN.**

2125 xiv. —— *At what time.*]—Where from the nature of the estate, daily attention & supervision was required:—*Held*: although the amount of compensation was usually determined after realisation & final accounting, compensation should be paid to the trustees as the work of winding-up proceeds, in the nature of an annual payment, subject to certain limitations & final adjustment.—*Re* COMMERCIAL BANK & TRUSTEES' COMMISSION (IN LIQUIDATION) (1899), 8 Nfld. L. R. 257.—**NFLD.**

2125 xv. —— *Successive trustees.*]—When in the winding up of an estate it becomes necessary to appoint several successive trustees, the remuneration of the later trustees will not depend upon the sums actually collected by them, but upon the difficulty & importance of the work performed & its value to the estate.—*Re* COMMERCIAL BANK (IN LIQUIDATION) (1910), 9 Nfld. L. R. 499.—**NFLD.**

o. *Who liable for.*]—Circumstances (*see* S. C., *ante*) in which:—*Held*: the remuneration was not chargeable against the creditor who had realised his securities, but, there being no general estate, should be paid by a contribution between the creditors who had proved against the estate.—NATAL BANK *v.* KURANDA'S TRUSTEE (1904), T. S. 586.—**S. AF.**

p. ——.]—Trustee's commission accruing in respect of the proceeds of immovables must be regarded as part of the costs of realisation thereof.—THOMPSON *v.* JOYCE'S TRUSTEE (1911), C. P. D. 886.—**S. AF.**

q. *Power of court to reduce remuneration.*]—Where the master allowed a trustee a commission of 5 per cent. upon the proceeds of immovable property, realised in the insolvent estate, instead of the usual 2½ per cent., the ct. reduced the charge.—MACKIE, DUNN & CO. *v.* REINACH'S TRUSTEE (1885), 2 Buch. A. C. 30.—**S. AF.**

Sect. 5.—*Relations between trustee, estate and creditors: Sub-sect.* 2, *B.* (*a*) *&* (*b*). *Sect.* 6, *sub-sect.* 1, *A.*]

B. Indemnity and Reimbursement.

(*a*) *In respect of Costs.*

Action brought by creditors—Leave to use trustee's name.]—*See* Part XXI., Sect. 7, *post.*

In respect of costs given against trustee—In actions against parties other than creditors.]—*See* Part XXI., Sect. 2, sub-sect. 6, *post.*

2131. Power of court.]—The Ct. of Bkpcy. has authority, independently of 1849 Act, s. 153, to allow the assignees on their accounts the costs of an unsuccessful action brought by them.—*Re* THOMSON, *Ex p.* EDMONDSON (1862), 4 De G. F. & J. 486; 31 L. J. Bcy. 32; 6 L. T. 234; 45 E. R. 1272, L. JJ.

2132. Reimbursement not matter of right—Onus on trustee—Respondent to successful appeal.]—A trustee in bkpcy., who is resp. to a successful appeal, is not entitled, as a matter of course, to have the costs paid out of bkpt.'s estate: unless he can make out a right to the contrary, he will be ordered to pay them personally.—*Re* MACKENZIE, *Ex p.* HERTFORDSHIRE (SHERIFF), [1899] 2 Q. B. 566, C. A.

Annotations:—**Consd.** *Re* Craig, *Ex p.* Hinchcliffe, [1916] 2 K. B. 497. **Mentd.** *Re* Driver, *Ex p.* Official Receiver (1899), 80 L. T. 840; *Re* British Salicylates, [1919] 2 Ch. 155.

2133. —— Although acting pursuant to resolution of creditors.]—Assignees in bkpcy. may in a proper case be ordered to pay costs personally, & not be allowed them out of bkpt.'s estate, notwithstanding they act pursuant to a resolution of creditors.—*Re* ATTWATER, *Ex p.* WATTS (1862), 3 De G. J. & Sm. 394; 1 New Rep. 170; 32 L. J. Bcy. 35; 7 L. T. 585; 9 Jur. N. S. 238; 46 E. R. 687, L. C.

2134. Application for reimbursement—When granted—Action brought properly—Not recklessly.]—Although a trustee in bkpcy. has a right to bring motions & initiate proceedings, which, if properly brought, will be paid for out of the assets of the estate, if he so acts as recklessly to institute litigation & causes matters to be brought before the ct., where by proper management litigation might have been avoided, the costs of such proceedings will not be allowed out of the estate, but the trustee will have to pay the costs out of his own pocket.—*Re* BRYANT, *Ex p.* GORDON (1889), 6 Morr. 262.

2135. —— —— Trustee acting bonâ fide.]—A trustee in bkpcy. can be made personally liable for costs of a suit to which he is a party, subject to the Ct. of Bkpcy. allowing him to recoup himself out of bkpt.'s estate, if his conduct has been *bonâ fide.*—PITTS *v.* LA FONTAINE (1880), 6 App. Cas. 482; 50 L. J. P. C. 8; 43 L. T. 519, P. C.

Annotation:—**Mentd.** Fraser *v.* Province of Brescia Steam Tram. Co. (1887), 56 L. T. 771.

2136. —— —— Respondent to successful appeal.]—A trustee, who is resp. to a successful appeal will not be ordered to pay costs personally.—*Re* NATHAN, *Ex p.* STAPLETON (1879), 10 Ch. D. 586, C. A.

Annotations:—**Expld.** Pitts *v.* La Fontaine (1880), 6 App. Cas. 482, P. C. **N.F.** *Re* Mackenzie, *Ex p.* Hertfordshire, [1899] 2 Q. B. 566, C. A. **Mentd.** Tolhurst *v.* Associated Portland Cement Manufacturers (1900), [1902] 2 K. B. 660, C. A.

2137. —— —— —— Opposing petition for payment of dividend.]—On petition for payment of dividend, which is unsuccessfully opposed by the assignees, interest at 5 per cent., & costs, are of course against the assignees, who, if they acted *bonâ fide*, may reimburse themselves out of the estate.—*Re* REMINGTON, *Ex p.* HARRISON (1831), Mont. 250.

See, further, Nos. 2045 *et seq.*, *ante*, No. 3321, *post.*

2138. —— —— Application on which invalid order made.]—Where upon the application of the solr. for the assignees, the ct. below made an order which it had no jurisdiction to make, the Ct. of

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PART VII, SECT. 5, SUB-SECT. 2.—B. (a).

r. *On sale of outstanding debts.*]—An assignee in bkpcy. selling outstanding debts, is entitled to security against costs by reasonable indemnity.—*Ex p.* LITTLE (1829), 3 Mol. 67.—**IR.**

s. *Trustee solicitor—Suing in own name.*]—Pltf., an attorney, was the official assignee of an insolvent estate. He brought an action on behalf of the estate & used his own name as the attorney on the record. Pltf. obtained a verdict:—*Held:* under 1875 Act, s. 32, he was entitled to tax disbursements only against deft.—AGNEW *v.* ROSS (1879), 8 P. R. 67.—**CAN.**

2132 i. *Reimbursement not matter of right—Although acting pursuant to resolution of creditors.*]—A trustee convened a meeting of several but not all the creditors, & the opinion of the meeting was that steps should be taken to prosecute insolvent. The trustee instituted criminal prosecutions as suggested:—*Held:* the trustee could not be allowed the costs of such prosecutions.—*Re* GORDON (1844), Res. & Eq. Jud. 9.—**AUS.**

2134 i. *Application for reimbursement—When granted—Action brought properly.*]—The assignee of insolvent debtor was obliged to file a bill to have the legal estate for insolvent's life conveyed to him, & for a sale, & obtained a decree:—*Held:* he was entitled to his costs out of the funds.—SPUNNER *v.* SPUNNER (1824), 2 Mol. 473.—**IR.**

2134 ii. —— —— *Suit brought negligently.*]—A., the trustee of an insolvent estate, the assets in which to his knowledge did not exceed £20, acting on counsel's advice, brought an action against B. for recovery of goods alleged to have been obtained by undue preference. The action was unsuccessful, & the estate was inadequate to meet B.'s costs. B. thereupon sued A. in his private capacity. It was proved that before the original action was brought the principal creditor in the estate had given A. a guarantee for his own costs, though not for the costs of B., should the latter succeed:—*Held:* there was proof of some negligence on the part of A., & he should be held personally liable for the costs.—LAMB *v.* PIETERS (1900), 17 S. C. 427; 10 C. T. R. 669.—**S. AF.**

2134 iii. —— —— *Trustee acting malâ fide.*]—The curator of an insolvent estate, who contests a judicial proceeding for personal motives & in his own interest, should, in case he is unsuccessful, be personally condemned to the costs.—GERVAIS *v.* PAQUETTE & TURGEON (1909), Q. R. 37 S. C. 501.—**CAN.**

2134 iv. —— —— *Proceedings caused by solicitor acting as trustee—No formal appointment.*]—A solr., who receives the proceeds of an insolvent estate, & undertakes to administer it, will be treated as if he had been actually appointed assignee, & will be directed to pay, personally, the costs of creditors who bring the matter before the ct.—*Re* CONNERY (1860), 12 Ir. Jur. 23.—**IR.**

2134 v. —— —— *Trustee employing solicitor.*]—BUTTERFIELD *v.* WELLS (1883), 4 O. R. 168.—**CAN.**

2134 vi. —— —— *Against petitioning creditor.*]—A judge of the Supreme Ct. has no jurisdiction to make the creditor, upon whose petition an order *nisi* for sequestration has been granted, pay to the assignee any remuneration, costs, charges, expenses, & allowances earned or incurred by him as such assignee between the date of the granting of such order & its discharge.—*Re* FERNE (1900), 25 V. L. R. 536.—**AUS.**

2134 vii. —— —— *Trustee added as defendant in foreclosure suit.*]—In a foreclosure suit, the provisional assignee having been made deft., in consequence of the insolvency of one of the mtgors., was declared entitled to his costs against pltf., the latter to have them over against the fund.—SPROULE *v.* OATS (1839), 2 I. Eq. R. 323.—**IR.**

2134 viii. —— —— ——.]—MAXWELL *v.* SCANLON (1838), 1 I. Eq. R. 277, n.—**IR.**

2134 ix. —— —— *Criminal prosecution abandoned without leave.*]—The abandonment, without the leave of the ct., of criminal proceedings against bkpt., in consideration of a payment of money for distribution among creditors, amounts to the compounding a felony, & the ct. will not in such a case direct the payment of the costs of the proceedings against bkpt. out of the estate.—*Re* REICHELT (1885), 3 N. Z. L. R. 393.—**N. Z.**

w. *On annulment of bankruptcy.*]—When a bkpcy. is annulled under 20 & 21 Vict. c. 60, s. 149, the ct. will require all the assignee's costs & expenses to be paid, with poundage upon the value of bkpt.'s estate, although not realised by the assignees.—*Re* COMYNS (1858), 7 I. Ch. R. 294.—**IR.**

Appeal ordered the assignees personally to pay the costs.—*Re* ATTWATER, *Ex p.* COLE & ATTWATER (1862), 3 De G. J. & Sm. 380; 32 L. J. Bcy. 11; 7 L. T. 406; 9 Jur. N. S. 33; 11 W. R. 127; 46 E. R. 682, L. C.

2139. —— —— **Unsuccessful appeal against directions of court.**]—*Re* MALDEN GIBSON & CO., *Ex p.* JAMES, No. 1971, *ante*.

2140. —— —— **Proceedings caused by default of trustee.**]—Where an assignee having paid a dividend in his own wrong, compels the proper party to petition the ct., he will be ordered to pay the costs personally, & not be permitted to retain them out of the estate.—*Re* MOODY, *Ex p.* JACKSON (1842), 3 Mont. D. & De G. 1, L. C.

2141. —— —— **Trustee entitled to make application.**]—Assignees are entitled to have the direction of the ct. with regard to the rights of parties claiming to be equitable mtgees. of the property of bkpt., & are entitled to their costs out of the mortgaged estate, although they have been requested to convene on a date without a petition being presented.—*Re* BURGON, *Ex p.* STEVENS (1843), 3 Mont. D. & De G. 817; 7 Jur. 566, Ct. of R.

2142. —— —— **Failure of trustee to apply to stop suit.**]—After bill filed on behalf of creditors to set aside as fraudulent & void a voluntary settlement by A., their debtor, & a composition signed by the creditors in ignorance of such prior voluntary settlement, debtor was adjudicated bkpt., & an order was made by the Ct. of Bkpcy. setting aside the voluntary settlement. Pltfs., whose claim to prove under the bkpcy. had been admitted, notwithstanding the opposition of the trustees of the settlement, wrote to them proposing to dismiss the bill without costs as against them, & that pltfs'. costs should come out of the estate. The trustees declined the proposal, but offered to consent to an order staying all proceedings in the suit without costs, or dismissing the bill without costs:—*Held:* upon the bkpcy. of A. the trustee in bkpcy. should have applied to the ct. to have stopped the suit, which, though rightly instituted in the first instance, could no longer be prosecuted with benefit to the creditors, & pltfs. were entitled to the costs of suit up to the date of their letter to the trustees of the settlement, out of the estate realised in bkpcy., & the trustee in bkpcy. to the costs only of realising the estate. —TANQUERAY *v.* BOWLES (1872), L. R. 14 Eq. 151.

2143. —— —— **Unsuccessful application to court—Assets insufficient.**]—If a trustee makes an unsuccessful application to the ct., he will, in the absence of special circumstances, be ordered to pay the costs, & if the estate is insufficient for payment of the costs, the trustee must bear them personally.—*Re* ANGERSTEIN, *Ex p.* ANGERSTEIN (1874), 9 Ch. App. 479; 43 L. J. Bcy. 131; 30 L. T. 446; 22 W. R. 581, L. JJ.

Annotations:—**Consd.** Pitts *v.* La Fontaine (1880), 6 App. Cas. 482, P. C. **Expld.** Fraser *v.* Province of Brescia Steam Tram. Co. (1887), 56 L. T. 771. **Reid.** Marbella Iron Ore Co. *v.* Allen (1878), 47 L. J. Q. B. 601. **Mentd.** *Re* Pettit's Estate (1876), 1 Ch. D. 478; *Re* Branson, *Ex p.* Trustee, [1914] 2 K. B. 701.

2144. —— —— **Frivolous appeal.**]—A frivolous appeal by a trustee in bkpcy. having been dismissed with costs:—*Held:* the trustee should not be allowed his costs out of bkpt.'s estate.—*Ke* VANDERHAEGE, *Ex p.* VINEY, [1888] W. N. 7, C. A.

2145. —— —— **Notice of motion served without sanction of Board of Trade or committee of inspection.**]—The fact that a trustee has served a notice of motion before obtaining the sanction of the Board of Trade or of the committee of inspection does not disentitle him from recovering the whole of the costs of such motion against resps. to same.—*Re* BRANSON, *Ex p.* THE TRUSTEE, [1914] 2 K. B. 701; 83 L. J. K. B. 1316; 110 L. T. 940; 58 Sol. Jo. 416; 21 Mans. 160.

2146. —— —— **Employment of solicitors—Without authority of Board of Trade.**]—A. was adjudicated bkpt. There was only one creditor, whose general proxy purported to appoint himself committee of inspection, & as such committee authorised the trustee to employ solrs. The debt was paid in full, & the bkpcy. annulled. The trustee under the above authority, & not under the authority of the Board of Trade, employed solrs., whose costs were taxed & paid. The solrs., although applied to by A., gave him no information as to costs until they had been taxed. A. thereupon applied to reopen the taxation:—*Held:* the trustee had not been duly authorised to retain solrs., & the sums paid for costs must be disallowed.—*Re* GEIGER, [1915] 1 K. B. 439; 84 L. J. K. B. 589; 112 L. T. 562; 59 Sol. Jo. 250; [1915] H. B. R. 44, C. A.

Annotations:—**Folld.** *Re* Salmon, *Ex p.* Official Receiver, [1916] 2 K. B. 510. **Mentd.** *Re* Yeatman, [1916] 1 K. B. 461; *Re* Yeatman, *Ex p.* Yeatman, [1916] 1 K. B. 780, C.A.

2147. —— —— **Appointment annulled owing to expunging of proof—Costs incurred with consent of committee.**]—A trustee, who has been appointed by creditors & permitted to incur costs by a committee of inspection, whose proofs have subsequently been expunged, with the result that the adjudication has been annulled & a new trustee appointed, is, in the absence of fraud on his part, entitled to have such costs out of the estate.—*Re* JONES, *Ex p.* GOATLY (1911), 56 Sol. Jo. 17.

2148. —— **How made—Application to commissioner.**]—If a bill in equity by assignees be dismissed with costs, they must apply to the comr. in the first instance to allow them out of the estate.—*Re* PHILLIPS, *Ex p.* GIBSON (1834), 1 Mont. & A. 479; 3 L. J. Bcy. 72, Ct. of R.

2149. —— **Necessity for affidavit—Frivolous appeal.**]—A frivolous appeal by a trustee in bkpcy. having been dismissed with costs:—*Held:* the trustee must produce an affidavit, if he had any ground to show why he should not pay the costs personally, & whether the trustee would be entitled to recoup himself or not remained to be seen when he had produced the affidavit, which he might do at any time.—*Re* LOCK, *Ex p.* POPPLETON (1891), 8 Morr. 51, D. C.

2150. —— **Who may object—Creditor failing to object to action until after decision.**]—Creditors, who do not object to an order sanctioning an action by assignees, until after the result is ascertained, cannot then be heard to object that the action should not have been sanctioned.—*Re* THOMSON, *Ex p.* EDMONDSON (1862), 4 De G. F. & J. 486; 31 L. J. Bcy. 32; 6 L. T. 234; 45 E. R. 1272, L. JJ.

(b) Other Cases.

What items chargeable in accounts.] *See* Nos. 2008 *et seq.*, *ante*.

SECT. 6.—RELATIONS BETWEEN TRUSTEE AND PARTIES OTHER THAN CREDITORS AND BANKRUPT.

SUB-SECT. 1.—LIABILITIES OF TRUSTEE.

A. In regard to Actions, Arbitrations, and other Legal Proceedings.

See Part XXI., Sects. 2 & 3, *post*.

Sect. 6.—Relations between trustee and parties other than creditors and bankrupt: Sub-sect. 1, B.; sub-sect. 2, A., B. & C.]

B. Other Cases.

2151. Trustee selling—Purchaser entitled to good title.]—If assignees of bkpt. agree to sell, they agree to sell with a good title. There may be special cases, as, where they enter into the contract, supposing they have a good title, the ct. would stand neuter, & leave the parties at law (LORD ELDON, C.).—WHITE *v.* FOLJAMBE (1805), 11 Ves. 343; 32 E. R. 1118.

Annotations:—**Apprvd.** Deverell *v.* Bolton (1818), 18 Ves. 505. **Mentd.** Vancouver *v.* Bliss (1805), 11 Ves. 458; Fane *v.* Spencer (1815), 2 Madd. 438; Temple *v.* Brown (1815), 6 Taunt. 60; Fildes *v.* Hooker (1817), 2 Mer. 424; Ogilvie *v.* Foljambe (1817), 3 Mer. 53; Purvis *v.* Rayer (1821), 9 Price, 488; Spratt *v.* Jeffery (1829), 5 Man. & Ry. K. B. 188; Shepherd *v.* Keatley (1834), 4 Tyr. 571; Souter *v.* Drake (1834), 5 B. & Ad. 992.

2152. —— —— Unless guarded by express stipulation.]—Assignees in bkpcy. are bound, as other persons, to make a good title, unless guarded by express stipulation, & their bill for a specific performance, the report being against the title, was dismissed.—M'DONALD *v.* HANSON (1806), 12 Ves. 277; 33 E. R. 106.

2153. —— Leasehold property subject to covenant not to assign—Whether liable under covenant.]—A trustee in bkpcy., who sells leasehold property of bkpt. that is subject to a covenant not to assign without consent, & does not obtain the necessary consent, is not personally liable under the covenant, though it extends to assigns by operation of law.—*Re* JOHNSON & STEPHENS, *Ex p.* BLACKETT (1894), 1 Mans. 54; 10 R. 138.

See, further, Part XX., Sect. 18, *post*.

2154. Trustee seizing goods in bankrupt's shop—Supplied in name of bankrupt's son.]—An uncertificated bkpt. hired a shop, & goods were supplied in the name of his son, but principally upon the father's guarantee:—*Held:* his assignees were liable to an action of trespass at the suit of the son, for seizing them as the goods of bkpt.—DAVIS *v.* LIVING (1816), Holt, N. P. 275, N. P.

2155. Trustee allowing agent to set off against estate of bankrupt principal—Sum received by agent to retire third party's note included in set-off—Right of third party to recover from trustee.]—A. was agent for B., a banker, & £450 was sent to A., as agent, to retire a note of petitioner, which was not done, as B. became bkpt. A. having a claim against B., the assignees allowed him to retain £2,000 including, as was assumed, the £450:—*Held:* petitioner was entitled to recover the £450 from the assignees.—*Re* MABERLY, *Ex p.* SIMPSON (1835), 1 Deac. 47; 2 Mont. & A. 294, Ct. of R.

Annotation:—**Mentd.** Tibbetts *v.* George (1836), 2 Har. & W. 154.

2156. Bankrupt carrying on business—Liability of trustee for goods supplied.]—If bkpt. carry on the business for the benefit of the creditors, as their agent, under the authority of the assignee, & order goods in his own name which are used in the business, the assignee is liable for the goods.—KINDER *v.* HOWARTH (1818), 2 Stark. 354.

2157. Sum due to third party for work done—Order for payment obtained ex parte—Whether enforceable.]—The ct. will not enforce an order for payment of money out of bkpt.'s estate to a third party for work done, where the order was obtained upon an *ex p.* application, & without notice to the creditors' assignee, notwithstanding that the official assignee had approved of the account & thought that the claim ought to be allowed & paid.—*Re* MOSS, *Ex p.* LADBURY (1865), 13 L. T. 446.

2158. Trustee disclaiming lease—To prejudice of mortgagee.]—When the trustee of bkpt. desires to disclaim a lease, which bkpt. has deposited by way of equitable mtge., he will not be allowed to do so to the prejudice of the mtgee., but if he assigns the lease to the mtgee., the latter must covenant to indemnify him against liability under the lease.—*Re* MÜLLER, *Ex p.* BUXTON (1880), 15 Ch. D. 289; 43 L. T. 183; 29 W. R. 28, C. A.

Annotation:—**Refd.** *Re* Levy, *Ex p.* Walton (1881), 17 Ch. D. 746, C. A.

2159. Receiver handing over assets to trustee—Whether lien for charges—Whether locus standi to impeach management of trustee.]—A receiver appointed under a liquidation petition handed over assets to the trustee who was afterwards appointed. When the receiver asked for payment of his charges, it appeared that the assets had been wasted by the trustee, & were insufficient for payment of the costs of the liquidation other than the receiver's charges:—*Held:* the receiver had no lien for his charges upon the assets he had handed over to the trustee, & no *locus standi* to impeach the management of the trustee, & the ct. could make no order against the trustee for payment of his charges.—*Re* MALTBY, *Ex p.* BROWNE (1880), 16 Ch. D. 497; 43 L. T. 682; 29 W. R. 921, C. A.

2160. Solicitor's remedy in bankruptcy—No assets.]—A solr. cannot in bkpcy. compel assignees without assets to pay his bill.—*Re* FRIEDMAN, *Ex p.* ADAMS (1836), 2 Mont. & A. 706, Ct. of R.

2161. —— —— What amounts to retainer.]—A. & B. sued out a commission as solrs. to petitioning creditor, & the assignees afterwards appointed C. to act as solr., but it was agreed between him & A. & B., with the privity of the assignees, that all three should jointly act as solrs. & share the profits. The assignees afterwards recognised the acting of A. & B. as such joint solrs.:—*Held:* (1) this amounted to a

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PART VII. SECT. 6, SUB-SECT. 1.—B.

2151 i. *Trustee selling—Goods on demised premises—Rights of landlord.*]—Upon the insolvency of a lessee, if the assignee sells the goods upon the demised premises upon credit, he must arrange with the landlord before the goods are removed, otherwise he becomes liable to an order for immediate payment.—*Re* MCCRAKEN, DALLAS *v.* STINSON (1879), 4 A. R. 486.—**CAN.**

2151 ii. —— *Crop of farm let for year.*]—Where the trustee on the estate of bkpt. farmer, a tenant for a year, sold the privilege of that year's crop on the farm:—*Held:* he could not be held to have intended to convey a higher right than had been in bkpt.—FLEMING *v.* MACDONALD (1860), 22 Dunl. (Ct. of Sess.) 1025.—**SCOT.**

a. *Trustee remaining in possession of demised premises—Rights of landlord.*]—Upon the insolvency of a lessee, whenever the assignee remains in possession unreasonably long without realising & paying the landlord, the latter may invoke the summary jurisdiction of the ct.—*Re* MCCRAKEN, DALLAS *v.* STINSON (1879), 4 A. R. 486.—**CAN.**

b. *Trustee resisting claim under alleged mortgage.*]—1875 Act, s. 125, only applies to the enforcement of a claim against the assignee in the nature of a debt, for which the creditor holds some of the securities mentioned in the sect., & a county ct. judge has no power to determine that a deed to insolvent, which is absolute on its face, was intended as a mtge., & to order the assignee to reconvey on being paid the amount due.—*Re* TRAVIS, *Ex p.* DANVILLE (1877), 1 P. & B. 337; 17 N. B. R. 337.—**CAN.**

c. *Trustee paying to insolvent—Surplus received from company—Right of company to recover.*]—An account & plan of distribution awarding a surplus to an insolvent shareholder having been confirmed, & no proof of debt having been filed by the liquidators, insolvent's trustee, in good faith & in the belief that the co., which had not then been ordered to be wound up, was a sound concern, paid a portion of such surplus to insolvent:—*Held:* the trustee was not personally liable, at the suit of the liquidators, to refund the amount so paid.—UNION BANK (IN LIQUIDATION) *v.* KING'S TRUSTEE (1893), 10 S. C. 101; 3 C. T. R. 89.—**S. AF.**

retainer by the assignees of A. & B. as joint solrs. with C.; (2) the Ct. of Review had jurisdiction, on the petition of A. & B., C. having been served with it, to enforce the payment by the assignees of the solr.'s bill of costs; (3) the assignees were liable for the payment of such costs, whether they had funds in their hands or not.—*Re* WOODING, *Ex p.* COATES & HAMMOND (1834), 3 Deac. & Ch. 626; 1 Mont. & A. 328; 3 L. J. Bcy. 62, Ct. of R.

2162. Costs of taxation of bills of costs delivered before bankruptcy—More than one-sixth deducted.]—Costs of taxing the bills of costs of a solr., who has become bkpt., do not fall upon his assignees, on the ground that more than a sixth part is deducted on taxation, although the assignees may have attended the taxation by their solr.—ALSOP *v.* OXFORD (LORD) (1835), 1 My. & Cr. 26; 40 E. R. 286.

Annotation:—**Mentd.** *Re* Nicholson (1861), 30 L. J. Ch. 796.

2163. Solvent partner of bankrupt suing for firm debts—Entitled to use of assignee's name—On indemnity.]—Where one member of a partnership becomes bkpt., the solvent partner may use the names of the assignees of bkpt. in bringing actions against debtors of the firm. The assignees are entitled to an indemnity against the costs, when they apply for it.—WHITEHEAD *v.* HUGHES (1834), 2 Cr. & M. 318; 2 Dowl. 258; 4 Tyr. 92; 149 E. R. 782.

Annotations:—**Apld.** Seal & Edgelow *v.* Kingston, [1908] 2 K. B. 579, C. A. **Refd.** Archard *v.* Coulsting (1843), 6 Man. & G. 75; Laws *v.* Bott (1847), 16 M. & W. 362; **Mentd.** Rodriguez *v.* Speyer. [1919] A. C. 59, H. L.

Creditor's right to use of name.]—*See* Part XXI., Sect. 7, *post.*

SUB-SECT. 2.—RIGHTS OF TRUSTEE AGAINST THIRD PARTIES.

A. In regard to Property of Bankrupt in Hands of Third Parties.

See Part XX., *post.*

B. Discovery.

See Part XIX, *post.*

C. In regard to Books of Account and Documents.

See, now, 1915 Rules, r. 383.

2164. Right to delivery of books—On which lien claimed—What are books of account—Vouchers, counterfoils, etc.]—1883 Rules, r. 259, which provides that "no person shall as against the official receiver or trustee be entitled to withhold possession of the books of accounts belonging to debtor, or to set up any lien thereon," is to be construed strictly, & will not be extended to vouchers, counterfoils of cheques, books, correspondence, & other papers in the hands of another person, although such documents would be of material assistance to the trustee in preparing his accounts of bkpt.'s estate.—*Re* WINSLOW, *Ex p.* GODFREY (1886), 16 Q. B. D. 696; 55 L. J. Q. B. 238; 54 L. T. 306; 34 W. R. 534; 2 T. L. R. 349; 3 Morr. 60.

See, also, cases in Part IX., Sect. 2, *post.*

2165. —— From purchaser of book debts—Right of inspection.]—A purchaser for value of the book-debts, books, & all the interest in the partnership of his partner prior to a dissolution, will not be compelled, upon the subsequent bkpcy. of such late partner, to hand over to the trustee the books of account which passed by the assignment, & thereupon ceased to be property of bkpt. But the trustee is entitled to inspection for the purpose of aiding him in the realisation of bkpt.'s estate.—*Re* WEST, *Ex p.* GOOD (1882), 21 Ch. D. 868; 51 L. J. Ch. 831; 46 L. T. 823.

2166. —— —— Application of 1883 Rules, r. 259.]—An assignment of the book-debts will carry the books, so that the person entitled to the book-debts under the deed is entitled to the books of account, & 1883 Rules, r. 259, was intended to apply only to a case where a person, not entitled to the debts, sets up some claim to the books, & so interferes with the official receiver.—*Re* WHITE & Co., *Ex p.* OFFICIAL RECEIVER (1884), 1 Morr. 77.

2167. —— From party having joint property in same with bankrupt—Right of inspection.]—An underwriter at Lloyd's carried on an underwriting business on behalf of himself & also on behalf of five other persons, called his "names." An agreement was entered into between him & each "name," by which it was stipulated that proper underwriting & account books should be provided & kept in the usual manner, & should at all times be open to the inspection of the "name." The "name" was to pay to the underwriter a fixed sum *per annum* as a remuneration for his services in conducting the business, keeping & providing books & papers, & for providing a proper office & clerical assistants, etc. The underwriter in fact kept books of account relating to the transactions in which he was jointly interested with the "names" or any of them, there being in the books six parallel columns, one for each "name," & one for the underwriter himself. The underwriter became bkpt., the books being at the time in the possession of accountants:—*Held:* the "names" had a joint property in the books with bkpt., & the trustee in the bkpcy. was not entitled to have the books delivered up to him, but the "names" must undertake to give to the trustee reasonable facilities for inspecting the books.—*Re* BURNAND, *Ex p.* BAKER, SUTTON & Co., [1904] 2 K. B. 68; 73 L. J. K. B. 413; 91 L. T. 46; 52 W. R. 437; 20 T. L. R. 377; 48 Sol. Jo. 368; 11 Mans. 113, C. A.

2168. Right to retain possession of books—Against receiver & manager of business.]—A trustee in bkpcy. of a mtgor. is not obliged to deliver up the books & papers relating to bkpt.'s business, to a receiver & manager appointed by the mtgee.—CAPITAL & COUNTIES BANK *v.* STEVENS' TRUSTEE (1901), 17 T. L. R. 260, C. A.

2169. —— & documents—What may be retained—Appearance by trustee on hearing of application.]—On bkpcy. taking place the property of bkpt. was taken possession of by the trustee, including the books, papers, & documents at bkpt.'s office, where he carried on business as a solr. Application was subsequently made by bkpt. to the trustee for the return of certain documents, on the ground that they were the property of other persons, & that no lien attached to them, but the trustee, without actually claiming the documents, declined to hand them over without the sanction of the ct.:—*Held:* (1) an order to deliver up the documents not belonging to bkpt. might be made; (2) such order must contain the further

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PART VII. SECT. 6, SUB-SECT. 2.—C.

2164 i. *Right to delivery of books—On which lien claimed.*]—A book-keeper has no lien on the books of his insolvent employer for money lent & advanced, & *semble:* even if entitled to a preference on distribution for wages due, the book-keeper must give up the books to the trustee.—SPANGENBERG'S TRUSTEES *v.* COUSINS, 2 M. 343.—**S. AF.**

2164 ii. —— *Book-keeper's lien for services.*]—An independent book-keeper, who has bestowed his time & labour on books, must, on the insolvency of the owner, hand them up to the trustee who, in the event of a dispute arising, must elect whether he will take an assignment of the book-keeper's lien or security for the benefit of creditors generally, or reserve the full effect of the security to the book-keeper.—SPURRIER *v.* COXWELL (1914), C. P. D. 83.—**S. AF.**

Sect. 6.—Relations between trustee and parties other than creditors and bankrupt: Sub-sect. 2, C. & D. Sects. 7 & 8.]

provision that nothing in the order should extend to any book or document which was the property of bkpt., or was kept by him for the purpose of his business. *Semble:* the trustee having taken up the position that he did not desire to give up the documents without the sanction of the ct., it was his duty to be present when the application to the ct. was made, although it might not be necessary for him to instruct counsel in the matter. —*Re* SCOTT, *Ex p.* SCOTT (1892), 36 Sol. Jo. 629; 9 Morr. 267.

2170. Right to vouchers.]—Vouchers in the possession of a solr., relating to payments made on behalf of a former client, must, on the bkpcy. of the client, be handed over to his trustee.—*Re* ELLIS & ELLIS (1908), 25 T. L. R. 38; *sub nom. Re* E. & E., 53 Sol. Jo. 32.

2171. Right to title deeds—Of property alleged to be mortgaged in hand of creditors.]—An equitable mtgee. by deposit of title deeds of bkpt. commenced in the Ch. Div. an action against the trustee for an account & foreclosure in default of payment. The trustee, who alleged that nothing was due on the mtge., but that it had been concocted to defeat bkpt.'s creditors, examined the mtgee. & other witnesses in the Ct. of Bkpcy., & applied to that ct., after the commencement of the action, for an order for delivery up of the title deeds by the mtgee:—*Held:* the application was rightly dismissed, with liberty to either of the parties to apply after the conclusion of the proceedings in the action.—*Re* ENGLAND, *Ex p.* PANNELL (1877), 6 Ch. D. 335; 47 L. J. Bcy. 21; 37 L. T. 450; 26 W. R. 194, C. A.

Annotation:—**Refd.** *Re* Lowenthal, *Ex p.* Beesty (1884), 13 Q. B. D. 238.

2172. Right to examine documents—On which solicitor claims lien.]—A solr. is not, on the ground of his lien on documents of a bkpt. in respect of professional services before the bkpcy., entitled to refuse to produce such documents for examination by the trustee.—*Re* TOLEMAN & ENGLAND, *Ex p.* BRAMBLE (1880), 13 Ch. D. 885; 42 L. T. 413; 28 W. R. 676.

See, further, Part XIX., *post.*

Validity & extent of solicitors lien over documents, *see* SOLICITORS.

D. In regard to Actions, Arbitrations, and other Legal Proceedings.

See Part XXI., Sect. 2, *post.*

SECT. 7.—RELATIONS BETWEEN TRUSTEE AND BANKRUPT.

2173. Money received by trustee—Must be applied for creditors—Notwithstanding arrangement with bankrupt.]—The assignee of bkpt. receiving money from him, receives it as trustee for the creditors at large, & cannot appropriate it to his own benefit, whatever agreement he may make with bkpt.—*Re* ELSWOOD (1855), 26 L. T. O. S. 96.

Distribution of property, generally, *see* Part XIII., *post.*

2174. Sale by trustee—To bankrupt.]—A sale of bkpt.'s property to bkpt. is not contrary to the policy of Bkpcy. Acts.—KITSON *v.* HARDWICK (1872), L. R. 7 C. P. 473; 26 L. T. 846.

Annotations:—**Mentd.** Emden *v.* Carte (1881), 17 Ch. D. 169; Mercer *v.* Vans Colina (1897), [1900] 1 Q. B. 130, n.; Affleck *v.* Hammond, [1912] 3 K. B. 162, C. A.

2175. —— To solvent partner of bankrupt—Of bankrupt's interest in partnership.]—The trustee can sell bkpt.'s interest in a dissolved partnership to the solvent partner.—*Re* MOTION, MAULE *v.* DAVIS (1873), 9 Ch. App. 192; 43 L. J. Bcy. 59; 29 L. T. 757; 22 W. R. 225, L. C. & L. JJ.

Annotations:—**Mentd.** Halliday *v.* Harris (1874), L. R. 9 C. P. 668; *Re* England, *Ex p.* Pannell (1877), 6 Ch. D. 335, C. A.; *Re* Lowenthal, *Ex p.* Beesty (1884), 13 Q. B. D. 238.

2176. Indemnity—Right of bankrupt—In respect of claim not discharged by bankruptcy.]—It is quite contrary to the principle of the laws relating to bkpts. or insolvents that the assignees taking the property for division amongst the creditors should be liable, either personally or out of the assets of the estate, to indemnify bkpt. or insolvent, in respect of any claims to which he may have rendered himself liable in respect of a particular portion of the estate, & from which claims he has not been discharged by his bkpcy. or insolvency. —LEVI *v.* AYERS (1878), 3 App. Cas. 842; 47 L. J. P. C. 83; 38 L. T. 725; 27 W. R. 79, P. C.

2177. Record book—Right of bankrupt to inspect.]—A debtor has no right in any circumstances to inspect the record book of the trustee in his bkpcy., & the ct. has no power to give him leave to do so.—*Re* SOLOMONS, *Ex p.* SOLOMONS, [1904] 2 K. B. 917; 73 L. J. K. B. 1029; 91 L. T. 512; 53 W. R. 49; 21 T. L. R. 48; 49 Sol. Jo. 53; 11 Mans. 345, C. A.

2178. Accounts—Right of bankrupt to account—Fraud not specifically alleged.]—In general an uncertificated bkpt. cannot file a bill against his assignees for an account of their dealings under the bkpcy., nor can bkpt. obtain such relief indirectly, by charging fraud & collusion between the assignees & a third party, where the bill states no specific acts of fraud on the part of the assignees, & prays no relief against them on the ground of fraud.—TARLETON *v.* HORNBY (1835), 1 Y. & C. Ex. 172; 160 E. R. 70.

Annotation:—**Mentd.** Preston *v.* Wilson (1846), 5 Hare, 185.

2179. —— —— Probability of surplus necessary.]—An uncertificated bkpt. cannot petition that his assignees be ordered to account, without alleging that his estate will produce a surplus after paying 20*s.* in the pound.—*Re* RYLEY, *Ex p.* RYLEY (1834), 4 Deac. & Ch. 50, Ct. of R.

2180. —— —— ——.]—If a certificated bkpt. shows merely the probability of a surplus, he is entitled to an account against his assignee.—*Re* MALACHY, *Ex p.* MALACHY (1840), 1 Mont. D. & De G. 353; 10 L. J. Bcy. 7; 4 Jur. 1092, Ct. of R.

2181. —— —— When permitted to surcharge.]—Bkpt. pending a commission has a right to an inspection in respect of the surplus, & the Lord Chancellor will take care that at the close of it he shall have justice; but in this case bkpt. was not permitted to surcharge & falsify in the master's office the accounts settled by the comrs. long ago, though palpable errors specifically pointed out by a short petition would be rectified.—TWOGOOD *v.* SWANSTON (1801), 6 Ves. 485; 31 E. R. 1157, L. C.

2182. Surplus—Trustee not trustee of—For bankrupt.]—A trustee in bkpcy. is not a trustee

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PART VII. SECT. 7.

2173 i. *Money received by trustee—Cannot be charged for his own debt.*]—Money in the hands of the assignee of an insolvent estate, cannot be charged, under C. L. P. Act, 1856, s. 63, by the assignee, for his own debt, after the petition in the insolvency matter has been dismissed.—JOHNSTONE *v.* FENIX (1857), 10 Ir. Jur. 67.—**IR.**

2181 i. *Accounts—Right of bankrupt to surcharge.*]—Bkpt., or those claiming under him, are not bound by the account taken by the comrs. from the assignees, but he will be allowed to surcharge & falsify such account before the master.—MONTGOMERY *v.* MONTGOMERY (1808), 2 Mol. 446.—**IR.**

of the surplus of the estate for bkpt.—*Re* AUSTIN, *Ex p.* SHEFFIELD (1879), 10 Ch. D. 434; 40 L. T. 15; 27 W. R. 622, C. A.

Annotations:—**Mentd.** *Re* Evelyn, *Ex p.* General Public Works & Assets Co. (1894), 63 L. J. Q. B. 658; Bird *v.* Philpott, [1900] 1 Ch. 822; *Re* A Debtor, *Ex p.* Peak Hill Goldfield, [1909] 1 K. B. 430, C. A.

2183. Allowance for maintenance—Right of bankrupt to.]—The ct. has no power to direct an allowance to bkpt. for maintenance.—*Re* ANON. (1862), 5 L. T. 698.

See, now, 1914 Act, s. 58, & 1915 Rules, rr. 312, 370.

See, further, Part XX., Sects. 7 & 15, *post*.

2184. Taxation—Attendance of bankrupt—Jurisdiction of court to allow.]—A debtor was adjudicated bkpt. on Apr. 3, 1913, on the petition of his sole creditor. In Dec., 1913, he became entitled to property more than sufficient to enable him to pay petitioning creditor's debt & all costs. On Apr. 7, 1914, the bkpcy. was annulled. In the meantime the sole creditor had appointed himself to be the committee of inspection, & as such committee had purported to fix the remuneration of the trustee & to sanction the employment by him of solrs. After the annulment debtor inquired of the trustee's solrs. when their costs were to be taxed & the trustee's remuneration fixed, & stated that he required to be present on the application. He was then informed that the costs had already been taxed & the trustee's remuneration fixed. There were two *allocaturs* for costs dated respectively Mar. 12 & Apr. 29, 1914, & the amount of the taxed costs was paid by the Board of Trade on May 7, 1914. On May 18 debtor applied to the county ct. to reopen the matter, but the registrar refused the application, on the ground that he had no jurisdiction to allow debtor to attend the taxation:—*Held*: there was jurisdiction to allow bkpt. to attend the proceedings in special circumstances such as existed in the present case.—*Re* GEIGER, [1915] 1 K. B. 439; 84 L. J. K. B. 589; 112 L. T. 562; 59 Sol. Jo. 250; [1915] H. B. R. 44, C. A.

Annotations:—**Consd.** *Re* Salmon, *Ex p.* Official Receiver, [1916] 2 K. B. 510, D. C. **Distd.** *Re* Yeatman, [1916] 1 K. B. 461. **Folld.** *Re* Yeatman, *Ex p.* Yeatman, [1916] 1 K. B. 780, C. A.

See, further, Nos. 2025 *et seq.*, *ante*.

2185. Power to compel bankrupt to submit to medical examination.]—The ct. has no jurisdiction to compel a bkpt. to submit to a medical examination, for the purpose of enabling the trustee to effect an insurance on bkpt.'s life with a view to increase the saleable value of bkpt.'s life interest in property.—*Re* GARNETT. *Ex p.* BULLOCK (1885), 16 Q. B. D. 698; 34 W. R. 79; *sub nom. Re* GARNETT, *Ex p.* OFFICIAL RECEIVER, 55 L. J. Q. B. 77; 53 L. T. 769; 2 Morr. 286,

Annotations:—**Apprvd.** (Fry, L.J. diss.) *Re* Betts, *Ex p.* Board of Trade (1887), 19 Q. B. D. 39, C. A.; Board of Trade *v.* Block (1888), 13 App. Cas. 570, H. L.

2186. ——.]—The principle asset of bkpt. was a contingent reversionary interest, which was saleable if bkpt.'s life were insured. The trustee having requested bkpt. to submit to a medical examination with a view to a policy being effected, bkpt. refused to do so without giving any reason, although he had not long before his bkpcy. submitted to such an examination for the purpose of raising money on his interest, & although he admitted that since then he had contracted no disease, & that he knew of no reason why he should not submit to such an examination:—*Held*: the obligation imposed upon bkpt. by 1883 Act, s. 24, to do all such acts & things in relation to his property, & the distribution of his property among his creditors, as might be reasonably required by the trustee, & to "aid to the utmost of his power in his realisation of his property & the distribution of the proceeds among his creditors," did not include an obligation to submit to a medical examination.—BOARD OF TRADE *v.* BLOCK (1888), 13 App. Cas. 570; 58 L. J. Q. B. 113; 59 L. T. 734; 53 J. P. 164; 37 W. R. 259; 4 T. L. R. 770, H. L.; *affg.* S. C. *sub nom. Re* BETTS & BLOCK, *Ex p.* BOARD OF TRADE (1887), 19 Q. B. D. 39, C. A.

Annotations:—**Expld.** *Re* Barker, *Ex p.* Constable, *Re* Jones, *Ex p.* Jones (1890), 25 Q. B. D. 285, C. A. **Consd.** *Re* Jones, *Ex p.* Jones (1890), 24 Q. B. D. 589.

See, further, Part XIX., Part XX., Sect. 18, *post*.

Removal—Right of bankrupt to petition for.]—*See* Nos. 2199, 2200, *post*.

2187. Costs—Action by trustee against bankrupt—To try validity of commission—Petition to supersede commission.]—Assignees were made to pay the costs of a trial upon an issue directed to try the validity of the commission, they being pltfs. & bkpt. being deft., but they were not made to pay the costs of the petition to supersede the commission.—*Re* EDWARDS, *Ex p.* EDWARDS (1818), Buck, 232.

See, further, Nos. 2021 *et seq.*, 2131 *et seq.*, *ante*.

Right of bankrupt to sue & liability of bankrupt to be sued.]—*See* Part XXI., Sects. 4 & 5, *post*.

SECT. 8.—RIGHTS OF TRUSTEE AGAINST CO-TRUSTEES.

2188. Contribution — In what cases — Loss occasioned by joint act.]—Contribution enforced among assignees in bkpcy. to reimburse a payment by one under an order for a loss, occasioned by their joint act, & the objection, that defts. acted only for conformity upon the representation &

2183 i. *Allowance for maintenance—Right of bankrupt to—When lost.*]—Where debtor has given an undue preference to one of his creditors, the ct. has power to quash an order for support.—MCDONALD *v.* WATT (1867), 1 Han. 24; 12 N. B. R. 24.—**CAN.**

2183 ii. —— —— ——.]—An assignment to a creditor by an insolvent person after service of process under pressure does not deprive prisoner of his right to a weekly allowance under Insolvent Act.—*Re* MCKAY (1868), 1 P. E. I. 278.—**CAN.**

2183 iii. —— —— ——.]—Under 20 & 21 Vict. c. 60, s. 302, even though bkpt.'s estate pays a large dividend, yet the ct. may, on the ground of his misconduct, refuse him any allowance whatever out of his estate.—*Re* NOBLE (1869), 3 I. L. T. Jo. 350.—**IR.**

2183 iv. —— —— *Joint bankruptcy.*]—A member of a firm trading in England & Ireland became bkpt. in Ireland. The other member of the firm became bkpt. in England. The former, having obtained his certificate in Ireland, applied for the statutable allowance under 20 & 21 Vict. c. 60, ss. 302, 303:—*Held*: the allowance should be calculated on his separate estate, & on his share of the joint estate, but not on the whole joint estate.—*Re* LUNHAMS (1861), 14 Ir. Jur. 403.—IR.

2183 v. —— —— ——.]—The allowance paid to bkpt. partners, whose joint estate has paid a dividend which entitles them to an allowance, will be double that paid on a separate estate.—*Re* SCOTT (1863), 15 Ir. Jur. 160.—**IR.**

2183 vi. —— —— ——.]—Where, on a joint bkpcy. of partners, a dividend is paid entitling them to an allowance, single allowance only will be made a out of the joint estate, in proportion to the dividend paid out of the net produce of the joint estate.—*Re* HUNTER (1872), 7 I. L. T. 153.—**IR.**

2183 vii. —— —— *Wife of bankrupt.*]—The Ct. of Bkpcy. will not, without the consent of the assignees, make an allowance to the wife of bkpt.—*Re* CAGNEY (1855), 15 L. R. Ir. 184.—**IR.**

PART VII. SECT. 8.

e. *As regards custody of books.*]—Under Law 13 of 1895 joint trustees enjoy equal rights in regard to the administration of the estate & it is not competent for the creditors to curtail the rights of one of them, & a resolution by the creditors, which purported to give the custody of insolvent's books, etc., to one joint trustee only, the other to have reasonable access thereto, was set aside as invalid.—GOLDSELLER *v.* HILL (1908), T. S. 822.—**S. AF.**

Sect. 8.—Rights of trustee against co-trustees. Sect. 9: Sub-sect. 1, A. & B.]

advice of pltf., did not prevail.—LINGARD *v.* BROMLEY (1812), 1 Ves. & B. 114; 35 E. R. 45.

Annotations:—**Consd.** Chillingworth *v.* Chambers, [1896] 1 Ch. 685. **Reld.** Belemore *v.* Watson (1885), 1 T. L. R. 241, C. A. **Mentd.** Seddon *v.* Connell (1840), 10 Sim. 58; Robinson *v.* Harkin, [1896] 2 Ch. 415; Moxham *v.* Grant, [1900] 1 Q. B. 88, C. A.

2189. —— —— Judgment for costs & expenses of messenger paid by one trustee.]—A messenger under a commission of bkpcy. obtained judgment against the assignees for his costs & expenses. One paid the debt & costs under the judgment:—*Held:* he had a right to an action of contribution against his co-assignee, & was not bound to show that any funds came into his hands from bkpt.'s estate.—HART *v.* BIGGS (1816), Holt, N. P. 245, N. P.

Annotation:—**Mentd.** *Re* Wooding, *Ex p.* Coates (1834). 3 L. J. Bcy. 62.

2190. —— Each must bring separate action—Two or three trustees paying whole debt.]—A., B. & C., being appointed assignees under a commission of bkpcy., & having acted as such, A. & B. paid each half of his bill to the solr.:—*Held:* A. & B. could not maintain a joint action against C. for his proportion of the money paid, but must each bring a separate action.—BRAND *v.* BOULCOTT (1802), 3 Bos. & P. 235; 127 E. R. 130.

Annotations:—**Apld.** Kelby *v.* Steel (1805), 5 Esp. 194. **Distd.** Place *v.* Delegal (1838), 6 Scott, 249.

2191. After removal—Money had & received.]—*Qu.:* whether the assignee of bkpt. can maintain an action for money had & received against his co-assignee, who has been removed.—WRAY *v.* BARWIS (1791), Peake, 69, N. P.

2192. Costs—One trustee refusing to sue—Application to allow other to sue alone.]—Where one of two assignees refuses to join in an action, or suffer his name to be used, the costs of the application to enable the other assignee to sue alone will not be given against the assignee who refuses, unless the other had previously offered to indemnify him.—*Re* CROFTS, *Ex p.* BROADBENT (1838), 7 L. J. Bcy. 22.

See, also, Sect. 5, sub-sect. 1, K., *ante.*

SECT. 9.—TERMINATION OF OFFFICE.

SUB-SECT. 1.—BY REMOVAL.

See, now, 1914 Act, ss. 19, 89 (5), 93, & 1915 Rules, rr. 330–332, 341, 367.

A. Jurisdiction of Court.

2193. To remove persons nominated—Before execution of assignment.]—The ct. has jurisdiction to remove the persons nominated by the creditors as assignees before the execution of the assignment.—*Re* HOWARD & GIBBS, *Ex p.* SHAW (1822), 1 Gl. & J. 127, L. C.

2194. To remove one of several appointees.]—Where more persons than one have been appointed trustee, the ct. has power to remove one of them without removing all.—*Re* MANSEL, *Ex p.* NEWITT (1884), 14 Q. B. D. 177; 54 L. J. Q. B. 245; 52 L. T. 202; 33 W. R. 142; 1 T. L. R. 98, C. A.

2195. To restrain creditors from meeting to consider removal—Pending decision as to expunging proof.]—The Bkpcy. Ct. has power to restrain the creditors from holding a meeting to consider the removal of the trustee, until after a question as to expunging the proof of a creditor has been decided.—*Re* MANSEL, *Ex p.* SAYER (1887), 19 Q. B. D. 679; 56 L. J. Q. B. 605; 3 T. L. R. 792, C. A.

B. Procedure.

2196. Who may apply—Assignee himself.]—It is a most unwholesome practice to permit an assignee to be removed as upon his own consent, when the ct. ought to remove him by its own act upon motives of a different & a higher nature.—*Ex p.* EDWARDS (1801), 6 Ves. 3; 31 E. R. 909.

Annotations:—**Mentd.** *Ex p.* Lacey (1802), 6 Ves. 625; *Re* Bryant, *Ex p.* Paterson (1813), 1 Rose, 402.

2197. —— —— Appointed in error.]—An assignee elected by mistake by his own power may petition to have himself removed on paying costs.—*Re* WEST, *Ex p.* HAMMOND (1839), 1 Mont. & Ch. 74, Ct. of R.

2198. —— —— Desiring to buy bankrupt's estate.]—An assignee may be removed, at his own request, in order that he may bid at a sale of part of bkpt.'s estate.—*Re* BAYLIS, *Ex p.* PERKES (1843), 3 Mont. D. & De G. 385, Ct. of R.

2199. —— Bankrupt—Estate not expected to produce surplus.]—*Semble:* bkpt. may petition for the removal of an assignee, although his estate may not be expected to produce a surplus.—*Re* OAKES, *Ex p.* OAKES (1841), 2 Mont. D. & De G. 60; 10 L. J. Bcy. 66; 5 Jur. 612, Ct. of R.

2200. —— —— Assignee acting fraudulently.]—

PART VII. SECT. 9, SUB-SECT. 1.—A.

f. *Limited by* 1875 *Act, s.* 125.]—The power given to the ct. or a judge by the above sect. to remove an assignee, is confined to the case of an assignee disobeying an order made under the sect., & does not extend to other misconduct on the part of the assignee, the general power of removal being committed to the creditors, under s. 29.—*Re* EVANS, *Ex p.* FALCONER (1880), 1 R. & G. 326; 13 N. S. R. 326.—**CAN.**

g. *To enforce order by writ of attachment.*]—A judge of a county ct., acting under 48 Vict. c. 26, s. 6, removed an assignee for creditors, & substituted another assignee. The first assignee refused to deliver over the keys of the place of business of insolvent to the second assignee:—*Held:* the judge had no power to direct the issue of a writ of attachment against the first assignee for contempt.—*Re* PACQUETTE (1886), 11 P. R. 463.—**CAN.**

h. *To order payment of costs.*]—Where a judge of a county ct., acting under R. S. O., 1887, c. 124, s. 6, orders the removal of an assignee, he exercises a statutory jurisdiction as *persona designata,* & has no power to order payment of costs.—*Re* YOUNG (1891), 14 P. R. 303.—**CAN.**

PART VII. SECT. 9, SUB-SECT. 1.—B.

2199 i. *Who may apply—Bankrupt—Assignee declining to act.*]—The course for an insolvent or bkpt. who has rights, if his assignee will not proceed, or is out of the jurisdiction, is to apply in the proper ct. either to remove the assignee or for liberty to proceed in his name.—BOURK *v.* COUGHLAN (1827), 1 Ir. L. Rec. 1st ser. 122.—**IR.**

k. —— *Creditor who has proved his claim—Estoppel.*]—Pltf. having proved his claim before the assignee in insolvency, & having obtained an order in the Queen's Bench to set aside insolvent's discharge in the insolvent ct., with costs to be paid to him out of the estate, is precluded from objecting that the assignee was not duly appointed.—ALLAN *v.* GARRATT & WILLIAMSON (1870), 30 U. C. R. 165.—**CAN.**

l. —— *Unsuccessful applicant—Not being creditor.*]—Where at an election of a trustee there were two appts., & after the election one of them, who was not a creditor, moved the ct. to expunge a certain proof of debt & to have it declared that he was duly elected as sole trustee, & he showed that, if the proof of debt had not been admitted, he would have been duly elected as sole trustee:—*Held:* he had a sufficient *locus standi* to make the application.—ELLIOTT *v.* TAYLOR, *Re* HAYBERRY (1888), 6 S. C. 2.—**S. AF.**

m. *In what court.*]—The appointment of an assignee may be impugned without going into the Insolvency Ct., *e.g.,* by deft. in an action by such assignee.—BROWN *v.* PEARMAN, R. E. D. 491.—**CAN.**

n. *Terms of reference to commissioners.*]—When a reference is made to the comrs., on a motion to remove the assignee of a bkpt. for misconduct, the terms of it should not be that the comrs. should come to any judicial determination upon it, but they should be directed to report on certain facts, from which the ct. might afterwards draw its conclusion.—*Re* BELL, 1 Ir. L. Rec. 1st Ser. 63.—**IR.**

o. *Meeting of creditors necessary.*]—A person who once becomes assignee to bkpt. will not be removed, although it is for the advantage of the estate, without a meeting of the creditors being called to choose a new assignee, or continue the former as the sole assignee, & the person seeking his removal must bear all the expenses.—*Ex p.* BAINBRIDGE (1830), 4 Ir. L. Rec. 1st ser. 57.—**IR.**

Where an assignee is acting fraudulently, bkpt. should apply to the Ct. of Bkpcy. either to have a new assignee appointed, or for leave to use the assignee's name in any proposed proceedings.—PAYNE *v.* DICKER (1871), 6 Ch. App. 578 ; 24 L. T. 893 ; 19 W. R. 987, L. C.

2201. Within what time.]—A petition for the removal of the assignee comes too late at the end of six months.—*Re* GREENWAY, *Ex p.* SCHOLEY (1821), 1 Gl. & J. 2.

2202. ——.]—A petition, presented six months after the election of assignees, for a new choice, is not too late.—*Re* HORSLEY, *Ex p.* DANBY (1830), Mont. 67.

2203. ——.]—*Re* ROBINSON, *Ex p.* CARTER, No. 2238, *post.*

2204. ——.]—An application to the Ct. of Bkpcy. to vacate the appointment of a trustee, on the ground that the rejection of a proof by him was procured by fraud, must be made very promptly after such rejection.—*Re* THRIFT, *Ex p.* KIMBER (1879), 11 Ch. D. 869 ; 41 L. T. 248 ; 28 W. R. 128, C. A.

2205. Notice of meeting—Trustee entitled to.]—A trustee in a liquidation is entitled to notice of a meeting, at which it is intended to propose a resolution to remove him from his office.—*Re* BAGNALL, *Ex p.* WRIGHT (1879), 27 W. R. 476.

2206. —— **Voting by proxy.**]—Notice for a general meeting of creditors in a liquidation, with a view to removing the trustee, was signed by certain creditors who had sold their debts to another creditor, who had a personal interest in the removal of the trustee. The creditors who had sold their debts voted in favour of resolutions carried by the requisite majority in value for removing the trustee. At the meeting there was present a creditor who was also proxy for another creditor, but he was not present with the intention of voting, nor with any authority from his principal :—*Held :* there was nothing sufficient to invalidate the notice ; & the principal could not be taken to have been present.—*Re* BAUM, *Ex p.* EVANS (1880), 13 Ch. D. 424 ; 49 L. J. Bcy. 25 ; 42 L. T. 384 ; 28 W. R. 500, C. A.

2207. Powers of court—To order reference.]—Where an assignee petitioned for the removal of his co-assignee, on the ground of misconduct, which was denied by the latter, who recriminated, a special reference was directed to the comr., to inquire into & report the circumstances of the case. —*Re* OULTON, *Ex p.* OULTON (1843), 3 Mont. D. & De G. 336.

Annotation :—**Mentd.** *Re* Mansel, *Ex p.* Newitt (1884), 14 Q. B. D. 177, C. A.

2208. —— **Petition not on true ground—Suspicion of fraud.**]—Where circumstances are brought to the attention of the ct., raising a case of grave suspicion as to the conduct of an assignee, it is the duty of the ct. to institute a thorough examination into the case, although the complaint may not in the petition be placed on its true ground. —*Re* TRISTRAM, *Ex p.* SINGLEHURST (1858), 3 De G. & J. 451 ; 32 L. T. O. S. 170 ; 7 W. R. 46 ; 44 E. R. 1342, L. C.

Grounds for granting application.]—*See* Nos. 2218 *et seq., post.*

2209. Grounds for refusing application.]—On a petition by bkpt. for the removal of one of two assignees, where it appeared that he was a mere instrument in the hands of the other assignee, & that the petition was got up between them in collusion, & out of a spirit of hostile opposition to the assignee against whom it was presented, the petition was dismissed.—*Re* OAKES, *Ex p.* OAKES (1841) 2 Mont. D. & De G. 60 ; 10 L. J. Bcy. 66 ; 5 Jur. 612, Ct. of R.

2210. Evidence admissible.]—The examination of the assignee before the comrs. as to a sale to himself of bkpt.'s property was permitted to be read, as evidence of the assignee's misconduct, the petition praying to discharge him for misconduct, although it did not pray a resale.—*Re* MILLER, *Ex p.* TURVILL (1833), 3 Deac. & Ch. 346, Ct. of R.

2211. Form of order—Nature of misconduct need not be stated.]—An assignee, who admitted that he had been guilty of misconduct, applied to be discharged on payment of costs. The ct. refused to act on the suggestion of resp., that the nature of the misconduct should be stated in the order for his removal, & directed that he should be discharged on his paying all costs, the order not to prejudice any future application against petitioner in respect of any matter or thing in the bkpcy.—*Re* SMITH, *Ex p.* ANGLE (1834), 4 Deac. & Ch. 118 ; 4 L. J. Bcy. 5.

2212. Effect of order removing one trustee—New choice of all.]—Where the creditors choose three assignees, & the comrs. reject one, there must be a new choice.—*Re* WHITEHEAD, *Ex p.* WILSON (1840), 1 Mont. D. & De G. 234 ; 4 Jur. 584.

2213. Appeals—Appellate court will not interfere with discretion.]—The removal of assignees is a matter within the discretion of the comr. with whom the appellate ct. will not interfere, merely because it doubts whether it would have acted as the comr. has done.—*Re* WILLIAMS, *Ex p.* BATES (1852), 1 De G. M. & G. 452 ; 21 L. J. Bcy. 20 ; 18 L. T. O. S. 324 ; 16 Jur. 459 ; 42 E. R. 627, L. JJ.

Annotations :—**Consd.** *Re* Stiff, *Ex p.* Madigan (1864), 10 L. T. 914. **Refd.** *Re* Basset, *Ex p.* Dives (1860), 9 W. R. 237.

2214. —— ——.]—If in making an order for removal of a trustee in bkpcy. for good cause, a judicial discretion has been exercised according to law, the Ct. of Appeal will not disturb the order.—*Re* POOLEY, *Ex p.* SHEARD (No. 1) (1880), 16 Ch. D. 107 ; 44 L. T. 259, C. A.

Annotation :—**Consd.** *Re* Mansel, *Ex p.* Newitt (1884), 14 Q. B. D. 177, C. A.

2215. Costs—Payable out of estate—Irregular appointment.]—Where assignees are chosen at the instance of bkpt.'s solr., who has the sole control of the estate, & bkpt. carries on business the same as before the bkpcy., & the assignees neglect their duty & do not attend the sittings of the ct., the ct. will order the costs of the creditors making the application for their removal to be paid out of the estate.—*Re* BEESLEY (1863), 11 W. R. 878.

2216. —— **No assets—Payable by petitioner.**]—Where a petition has been presented to remove an assignee, & there are no assets, petitioner must pay costs.—*Re* ARBER, *Ex p.* LEWIS (1850), 14 L. T. O. S. 425.

2217. Restoration of trustee—On annulment of receiving order.]—Where a receiving order is

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2207 i. *Powers of court—To order meeting—Trustee resident without jurisdiction.*]—Under 12 & 13 Vict. c. 107, s. 77, the ct. will grant a meeting to consider the propriety of removing the creditor's assignee, & of appointing another in his place, though no charge of misconduct is made against him, if it appears that he has gone to reside permanently out of Ireland.—*Re* HANDY (1850), 2 Ir. Jur. 245.—**IR.**

q. *Costs—Payable by party seeking removals.*]—A person seeking the removal of an assignee of a bkpt. must bear all the costs attendant upon such proceeding.—*Ex p.* BAINBRIDGE (1830), 4 Ir. L. Rec. 1st ser. 57.—**IR.**

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made against a trustee in bkpcy., in consequence of which he vacates his office, & the order is subsequently rescinded by the ct., on the ground that it ought never to have been made, the trustee is thereupon restored to his original office subject to any new rights which may have arisen in the interval.—*Re* NEWMAN, *Ex p.* OFFICIAL RECEIVER, [1899] 2 Q. B. 587; 68 L. J. Q. B. 961; 81 L. T. 527; 48 W. R. 94; 43 Sol. Jo. 721; 6 Mans. 381.

C. Grounds for Removal.

(a) In General.

2218. For good cause.]—The true rule is, that the assignees ought to be continued unless petitioners can show there is some objection with regard to the substance or integrity of the person who is chosen assignee.—*Ex p.* GREIGNIER (1744), 1 Atk. 91; 26 E. R. 60, L. C.

2219. ——.]—A trustee in bkpcy. can be removed by the ct. only upon good cause shown.—*Re* POOLEY, *Ex p.* SHEARD (No. 1) (1880), 16 Ch. D. 107; 44 L. T. 259, C. A.

Annotation:—**Refd.** *Re* Mansel, *Ex p.* Newitt (1884), 14 Q. B. D. 177, C. A.

2220. For benefit of estate.]—Before the ct. will remove a creditor's assignee it must be satisfied that the change is for the benefit of the estate.—*Re* STIFF, *Ex p.* MADIGAN (1864), 10 L. T. 914.

2221. Necessity for taking account with trustee.]—Grounds for the removal of an assignee in bkpcy. include the fact that an account cannot be conveniently or justly taken while he remains, but the simple circumstance, that he is to account, is not sufficient.

Resorting to the principle, upon which an assignee may be removed, the rule is that, where an account is to be taken, it must appear that the account cannot be taken conveniently or justly, or not so conveniently & justly, while that person remains an assignee (LORD ERSKINE, C.).—*Ex p.* SURTEES (1806), 12 Ves. 10; 33 E. R. 4.

2222. ——.]—Trustees under a deed of trust to manage property for the protection of creditors, to protect the trust, issued a fiat against debtor, & thereby prevented creditors dissenting from the trust deed from issuing an adverse fiat. The trustees continued to manage the property under the trust deed, & did not further prosecute the fiat than by getting themselves appointed assignees. Upon petition of the adverse creditors to annul the fiat, & issue an effective one:—*Held:* without reference to their conduct, the trustees must be removed from the office of assignees, in order to take accounts against them as trustees.—*Re* HUGHES, *Ex p.* MENDELL (1835), 4 Deac. & Ch. 725; 4 L. J. Bcy. 81, Ct. of R.

2223. Rejection of one of several trustees by court—New choice of all.]—Where, upon a joint choice of three persons as assignees, the ct. rejects the nomination of one of them, it will set aside the choice altogether, as it cannot collect from the nomination of three persons jointly an intention to entrust the administration to two of the three if one be rejected.—*Re* HOWARD & GIBBS, *Ex p.* SHAW (1822), 1 Gl. & J. 127, L. C.

Annotations:—**Mentd.** *Re* Rowe, *Ex p.* Rowe (1845), 14 L. J. Bcy. 17; *Re* James. *Ex p.* Cadwallader (1862), 4 De G. F. & J. 499, L. JJ.

2224. Assignee resident in Scotland.]—An assignee, permanently resident in Scotland, was ordered to be removed, as, whilst he was so resident, the ct. had no hold over him, & could reach him with no process.—*Ex p.* GREY (1807), 13 Ves. 274; 33 E. R. 297.

See, also, Nos. 1901 *et seq., ante.*

(b) Irregularity of Appointment.

2225. Creditors prevented from voting—Absence beyond seas.]—The ct. will not set aside the choice of assignees, because some of creditors live beyond sea & had no opportunity of voting.—*Ex p.* GREIGNIER (1744), 1 Atk. 91; 26 E. R. 60, L. C.

2226. —— **Accident.**]—The choice of assignees in bkpcy. not disturbed on the ground that creditors were prevented by accident from voting, if not kept back by fraud.—*Ex p.* SURTEES (1806), 12 Ves. 10; 33 E. R. 4.

2227. —— ——.]—Where, at the election of assignees, the greater part in value of the creditors had been accidentally, & without default on their part, excluded from voting, a new choice was directed.—*Re* TOMKINS, *Ex p.* DE CHAPEAUROUGE (1829), Mont. & M. 174.

2228. —— **Error of commissioners.**]—Where, through the error of the comrs. the great body of the creditors were prevented from proving their debts, & voting in the choice of assignees, a new choice was directed.—*Re* HOLMES, *Ex p.* HAWKINS (1819), Buck, 520.

PART VII. SECT. 9, SUB-SECT. 1.—C. (a).

2221 i. *Necessity for taking account with trustee.*]—An assignee will not be removed, upon the ground of a disputed account existing between him & bkpt. To justify a petition for removal, a case should be made to show that an adverse investigation is necessary, involving perhaps an action against the assignee.—*Ex p.* DOYLE (1827), 2 Mol. 149.—**IR.**

r. *Trustee's interest & duty in conflict.*]—It is not sufficient ground for setting aside the election of a trustee that there is a dispute between one of the creditors & the trustee as to such creditor's claim on the estate. It must be shown that the person elected as trustee is disqualified by having an interest opposed to the interests of creditors generally.—STEWART & Co. *v.* BRINK'S TRUSTEE (1878), Buch. 16.—**S. AF.**

s. —— *Trustee liable to be subjected to action for undue preference.*]—Where it was alleged that a trustee might be liable to be subjected to an action for undue preference at the instance of the estate, & that it was to his interest that certain property of the estate should be sold under its fair value, but there was no personal objection to him:—*Held:* an application to have the election set aside should be refused.—*Re* HALL, MAIR *v.* LITTLEJOHN (1886), 4 S. C. 278.—**S. AF.**

t. *Irregularity in bond.*]—A bond to W., of etc., president of the Board of Trade of the City of London, to be paid to him as president of the Board, his successors & assigns, & executed by the sureties, but not by the assignee:—*Held:* sufficient, under Insolvent Act, 1864. *Qu.:* whether a defect in such security, or the absence of it altogether, would avoid the assignee's appointment.—CHURCHER *v.* COUSINS (1869), 28 U. C. R. 540.—**CAN.**

PART VII. SECT. 9, SUB-SECT. 1.—C. (b).

2226 i. *Creditors prevented from voting —Accident.*]—Where the chief creditor, being resident at a considerable distance from the town at which the meeting was to be held for the election of trustee, mistook the proper post by which to dispatch the power to prove debt & vote for himself as sole trustee, in consequence of which mistake the power arrived too late for the meeting, at which meeting the representative of the only other creditor entitled to vote had voted for himself as sole trustee, & was elected, the ct. set aside the election, & ordered a fresh one to take place.—DEARE & DIETZ *v.* HONEYBORNE (1868), Buch. 107.—**S. AF.**

w. *Requisite notice of meeting not given.*]—Where the notice was published in the *Gazette* of the 19th, & the meeting at which the creditors' assignee was appointed was held on the 29th:—*Held:* the appointment was irregular & invalid, "at least ten days' notice" being required by 1875 Act, s. 101.—PARKER *v.* KENNY (1884), 5 R. & G. 457; 17 N. S. R. 457; *affd.* in P. C.—**CAN.**

y. *Assignee chosen at adjourned meeting—First meeting not abandoned as failure.*]—At the meeting of creditors there was only one person who had filed a claim, which was without a voucher. Instead of abandoning the meeting as a failure & calling another, giving due notice, the meeting adjourned to another day, on which pltf. was appointed assignee: *Held:* the appointment was invalid.—BROWN *v.* PEARMAN R. E. D. 491.—**CAN.**

Annotation :—**Folld.** *Re* Best, *Ex p.* Milner (1833), 3 Deac. & Ch. 235, Ct. of R.

2229. —— **Proof improperly rejected—General rule.**]—The general rule is, that the choice of assignees will not be disturbed on account of the mere error of the comrs. in the rejection of debts, but there may be cases of exception.—*Re* GREENWAY, *Ex p.* SCHOLEY (1821), 1 Gl. & J. 2.

2230. —— —— —— **Fraud must be shown.**]—It is the settled practice of the Ct. of Bkpcy. not to vacate the appointment of a trustee, merely because a proof has been improperly rejected. In order to induce the ct. to vacate the appointment special circumstances, *e.g.* that the rejection of the proof has been procured by fraud, must be shown.—*Re* THRIFT, *Ex p.* KIMBER (1879), 11 Ch. D. 869 ; 41 L. T. 248 ; 28 W. R. 128, C. A.

2231. —— —— **Absence of fraud.**]—It is not a ground for the removal of assignees that the comrs. have improperly rejected the proof of a debt that would have turned the choice, unless the rejection was fraudulent.—*Re* ENFIELD, *Ex p.* DURENT (1818), Buck, 201.

Annotation :—**Folld.** *Re* Best, *Ex p.* Milner (1833), 3 Deac. & Ch. 235, Ct. of R.

2232. ——— ———.]—Creditors having applied for a new choice of assignees, on the ground that their proof had been refused :—*Held :* the exclusion of creditors, who, if they had been allowed to prove their debts would have had great weight in the choice, was not a good objection, unless it could be shown they had been excluded by improper conduct or fraud.—*Re* MATHIESON, *Ex p.* THOMPSON (1818), Buck, 201, n.

Annotation :—**Folld.** *Re* Best, *Ex p.* Milner (1833), 3 Deac. & Ch. 235, Ct. of R.

2233. —— —— ——.]—It is a settled rule that assignees are not to be removed because the comrs. improperly reject a proof, unless it appears that the proof was fraudulently procured to be rejected, with a view to influence the choice of assignees.—*Re* BEST, *Ex p.* MILNER (1833), 3 Deac. & Ch. 235 ; 3 L. J. Bcy. 73, Ct. of R.

Annotation :—**Apprvd.** *Re* Thrift, *Ex p.* Kimber (1879), 11 Ch. D. 869, C. A.

2234. —— —— ——.]—A trustee rejected the proof of a mtgee., on the ground of the non-production of title deeds other than the mtge. deed. The deeds had been deposited with bankers, & the creditor offered to produce them at a day's notice :—*Held :* although the proof had been wrongly rejected, there was no imputation on the conduct of the trustee to justify his removal.—*Re* DUNKLEY, *Ex p.* CASS (1881), 45 L. T. 560.

2235. —— —— **Other creditors relatively small in value.**]—Although, generally speaking, the error of the comrs. in admitting or rejecting the proof of debts will not vitiate the choice of assignees, if no corrupt motives are fixed upon them & their judgment be not surprised by fraud & contrivance, yet where the comrs. had, through an error of judgment, rejected petitioner's proof for £10,000, whereby the only other two creditors, whose debts only amounted to £172, were enabled to choose the assignees, a new choice was directed in the very special circumstances.—*Re* RIDDALL, *Ex p.* EDWARDS (1819), Buck, 411.

Annotation :—**Apld.** *Re* Best, *Ex p.* Milner (1833), 3 Deac. & Ch. 235, Ct. of R.

2236. —— —— ——.]—The ct. exercised its discretion, in view of the smallness of the amount in value of the creditors who governed the choice, compared with those whose debts were improperly rejected.—*Re* BEST, *Ex p.* MILNER (1833), 3 Deac. & Ch. 235 ; 3 L. J. Bcy. 73, Ct. of R.

Annotation :—**Mentd.** *Re* Thrift, *Ex p.* Kimber (1879), 11 Ch. D. 869, C. A.

2237. —— —— ——.]—The proof of a creditor, whose debts amounted to more than those of all the other creditors, was rejected by the comrs. upon an improper ground, the objection to the proof having been taken for the purpose of influencing the choice of assignees :—*Held :* a sufficient ground for vacating the choice.—*Re* WATERS, *Ex p.* SPILLER (1841), 2 Mont. D. & De G. 43 ; 5 Jur. 659, Ct. of R.

2238. —— —— **Opposed on insufficient grounds by bankrupt's solicitor.**]—Where the solr. of a trader declared bkpt. on his own petition held powers of attorney from friendly creditors to vote at the choice of assignees, & opposed on insufficient grounds a proof which would have turned the choice, & carried it by his powers of attorney, another proof having been also omitted to be placed on the proceedings :—*Held :* a proper case for setting aside the choice, although the proceedings had advanced nearly as far as a declaration of dividend.—*Re* ROBINSON, *Ex p.* CARTER (1858), 3 De G. & J. 116 ; 44 E. R. 1212, L. JJ.

2239. —— —— **Creditor having clear right of proof.**]—If a creditor having a clear right of proof be excluded from voting in the appointment of a trustee & committee of inspection by reason that his proof is rejected, & the proof be afterwards sustained, the ct. will vacate the appointment so made, & order a new choice.—*Re* HARRISON, *Ex p.* CROWTHER (1871), 24 L. T. 330.

Annotation :—**N.F.** *Re* Thrift, *Ex p.* Kimber (1879), 11 Ch. D. 869, C. A.

2240. —— **Proof postponed for want of evidence—Subsequently admitted.**]—At a meeting for the choice of assignees under a fiat issued by bkpt. himself, assignees were chosen by creditors who were represented by bkpt.'s solr., but a proof, which was afterwards admitted, was postponed for want of evidence. Upon the petition of the creditor whose proof was postponed :—*Held :* there should be a new choice of assignees.—*Re* LAYT, *Ex p.* MORSE (1847), 16 L. J. Bcy. 9 ; 9 L. T. O. S. 202 ; 11 Jur. 482, Ct. of R.

2241. —— **Proof properly rejected—Amended proof subsequently admitted.**]—The ct. will not direct a new first meeting of creditors to be held at the instance of a creditor, whose proof was rightly rejected at the first meeting of creditors, but has since been put in order & been ordered to be admitted.—*Re* BRADLEY, *Ex p.* BOURNER (1910), 54 Sol. Jo. 444, C. A.

2242. Parties voting who are not entitled to do so—Petitioning creditor before proof of debt.]—If assignees are elected by the vote of petitioning creditor before he has proved, the choice may be vacated.—*Re* HORSLEY, *Ex p.* DANBY (1830), Mont. 67.

2243. —— **Proof expunged for informality.**]—A proof expunged, on the ground of informality, will not render a change in the choice of assignees requisite.—*Re* MARSTON, *Ex p.* MARSTON, *Re* MARSTON, *Ex p.* BROOME (1839), Mont. & Ch. 576 ; 4 Deac. 191 ; 9 L. J. Bcy. 5 ; 3 Jur. 1079, Ct. of R.

Annotation :—**Consd.** *Re* Hayne & Shadwell, *Ex p.* Law (1840), 1 Mont. D. & De G. 16, Ct. of R. ; **Mentd.** *Re* Dobbs, *Ex p.* County of Gloucester Bank (1866), 15 L. T. 53.

2244. —— **Sole parties voting.**]—Where the only persons voting in the choice of assignees were not entitled so to vote, the choice was set aside, & a new one directed.—*Re* ROWE, *Ex p.* ROWE (1845), De G. 111 ; 14 L. J. Bcy. 17 ; 4 L. T. O. S. 321, Ct. of R.

2245. Joint creditors voting as separate creditors—Choice not disturbed.]—The choice of assignees under a separate commission not disturbed, on the ground that they had been elected by joint

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creditors, who had been admitted on the proceedings as separate creditors. *Secus*, if they had been admitted & voted as joint creditors.—*Re* HOOPER, *Ex p.* JEFFERY (1812), 1 Rose, 315, L. C.

2246. Bankrupt interfering in choice.]—It is against the first principles & the whole policy of the bkpcy. laws to permit bkpts. indirectly to choose their own assignees.—*Re* HOWARD & GIBBS, *Ex p.* SHAW (1822), 1 Gl. & J. 127, L. C.

Annotations:—**Mentd.** *Re* Rowe, *Ex p.* Rowe (1845), 14 L. J. Bcy. 17; *Re* James, *Ex p.* Cadwallader (1862), 4 De G. F. & J. 499, L. JJ.

2247. ——.]—If bkpt. interferes in the choice of assignees:—*Semble:* they will be removed.—*Re* BRIGHT, *Ex p.* MOLINEUX (1836), 3 Mont. & A. 703; *sub nom. Re* KEAT, *Ex p.* MOLINEUX, 1 Deac. 603, Ct. of R.

2248. Assignees chosen at instance of bankrupt's solicitor.]—Where assignees are chosen at the instance of bkpt.'s solr., who has the sole control of the estate, & bkpt. carries on business the same as before the bkpcy., the ct. will remove them.—*Re* BEESLEY (1863), 11 W. R. 878.

2249. Assignee elected without his consent.]—When an assignee is elected without his consent, & he declines to act, there must be a new choice.—*Re* BALCHERN, *Ex p.* STEPHENSON (1838), 3 Mont. & A. 663, Ct. of R.

2250. —— One of several—New choice of all.]—Where two assignees were elected, one of whom was chosen without his own consent & refused to serve, the ct. directed a new choice altogether.—*Re* BIRD, *Ex p.* CATTARAL (1835), 1 Deac. 193, Ct. of R.

2251. —— —— ——.]—A., B. & C. were chosen assignees under a bkpcy. B. had been represented at the meeting by a person to whom he had given a power of attorney to vote, but words in the printed form empowering the attorney to accept the office of assignee on behalf of B. were struck out:—*Held:* the choice of all three was invalid, & the appointment & confirmation must be vacated, & the comr. should be directed to call another meeting for the appointment of new assignees.—*Re* BODDINGTON, *Ex p.* WOLVERHAMPTON & STAFFORDSHIRE BANKING CO. (1862), 31 L. J. Bcy. 30; 6 L. T. 207, L. JJ.

(c) Bankruptcy or Insolvency.

2252. General rule.]—Grounds for removing an assignee include proof of insolvency, compounding with creditor, etc.—*Ex p.* SURTEES (1806), 12 Ves. 10; 33 E. R. 4.

2253. —— Suspicion attaching to debts of electing creditors.]—Where a sole assignee was in insolvent circumstances, & there was some suspicion attached to the debts of the creditors who elected him, an order was made that he should be restrained from acting as assignee, & that one or more persons should be appointed to act in his name, giving him a proper indemnity.—*Re* WESTON, *Ex p.* COPELAND (1834), 3 Deac. & Ch. 561, Ct. of R.

2254. —— Jurisdiction.]—Where an assignee becomes bkpt., the comrs. may direct his removal, & a new choice, without any application to the Ct. of Review.—*Re* JOHNSON, *Ex p.* BONSOR (1840), 1 Mont. D. & De G. 194, Ct. of R.

See, further, Nos. 2193–2195, *ante*.

(d) Misconduct.

2255. General rule.]—The principle upon which an assignee may be removed is, that there must be some misconduct imparted to him.—*Ex p.* SURTEES (1806), 12 Ves. 10; 33 E. R. 4.

2256. Purchase of bankrupt's estate.]—Assignees of bkpt. were removed, on the ground that one of them had purchased bkpt.'s estate under the commission for himself.—*Ex p.* REYNOLDS (1800), 5 Ves. 707; 31 E. R. 816.

Annotation:—**Consd.** *Re* Saunders, *Ex p.* Treherne (1860), 3 L. T. 458, C. A.

2257. —— After disclaimer.]—An assignee of a bkpt. estate relinquished part of the estate as a *damnosa hæreditas*, & subsequently purchased some shares in the undertaking. He also acted as solr. to the commission:—*Held:* he should be removed from the office of assignee & a new assignee should be chosen.—*Re* GUNDRY, *Ex p.* BADCOCK (1829), Mont. & M. 231, L. C.

Annotations:—**Consd.** *Re* Gundry, *Ex p.* Grylls, *Ex p.* Batten (1832), 2 Deac. & Ch. 290, Ct. of R. **Foll.** *Re* Garbett, *Ex p.* Downes (1847), De G. 390, Ct. of R. **Consd.** Farrar *v.* Farrars (1888), 40 Ch. D. 395, C. A.

2258. —— Without leave of court.]—Where an assignee without leave of the ct. purchases any portion of bkpt.'s property, it is the invariable rule, on the complaint of any creditor, to order him to be removed from the office of assignee.—*Re* HOBBS, *Ex p.* ALEXANDER (1835), 1 Deac. 273; 2 Mont. & A. 492; 5 L. J. Bcy. 12, Ct. of R.

2259. —— Small part only bought—Inquiry ordered.]—A purchase by an assignee of a small portion of bkpt.'s estate, although it may render an inquiry necessary, does not justify the removal of assignees.—*Re* MILTON, *Ex p.* THOMSON (1830), 9 L. J. O. S. Ch. 17.

See, further, Nos. 2067 *et seq.*, *ante*.

Sale of estate—To parties with whom interested in common.]—*See* Nos. 2096 *et seq.*, *ante*.

2260. Refusal to bring action for recovery of property.]—Where the assignees refuse to bring an action for the recovery of property, which a creditor alleges to have belonged to bkpt., the ct. will not order a new election of assignees.—*Re* ELSTON, *Ex p.* RYLAND (1832), 2 Deac. & Ch. 392, Ct. of R.

PART VII. SECT. 9, SUB-SECT. 1.—C. (c).

2252 i. *General rule—Enforcement of.*]—The general rule that an assignee of bkpt. discharged as an insolvent, shall not continue as assignee, is not strictly enforced after a considerable lapse of time has occurred between his discharge & the presentation of the petition, especially when but one creditor complains; but the comrs. may be directed to call a meeting of the creditors to consider whether such assignee ought to be continued.—*Re* MULLAY, *Ex p.* COSLETT (1827), 1 Mol. 62.—**IR.**

PART VII. SECT. 9, SUB-SECT. 1.—C. (d).

2255 i. *General rule.*]—On an application for the removal of a trustee, on charges of not lodging the sederunt-book in proper time, not making up quarterly states, although no alteration had taken place in the affairs of the estate, granting an allowance to bkpt. without authority, & being a confident & conjunct person:—*Held:* although there were certain irregularities committed by the trustee, they were not such as to warrant his removal.—EWING *v.* LAWRIE (1824), 3 Sh. (Ct. of Sess.) 234.—**SCOT.**

2255 ii. —— *Absence of mala fides.*]—A trustee acted in a loose, negligent & unbusinesslike manner in some of his dealings as trustee, & his conduct caused considerable suspicion, but *mala fides* on his part was not established:—*Held:* there had not been such misconduct on his part as would justify his removal from office.—LOUW & DUMMER *v.* FAGAN (1914), C. P. D. 630.—**S. AF.**

2260 i. *Refusal to take proceedings against mortgagee for account.*]—Where an application is made to remove an assignee, against whom no complaint exists, except that he refused to take proceedings to make an alleged mtgee. in possession account, & where that mtgee. is brought into ct. upon notice, the application will be refused with costs.—*Re* WILSON & BEERE (1867), 1 I. L. T. Jo. 210.—**IR.**

a. *Trustee hostile to interests of estate.*]—Where a trustee places himself in a position antagonistic to his duty as trustee, he will be removed.—

2261. Conniving at insertion of fictitious debt—Refusal to answer questions.]—An assignee, who connived at the insertion of a fictitious debt in bkpt.'s balance sheet, attended with other circumstances of fraud, was ordered to be removed & to pay the costs, together with the costs of a new choice.

A refusal to answer questions in the course of a lawful examination is quite sufficient to justify the ct. in removing him.—*Re* INNES & BRACHER, *Ex p.* PERRYER (1840), 1 Mont. D. & De G. 276, Ct. of R.

2262. Selling debt—To creditor adverse to fiat.]—Where an assignee has sold his debt to a creditor, who was adverse to the fiat, he was ordered to be removed, & a new one chosen in his room, & he was restrained from voting in the choice of the new assignee.—*Re* BURTON, *Ex p.* STAGG (1841), 2 Mont. D. & De G. 186, Ct. of R.

2263. Refusal to remove solicitors related to bankrupt.]—Where the comr. gave the assignees time to consider whether they would remove solrs., whom they had appointed, & who were related to bkpt., or would themselves retire, & the assignees declined to do either, & the comr. removed the assignees, the ct. dismissed, with costs, an appeal from the comr.'s decision.—*Re* WILLIAMS, *Ex p.* BATES (1852), 1 De G. M. & G. 452; 21 L. J. Bcy. 20; 18 L. T. O. S. 324; 16 Jur. 459; 42 E. R. 627, L. JJ.

Annotations:—**Mentd.** *Re* Basset, *Ex p.* Dives (1860), 9 W. R. 237; *Re* Stiff, *Ex p.* Madigan (1864), 10 L. T. 914.

2264. Failure to render accounts—Failure to attend court.]—A creditor's assignee omitted to render to the official assignee his accounts within the time prescribed by 1861 Act, s. 129, & neglected to attend on two occasions the sittings of the ct. under the bkpcy.:—*Held:* he had been properly removed from the assigneeship.—*Re* RAWLINGS, *Ex p.* RAWLINGS (1863), 9 L. T. 275; 9 Jur. N. S. 1183; 12 W. R. 3, L. C.

2265. Refusal to act.]—Where a creditor's assignee appointed at a first meeting declines to act, the ct. will, pursuant to 1861 Act, s. 139, forthwith remove him, reserving the question of the payment of the costs occasioned by such removal.—*Re* SAPH (1865), 13 W. R. 352.

2266. Non-payment of money into Bankruptcy Estate Account—Deceitful attempt to conceal irregularity.]—A mere irregularity not amounting to misconduct, such as delay in payment into the Bkpcy. Estate Account, does not justify the Board of Trade in removing a trustee. If, however, the trustee makes a deceitful attempt to hide his irregularity, he may be removed.—*Re* MORGAN, ISTED & MORGAN, *Ex p.* WILDING (1895), 2 Mans. 526.

See, further, Nos. 2105 *et seq., ante.*

SUB-SECT. 2.—BY RESIGNATION.

2267. On what conditions trustee may resign—Payment of costs occasioned by retirement.]—Where an assignee, on being chosen, accepts the office, he can only retire, upon payment of the costs occasioned by his removal.—*Re* HENFREY, *Ex p.* WATTS (1832), 1 Deac. & Ch. 322, Ct. of R.

2268. —— —— Costs of new choice—Liberty to new trustee to use name.]—A retiring assignee must pay the costs of the meeting for a new choice & the costs of his application to retire, & must permit his name to be used in any legal proceedings already commenced on an indemnity by the new trustee, the indemnity to be settled by the master.—*Re* ROBERTS, *Ex p.* THORLEY (1818), 3 Madd. 273; Buck, 231, 465; 56 E. R. 511.

Annotation:—**Folld.** *Re* Lee, *Ex p.* Sadler (1868), 19 L. T. 294.

2269. —— —— —— ——.]—A retiring assignee must pay the costs of his petition & of the new choice to be settled by the registrar, & permit his name to be used in suits & actions, he being indemnified. Order to be settled by the registrar.—*Re* LEE, *Ex p.* SADLER (1868), 19 L. T. 294.

2270. —— Security for costs of actions caused by retirement.]—An assignee who retires must give security, to be approved of by the master, to protect the estate against any costs that may arise in any action at law or suit in equity occasioned by his retiring.—*Re* ROBERTS, *Ex p.* THORLEY (1818), 3 Madd. 273; Buck, 231, 465; 56 E. R. 511.

Annotation:—**Folld.** *Re* Lee, *Ex p.* Sadler (1868), 19 L. T. 294.

OFFICER *v.* HAYNES (1877), 3 V. L. R. 115.—**AUS.**

b. —— *Obstructing interest of estate.*]—The first duty of a trustee is to advance the interests of the estate which he administers, & if he wilfully damages such interest in order to advance his own, he is guilty of misconduct.

At the third meeting of creditors, a resolution was proposed that a certain auctioneer should conduct the sale of the assets, to which resp., one of the trustees, proposed an amendment that he should himself be the auctioneer. The original resolution having been carried, his co-trustee advertised the sale, but on the day advertised, resp. appeared & did everything in his power to obstruct the sale & prevent its being a success. He also proceeded with litigation against the wishes of his co-trustee. On the application of such co-trustee, the resp. was removed from his trust.—HALL *v.* FITZGERALD, *Re* MANDY'S ESTATE (1895), 12 S. C. 277; 5 C. T. R. 282.—**S. AF.**

2266 i. *Non-payment of money into bank—Money received by firm in which trustee was partner.*]—A firm of estate agents & auctioneers, of which deft. was a partner, & upon whose banking account he had power to draw, acted for the trustee in the administration & liquidation of the insolvent estate, & the account of the estate was kept in the books of the firm. The trustee did not pay into the banking account of the estate in terms of Ord. 6 of 1843, s. 101, certain money so received by the firm, & no just or lawful reason for the retention was shown by the trustee:—*Held:* as it had not been shown that the trustee had been actuated by an intention to benefit his firm he should not be removed from office.—MARAIS *v.* FAGAN (1914), C. P. D. 654.—**S. AF.**

d. *Attempt to bribe creditor to vote.*]—Where a trustee previous to election offered a creditor, an auctioneer, the sale of the estate in return for his vote, although such offer was refused by the creditor, who in point of fact did not vote for the trustee, the ct. ordered the removal of the trustee.—PREUSS & SELIGMANN *v.* BOSMAN (1868), Buch. 113.—**S. AF.**

e. *Application of funds in prior satisfaction of his own debt.*]—A provisional trustee, who was also the principal creditor, was removed from office for having, without the knowledge or consent of other creditors, & before any liquidation or distribution account had been framed, applied a portion of the funds of the estate in payment of bills made by insolvent in his favour, although the amount so applied would probably have been much less than the amount of the dividend which would have been coming to him as a creditor.—*Re* MARTIN & GRIFFITH'S ESTATE, 4 E. D. C. 30.—**S. AF.**

f. *Refusal to abandon security at creditor's valuation.*]—A bondholder in an insolvent estate valued his security at £9,000. Appct., a concurrent creditor, called upon the trustee to abandon the security to the bondholder at that valuation. The trustee, who was also acting as agent for the bondholder, declined. Thereafter the bondholder reduced his valuation to £4,000, & proved as a concurrent creditor for the balance. In an application for the trustee's removal for misconduct in refusing to abandon the secured property:—*Held:* as the trustee's option to take over or abandon had not yet arisen, there was no breach of duty.—STEINWEISS *v.* AARON'S TRUSTEE (1914), W. L. D. 57.—**S. AF.**

g. *Sale of assets at undervalue—Collusion with insolvent.*]—The assignees of W., an insolvent, having sold a policy of insurance on W.'s life, some creditors alleged that the sale had been made at an undervalue, by collusion between the assignee & W. The purchaser having filed a petition against the assignee & the intervening creditors:—*Held:* as against the assignee the petition should stand over in order to have a new assignee appointed.—O'REILLY *v.* FANNIN (1857), 6 I. Ch. R. 166.—**IR.**

Sect. 9.—*Termination of office: Sub-sects.* 2 & 3. *Sect.* 10.]

See, now, 1914 Act, ss. 93 (1), (3), & 1915 Rules, rr. 333, 367.

Costs of actions progressing at date of retirement.] —*See* sub-sect. 3, *post.*

SUB-SECT. 3.—EFFECT OF TERMINATION OF OFFICE.

2271. Whether trustee can be made liable by subsequent memorandum—After order to discharge himself recognised by commissioners.] — One assignee obtained an order, which was not drawn up, to discharge himself from the office, but the comrs. by their memorandums virtually recognised such discharge by excluding his name from them :—*Semble :* he could not be made liable by any subsequent memorandum.—*Re* THOMPSON & KNIGHT, *Ex p.* LEARMOUTH (1832), 1 Deac. & Ch. 491, Ct. of R.

2272. On litigation already begun—Liability for costs—New trustee not continuing—Costs properly incurred.]—*Re* ROBERTS, *Ex p.* THORLEY, No. 2270, *ante.*

2273. —— Removal between presentation & hearing of appeal—Locus standi to prosecute appeal —Personal order for costs.]—*Re* POOLEY, *Ex p.* SHEARD (No. 2), No. 3309, *post*

2274. On litigation begun by purchaser from trustee—Jurisdiction of court to hear application in name of trustee & purchaser.]—There is no authority in bkpcy. for the general proposition that where a trustee has sold his estate, the ct. ought in no case to entertain an application in the name of the trustee coupled with that of the assignee or purchaser to whom the estate has been sold. Under 1883 Act, s. 102 (1), certain rules of judicial discretion have been laid down limiting generally the application of the jurisdiction conferred by that sect. & in each & every case the judge has further a discretion whether he will or will not exercise such jurisdiction.

Where the matter is relevant to the bkpcy. & the right insisted upon is a right of the trustee higher than that which bkpt. could have claimed, & where there is no large sum involved or question of character arises, *primâ facie*, the jurisdiction ought to be put in force. In each case the judge must consider whether in all the circumstances it is right & proper that the jurisdiction should be exercised.

The official receiver as trustee in the bkpcy. assigned to a creditor all his right & interest to bring, prosecute or carry on, either in bkpcy. or in equity or at law, any action or other proceeding to recover certain property alleged to form part of bkpt.'s estate. After the release of the trustee an application was made to the county ct. judge by the creditor in the trustee's name to obtain possession of the property, but the county ct. judge declined to exercise his jurisdiction to hear the application :—*Held :* in the circumstances, & looking to the fact that the trustee had himself taken no steps to enforce the alleged claim, the county ct. judge was right in refusing to entertain the motion.—*Re* ARNOLD, *Ex p.* OFFICIAL RECEIVER (1891), 66 L. T. 121 ; 40 W. R. 288 ; 36 Sol. Jo. 80 ; 9 Morr. 1, D. C.

2275. On liability of agent—For trustee removed on grounds of insanity.]—Where the assignee of bkpt. was removed, & a new one appointed, & a party had money in his hands which he received on account of bkpt.'s estate, in the character of agent to the late assignee, & the former assignee was insane when the money was received :—*Held :* such receiver was liable in *assumpsit* for money had & received to the use of the newly appointed assignee, for he could not be the agent of an insane person, & held the property as a mere stranger. *Qu. :* whether the receiver would have been liable, if the former assignee had not been insane when the money was received.—STEAD *v.* THORNTON (1832), 3 B. & Ad. 357, n. ; 1 L. J. K. B. 74 ; 110 E. R. 134.

Annotation :—**Mentd.** Clark *v.* Gilbert (1835), 2 Bing. N. C. 343.

2276. On sums due by trustee to solicitor—Right to retain—Removal for benefit of estate.]—An assignee, who is removed from office for the benefit of the estate, *e.g.* on becoming insane, is entitled to retain out of any funds in hand sufficient to answer the amount of his solr.'s bill of costs.—*Re* DAVIS, *Ex p.* JAMES (1832), 1 Deac. & Ch. 272, Ct. of R.

2277. —— Whether bound to discharge solicitor's lien.]—In the course of a bkpcy. a change of trustee & consequent change of solr., took place. The new trustee applied for an order upon the old trustee, & upon his solr., to deliver up all documents relating to his office :—*Held :* the solr. was entitled to a lien for his costs upon all documents & papers upon which his labour as a solr. had been expended, & it was not the duty of the old trustee to discharge the solr.'s lien by paying the costs himself.—*Re* AUSTIN, *Ex p.* YALDEN (1876), 4 Ch. D. 129 ; 46 L. J. Bcy. 59 ; 35 L. T. 720 ; 25 W. R. 134, C. A.

Annotations :—**Consd.** *Re* Rapid Road Transit Co., [1909] 1 Ch. 96. **Mentd.** *Re* Watson (1884), 53 L. J. Ch. 305 ; *Re* Hawkes, Ackerman *v.* Lockhart, [1898] 2 Ch. 1, C. A.

2278. On dividends—Jurisdiction of court to order payment.]—The trustee of a liquidating debtor sold the whole estate for a sum equal to 7*s.* 6*d.* in the pound upon the amount of the provable debts, to be paid in three instalments, on Apr. 23, June 23, & Aug. 23. On Apr. 23 the creditors resolved that debtor should have his discharge as from Apr. 30, subject to a certificate by the trustee that the first instalment of the purchase-money had been paid, & that promissory notes for the other instalments had been delivered to him, & that the close of the liquidation should take place, & the trustee be released on & from Oct. 23 :—*Held :* notwithstanding the release of the trustee, the ct. had jurisdiction to order him to pay a dividend to a creditor.—*Re* PRAGER, *Ex p.* SOCIÉTÉ COCKRILL (1876), 3 Ch. D. 115 ; 45 L. J. Bcy. 124 ; 34 L. T. 665.

PART VII. SECT. 9, SUB-SECT. 3.

k. *On rights of purchaser under sale of assets by old trustee.*]—A party agreed to purchase furniture belonging to bkpt., & an assignment of the furniture was executed by the then trustee & the comrs., but the deed was not delivered to him, & the furniture remained in the possession of bkpt. The trustee was afterwards removed from office, & another appointed. The purchaser, in ignorance of such fact, *bonâ fide* made payments of the price to the old trustee. Interdict granted, at his instance, against a sale of the furniture by the new trustee. —MITCHELL *v.* MAJOR (1856), 29 Sc. Jur. 6.—**SCOT.**

2272 i. *On litigation already begun—Liability for costs—Application by new trustee to be substituted as plaintiff.*]—The assignee of an insolvent mtgor. filed a bill for an account & for redemption of a mtge. Two cause petitions, for the same purpose, were afterwards filed, but were dismissed with costs. A new assignee having been appointed, he moved to be substituted by suggestion as pltf. :—*Held :* the costs of the dismissed petitions must be paid before the suggestion could be entered.—M'CONKEY *v.* GWYNNE (1858) 10 I. Ch. R. 261.—**IR.**

2272 ii. —— *Right to costs—New trustee continuing by predecessor's solicitor.*] —During a foreclosure suit the mtgor. was discharged as an insolvent. His assignee was made deft. That assignee died. A new assignee having been appointed, he appeared by the former assignee's attorney :—*Held :* the new assignee was entitled to his own costs, & those of the first assignee.—LAHEY *v.* BELL (1842), 5 I. Eq. R. 108.—**IR.**

Annotations :—**Distd.** *Re* Ware, *Ex p.* Carter (1878), 8 Ch. D. 731, C. A. **Refd.** *Re* Holmes, *Ex p.* Woods (1880), 43 L. T. 447.

2279. On alleged default in administration—Whether discharged by release—Fraud.]—Debtor filed a liquidation petition on Sept. 14, & on Oct. 3 a trustee was appointed. On Nov. 26 the creditors resolved that the trustee should sell debtor's estate for a sum sufficient to pay the creditors 4*s.* in the pound, that debtor's discharge should be granted on the filing of the trustee's certificate that the provisions of the scheme of settlement had been complied with, & that the close of the liquidation & the release of the trustee should take place on & from Jan. 28. On Jan. 4 the resolutions were approved by the ct. Debtor was tenant of some business premises & some chattels for a term which expired on Dec. 25. The trustee took possession of the premises & the chattels, & remained in possession of them until the expiration of the term, but he did not pay the landlord the quarter's rent which fell due on Dec. 25. On Feb. 26 the landlord applied to the Ct. of Bkpcy. for an order directing the trustee to pay him that quarter's rent. There was evidence that several applications had been made to the trustee for the rent in the course of Jan., & that he had said that he had left money with debtor to pay it :—*Held :* (1) either the landlord's remedy was a personal one against the trustee, in which case the Ct. of Bkpcy. had no jurisdiction in the matter, or, if there was a remedy in the Ct. of Bkpcy., the trustee had done nothing more than commit a default in the administration of the assets, from liability for which he was protected by the release, there being nothing to show that there had been any fraud in obtaining it ; (2) 1869 Act, s. 53, applied to a release given by the creditors to the trustee under a liquidation by arrangement. —*Re* WARE, *Ex p.* CARTER (1878), 8 Ch. D. 731 ; 39 L. T. 185 ; 27 W. R. 106, C. A.

Annotation :—**Apld.** *Re* Gill, *Ex p.* Barnard (1882), 46 L. T. 824.

2280. —— —— ——.]—The lessee of a house & premises having filed a liquidation petition early in Aug. 1881, the trustee on Nov. 24 following disclaimed the lease. The lessor tendered a proof on Dec. 14 in respect of rent & dilapidations for £117 14*s.* 4*d.* which was admitted, & also claimed unliquidated damages sustained by reason of the disclaimer, but naming no amount. At a meeting of the creditors held on Jan. 6, 1882, a dividend of 1*s.* 6*d.* in the pound was declared payable on the 20th, & at the same meeting a resolution was passed to release the trustee as from that day. The lessor on Mar. 4 sent in a second proof for £309 7*s.* 6*d.* in respect of unliquidated damages, & claimed to be paid the dividend thereon :—*Held :* in the absence of fraud the remedy of the lessor was by an action at law outside the bkpcy., inasmuch as if any default had been made by the trustee, his liability for such default had been discharged by the release, & no fraud was alleged against him. —*Re* GILL, *Ex p.* BARNARD (1882), 46 L. T. 824.

2281. On accounts—Whether discharged by release—Undistributed funds in trustee's hands.]—A trustee under 1869 Act, who had obtained his statutory release & discharge under that Act, after the date of the passing of 1883 Act :—*Held :* not thereby relieved from rendering an account to the Board of Trade of his receipts & payments as such trustee if, on that date, he had in his hands any undistributed funds, although such funds might have been disposed of by a subsequent resolution of the creditors.—*Re* CHUDLEY, *Ex p.* BOARD OF TRADE (1884), 14 Q. B. D. 402 ; 33 W. R. 708 ; 1 T. L. R. 164 ; 2 Morr. 8.

Annotations :—**Expld.** *Re* Cornish, *Ex p.* Board of Trade, [1895] 2 Q. B. 634. **Refd.** *Re* Cornish, *Ex p.* Board of Trade, [1896] 1 Q. B. 99, C. A.

2282. —— **Power of court to enforce order after release.**]—The Board of Trade has power to require a trustee appointed under a scheme of arrangement to transmit a verified account of all his receipts & payments, even though such trustee may have been removed from office, & in case of refusal, the ct. will make an order against such trustee enforcing compliance with the requirements of the Board of Trade in that behalf.—*Re* ROGERS, *Ex p.* BOARD OF TRADE (1887), 35 W. R. 457 ; 4 Morr. 67.

2283. —— ——.]—A scheme of arrangement under a liquidation petition was accepted by the creditors, by which 20*s.* in the pound was paid, & debtor obtained his discharge. The trustee after his release having been required by the Board of Trade to furnish a proper account :—*Held :* the Board of Trade were entitled to demand that an account should be rendered, & the trustee must comply with the order.—*Re* CALDERWOOD, *Ex p.* BOARD OF TRADE (1889), 6 Morr. 104.

2284. On books, papers, etc.—Duty to hand to official receiver or new trustee.]—A trustee on resigning or being removed must hand to the official receiver or new trustee all books, papers, etc., & the ct. will enforce a notice by the Board of Trade calling on a trustee to comply with 1886 Rules, r. 292.—*Re* HINCKS & RADCLIFFE, *Ex p.* BOARD OF TRADE (1891), 8 Morr. 295.

2285. Revocation of order of release—Order obtained by fraud.]—The power of the Board of Trade to revoke an order releasing a trustee, on the ground that the order was obtained by the suppression or concealment of material facts, can only be used where the suppression or concealment has in it some element of fraud.—*Re* HARRIS, *Ex p.* HASLUCK, [1899] 2 Q. B. 97 ; 68 L. J. Q. B. 769 ; 80 L. T. 499 ; 47 W. R. 544 ; 43 Sol. Jo. 439 ; 6 Mans. 259.

2286. Position of creditors—Power to appoint new trustee—On new estate falling in.]—In a summary bkpcy., as in an ordinary bkpcy., after the release of the trustee or of the official receiver acting as trustee, the creditors have no power to appoint a new trustee to administer further assets that may come in, but the official receiver is the trustee for that purpose, if necessary.—*Re* LEACH, *Ex p.* BARNES, [1900] 2 Q. B. 649 ; 69 L. J. Q. B. 931 ; 83 L. T. 222 ; 49 W. R. 76 ; 7 Mans. 384.

SECT. 10.—COMMITTEE OF INSPECTION.

See, now, 1914 Act, s. 20, & 1915 Rules, rr. 347, 348.

2287. Who may be appointed—Creditor who has not proved.]—A creditor, who has not tendered a

2282 i. *On accounts—Power of court to order after removal.*]—J., an assignee, before his removal, rendered an account of his receipts & disbursements. The creditors being dissatisfied with the account, presented a petition to the judge to examine, settle, & adjust the account & to order J. to pay over all money which might be found to be in his hands :—*Held :* (1) the jurisdiction of the judge to examine into & decide upon the correctness of the items of an assignee's account, & to adjust such account existed over a removed assignee until he had fully accounted for his acts & conduct while he remained assignee ; (2) the duties of an assignee were to conform himself to the law, & the performance of those duties might be summarily enforced by the judge, & a removed assignee remained subject to such jurisdiction until he had fully accounted for his acts & conduct while he remained assignee.—*Re* BOTSFORD (1871), 22 C. P. 65.—CAN.

Sect. 10.—*Committee of Inspection. Sect.* 11. *Part VIII. Sect.* 1.]

proof, is qualified for appointment to the committee of inspection.—*Re* JONES, *Ex p.* GOATLY (1911), 56 Sol. Jo. 17.

2288. —— Sole creditor.]—A sole creditor can not appoint himself to be the committee of inspection.—*Re* GEIGER, [1915] 1 K. B. 439; 84 L. J. K. B. 589; 112 L. T. 562; 59 Sol. Jo. 250; [1915] H. B. R. 44, C. A.

Annotations:—**Consd.** *Re* Salmon, *Ex p.* Official Receiver, [1916] 2 K. B. 510. **Mentd.** *Re* Yeatman, [1916] 1 K. B. 461; *Re* Yeatman, *Ex p.* Yeatman, [1916] 1 K. B. 780, C. A.

2289. Nature of office fiduciary—Can only sell to estate at cost price.]—One of the inspectors, under a creditor's deed, of a newspaper to be carried on under it by debtor himself, furnished the paper:—*Held:* being in the position of a trustee, he could only charge the cost price.—CHAPLIN *v.* YOUNG (1864), 33 Beav. 414; 3 New Rep. 600; 55 E. R. 428.

2290. —— ——.]—Where the trustee in bkpcy. is carrying on the business of bkpt., & orders goods from firms with which a member of the committee of inspection is connected, although this fact was not known to the trustee at the time when such orders were given & executed, the ct. will sanction the payment by the trustee out of bkpt.'s estate of the cost price of goods so supplied.—*Re* SPINK, *Ex p.* SLATER (1913), 108 L. T. 811.

2291. —— Cannot buy from estate—Sale to partner of member of committee for private account.]—A sale by the trustee to a partner of a member of the committee of inspection, for himself & not for the benefit of the partnership, cannot be set aside as being a sale directly or indirectly to a member of the committee of inspection.—*Re* GALLARD, *Ex p.* GALLARD, [1897] 2 Q. B. 8; 66 L. J. Q. B. 484; 76 L. T. 327; 45 W. R. 556; 13 T. L. R. 316; 41 Sol. Jo. 407; 4 Mans. 52.

2292. —— —— Purchaser before assets claimed on behalf of estate.]—A contract for the sale of part of testator's property, the subject of an administration action, to the exor.'s solr., & another person, was made by leave of the ct. The contract was made by the purchasers on behalf of themselves & some other persons, one of whom was a member of the committee of inspection in the joint bkpcy. of testator's surviving partners. The joint estate had a claim for a large amount against the separate estate of testator, but that claim was not ascertained & admitted in the administration action until several years after the contract for purchase:—*Held:* in the circumstances the member of the Committee did not stand in any fiduciary position which could prevent his joining in the purchase.—COAKS *v.* BOSWELL (1886), 11 App. Cas. 232; 55 L. J. Ch. 761; 55 L. T. 32, H. L.; *subsequent proceedings* (1894), 86 L. T. 365, n., H. L.

Annotation:—**Mentd.** Davis *v.* Ohrly (1898), 14 T. L. R. 260.

2293. —— Cannot derive any profit from dealing with estate—Without previous sanction of court.]—The sanction of the ct. required by 1886 Rules, r. 317, cannot be given after the profit has been derived, but must be obtained before the business from which the profit is to be derived is undertaken.—*Re* GALLARD, *Ex p.* GALLARD, [1896] 1 Q. B. 68; 65 L. J. Q. B. 199; 73 L. T. 457; 44 W. R. 121; 12 T. L. R. 43; 40 Sol. Jo. 99; 2 Mans. 515.

Annotations:—**Refd.** *Re* Spink, *Ex p.* Slater (1913), 108 L. T. 811. **Mentd.** *Re* London Metallurgical Co. (1897), 66 L. J. Ch. 635.

2294. Directions given by—Application of 1914 Act, s. 79 (1).]—The above sub-sect. relates to the administration & distribution of bkpt.'s property, & has no application to s. 56, which gives permission to the trustee to do certain things with the consent of the committee of inspection.—*Re* SALMON, *Ex p.* OFFICIAL RECEIVER, [1916] 2 K. B. 510; 85 L. J. K. B. 1268; 115 L. T. 155; [1916] H. B. R. 120, D. C.

Power—To fix trustee's remuneration.]—*See* No. 2296, *post.*

2295. —— To limit costs when consenting to employment of solicitor.]—The committee of inspection, in giving permission to the trustee to employ a solr., have power to limit the amount of costs which may be incurred.—*Re* DUNCAN, *Ex p.* OFFICIAL RECEIVER, [1892] 1 Q. B. 879; 61 L. J. Q. B. 712; 66 L. T. 508; 40 W. R. 409; 8 T. L. R. 412; 36 Sol. Jo. 330; 9 Morr. 61, C. A.

Annotations:—**Consd.** *Re* Geiger (1914), 112 L. T. 562, C. A.; *Re* Yeatman, [1916] 1 K. B. 461. **Refd.** *Re* Yeatman, [1916] 1 K. B. 780, C. A.

2296. Exercise of power—To fix remuneration of solicitor—Must be by giving commission.]—The creditors of bkpt. appointed a solr. the trustee in the bkpcy., "at a remuneration to be fixed by the committee of inspection." Subsequently the committee passed a resolution that the remuneration of the trustee should be "his proper professional charges as a solr. for attendance & work done & expenses incurred by him in or about the proceedings in the bkpcy.":—*Held:* the resolution was invalid, as it was contrary to 1883 Act, s. 72, which required that the remuneration should be a commission or percentage on the amount realised or distributed. *Semble:* where the trustee, being a solr. contracts, with the committee of inspection that his remuneration shall include his professional charges, the proper course is to fix his commission or percentage as trustee at such a rate as will cover his reasonable professional charges.—*Re* WAYMAN, *Ex p.* OFFICIAL RECEIVER (1889), 24 Q. B. D. 68; 59 L. J. Q. B. 28; 61 L. T. 644; 38 W. R. 95; 6 T. L. R. 18; 6 Morr. 272.

2297. —— To consent to appointment of solicitor—May be given separately—Meeting unnecessary.]—The consent of the committee of inspection, required to be given to the appointment of a solr. by the trustee, may be given by the inspectors separately, & a meeting is not required for that purpose.—*Re* GEARING, *Ex p.* WHITE & Co. (1881), 29 W. R. 632.

2298. —— —— No particular form necessary—Must be specific—"Where necessary" too vague.]

PART VII. SECT. 10.

2289 i. *Nature of office—Extent of powers.*]—Inspectors of the accounts of bkpts. have no authority to present petitions in the matter of the bkpcy.; their duty is to inspect all accounts in the bkpcy., in which the class of creditors for whose benefit they are appointed is interested, & to communicate to those creditors the result of such investigation, & if the creditors think it necessary, they, & not the inspectors, are to bring the matter before the ct.—*Re* FRENCH (1827), 1 Mol. 59.—**IR.**

l. *Remuneration.*]—At a meeting of creditors under 1874 Act (38 Vict. No. 5), s. 202, a resolution was passed allowing the trustee remuneration at the rate of 5 per cent. on all amounts collected. At the time of the passing of the resolution it was represented to the meeting, with the concurrence of the trustee, that 2 per cent. of the 5 per cent. allowance would be paid by him to the committee of inspection. The resolution registered contained no reference to such promise or undertaking. On a motion by a dissenting creditor to set aside the resolution as invalid:—*Held:* the ct. was not precluded by the form of the resolution from inquiring as to its real intent, & as such inquiry revealed an intention to apply the assets of the estate in a manner not authorised by law, appct. was entitled to a declaration that the resolution was invalid.—*Re* GRAZIERS' BUTCHERING CO., *Ex p.* PARBURY LAMB & Co. (1897), 8 Q. L. J. 125.—**AUS.**

—The permission of the committee of inspection for the employment of a solr. by the trustee, to take proceedings or do business sanctioned by the committee, need not be in any particular form, but, although it may be so framed as to cover several proceedings or pieces of business, it must in some way or other specify them. A resolution of the committee that a solr. be employed by the trustee "where necessary" is too vague.—*Re* VAVASOUR, [1900] 2 Q. B. 309; 69 L. J. Q. B. 685; 82 L. T. 622; 48 W. R. 453; 44 Sol. Jo. 430; 7 Mans. 262.

Annotations:—**Refd.** *Re* White, *Ex p.* Nichols (1902), 46 Sol. Jo. 569. **Mentd.** *Re* Geiger, *Ex p.* Geiger (1914), 58 Sol. Jo. 757, D. C.; *Re* Yeatman, [1916] 1 K. B. 461; *Re* Yeatman, *Ex p.* Yeatman, [1916] 1 K. B. 780, C. A.

2299. —— —— —— "To act in all actions" etc., too vague.]—A committee of inspection authorised the appointment of solrs. "to act for & on behalf of the trustee in all actions, proceedings & applications," & generally on his instructions:—*Held:* the retainer was too general, & items for attending the public examination, opposing bkpt.'s discharge, & the costs of actions against debtors to the estate, were properly disallowed by the taxing master.—*Re* WHITE, *Ex p.* NICHOLS (1902), 46 Sol. Jo. 569.

See Nos. 2145-2147, *ante*.

SECT. 11.—LIABILITY OF SURETIES FOR TRUSTEE.

2300. What is loss or damage to estate—Non-payment of penal interest by trustee.]—Non-payment by a trustee in bkpcy. of the interest at 20 per cent. *per annum* imposed by 1883 Act, s. 74 (6), upon a trustee who improperly retains for more than ten days a sum exceeding £50, is not a loss or damage to the estate of bkpt. by the default of the trustee within a bond given by the trustee & his surety for the due performance of his duties by the trustee, conditioned to be avoided if the surety should make good any such loss or damage occasioned by any such default.—BOARD OF TRADE *v.* EMPLOYERS' LIABILITY ASSURANCE CORPN., LTD., [1910] 2 K. B. 649; 79 L. J. K. B. 1001; 102 L. T. 850; 26 T. L. R. 511; 54 Sol. Jo. 581; 17 Mans. 273, C. A.

2301. Amount of loss—Set-off of sums due to trustee for remuneration.]—A surety in making good the loss or damage occasioned by the default of a trustee in bkpcy. in not sufficiently performing his duties is not entitled to deduct what the trustee has earned by way of remuneration.

The contract is, that whatever money is not properly accounted for by the trustee is to be made good, & we are not to look to such things as the question of whether there is or is not any remuneration due, when that remuneration is declared to be forfeited & is no longer due to the man who has made default (CAVE, J.).—BOARD OF TRADE *v.* GUARANTEE SOCIETY (1896), [1910] 1 K. B. 408, n.

Annotation:—**Folld.** Board of Trade *v.* Employers' Liability Assce. Corpn., [1910] 1 K. B. 401.

2302. How enforced—Order of county court.]—A bond with sureties given by a trustee in a bkpcy. to the chief judge, as security for the faithful discharge of the duties of his office, may be enforced by the order of a county ct.—*Re* PARRY (1876), 4 Ch. D. 250; 35 L. T. 768; 25 W. R. 128.

Part VIII.—Proof of Debts.

SECT. 1.—JURISDICTION OF COURTS AND OFFICIALS.

2303. Limits of jurisdiction of court.]—*Semble:* proving of a debt under a fiat gives the ct. a jurisdiction merely to the extent of the proof.—*Re* SMITH, *Ex p.* BRAND (1836), 1 Deac. 308; 2 Mont. & A. 707; 5 L. J. Bcy. 57, Ct. of R.

2304. —— Money-lenders Act, 1900 (c. 51), s. 1 (3).]—The jurisdiction of the Bkpcy. Ct. to exercise the powers of the above Act arises only under s. 1 (3) of that Act, & is confined to cases in which there is an application before the ct. relating to the admission or amount of a proof by a money-lender.—*Re* ATTREE, *Ex p.* WARD, [1907] 2 K. B. 868; 77 L. J. K. B. 130; 97 L. T. 641; 23 T. L. R. 734; 51 Sol. Jo. 687; 15 Mans. 9, D. C.

2305. —— Parties proving fictitious debts.]—The Ct. of Review has no jurisdiction to order persons, who have proved fictitious debts, to repay a sum of money with which an assignee, whom they have procured to be chosen, has absconded, or to pay the costs of defending a party upon an indictment for perjury, which they have preferred against him, in consequence of his disclosure of their fraudulent proceedings. Neither will the ct. order them to deliver up the fictitious securities, upon which the debts have been proved.—*Re* SMITH, *Ex p.* BRAND (1836), 1 Deac. 308; 2 Mont. & A. 707; 5 L. J. Bcy. 57.

2306. —— To rectify mistake in bond—To enable proof to be made.]—The ct. can rectify a clear mistake in the condition of a bond to enable a proof to be made.—*Re* WHITE, *Ex p.* WHITE (1836), 2 Mont. & A. 541, Ct. of R.

In regard to appeals from rejection of proof.]—*See* Sect. 8, Sub-sect. 5, *post*.

In regard to expunging & restoring proof.]—*See* Sect. 9, *post*.

In regard to costs.]—*See* Sect. 14, *post*.

In regard to proof by secured creditor.]—*See* Part IX., Sect. 4, *post*.

PART VII. SECT. 11.

m. *Restraining proceedings against surety.*]—The ct. will not interfere by injunction to restrain proceedings instituted against the sureties of a defaulting assignee in insolvency, notwithstanding several actions may have been brought against them, & the aggregate amount sought to be recovered greatly exceeds the amounts for which they had become security.—CRAIG *v.* MILNE (1877), 25 Gr. 259.—**CAN.**

n. *What defence available to surety.*]—The surety of a defaulting assignee sued under 1875 Act, s. 68, by a creditor, who has filed a claim against bkpt. & who is entitled to the fruits of such litigation, will not be allowed to set up a plea that the sum secured by him would, if he paid it, be exhausted by the privileged creditors of bkpt.—KENT *v.* LETOURNEUX (1905), Q. R. 14 K. B. 60.—**CAN.**

o. *How discharged.*]—*Semble:* one who brings an action against an official assignee in insolvency for default in dealing with a certain estate, upon his bond given as security against such defaults, is not bound to ascertain if the assignee is in default as to other estates, & the sureties to the bond are discharged by the payment to any one who recovers judgment against them.—ARMSTRONG *v.* FORSTER (1883), 6 O. R. 129.—**CAN.**

p. —— *Signature of co-surety by trustee without authority.*]—R. being appointed creditor's assignee of an insolvent estate, gave a bond as security for the performance of his duties with the names of T. & R. J. & Co., of which firm he was a member, as sureties. R. had no authority to sign the firm name to the bond, but there was no allegation or proof, or anything on the face of the bond, to raise an implication that it was signed by T., on any condition or reservation that it should be also signed by R. J. & Co.:—*Held:* T. was liable.—R. *v.* RUMSEY (1886), 7 R. & G. 177; 19 N. S. R. 177; 7 C. L. T. 245.—**CAN.**

Sect. 1.—*Jurisdiction of courts and officials. Sects.* 2 & 3: *Sub-sects.* 1 & 2.]

2307. Jurisdiction of registrar—To fix amount of solicitor's bill of costs.]—A solr. who tenders a proof in the bkpcy. of his client, in respect of costs due to him by the client, is not entitled to insist on having his bill referred for taxation to the taxing master, but the registrar has jurisdiction to determine the amount due, availing himself, if necessary, of the advice of the taxing master.—*Re* WOODS, *Ex p.* DITTON (1880), 13 Ch. D. 318; 42 L. T. 161; 28 W. R. 402, C. A.

Annotations:—**Distd.** *Re* Bushell, *Ex p.* Izard (1883), 23 Ch. D. 75. **Consd.** *Re* Park, Cole *v.* Park (1889), 41 Ch. D. 326, C. A. **Refd.** *Re* Palace Restaurants, [1914] 1 Ch. 492, C. A. **Mentd.** *Re* Van Laun, *Ex p.* Chatterton, [1907] 2 K. B. 23, C. A.

See, generally, Part I., *ante.*

SECT. 2.—POSITION OF BANKRUPT AND CREDITOR SEEKING TO PROVE.

2308. Right of bankrupt—To be heard.]—Bkpt. cannot be heard on a question of proof, especially if he has not obtained his certificate, except to cite cases as *amicus curiæ.*—*Re* LLOYD, *Ex p.* FAIRMAN (1838), 3 Deac. 467, 470; Mont. & Ch. 125, 134, Ct. of R.

2309. —— To cross-examine creditor.]—Bkpt. has a right to cross-examine a creditor upon his proof of debt.—*Re* PETIT (1849), Fonbl. 6; 14 L. T. O. S. 88.

2310. —— To have creditor privately examined—Compromise detrimental to bankrupt.]—A debtor became bkpt. in 1872, & in 1875 his assets were found sufficient to pay in full all creditors who had proved, & to leave a considerable surplus, but no dividend had yet been paid. In Nov., 1875, G., the personal representative of a mtgee. who had obtained in 1869 an absolute order for foreclosure, came in to prove for £21,000, the balance of the mtge. debt, after deducting the estimated value of the property. Supposing the proof admitted, the assets were not sufficient to pay the creditors in full. The trustees, with the sanction of the committee of inspection, made an arrangement with G. to admit the proof at £20,000 on the terms that he was to receive nothing till the other creditors had received 18*s.* in the pound, after which he was to receive 18*s.* in the pound, & after that all the creditors, including G., were to rank *pari passu.* Bkpt. then applied for an order to have a private sitting appointed for the examination of G., which was refused by the registrar sitting as Chief Judge:—*Held:* in the peculiar circumstances of the case, bkpt. ought to have an opportunity of investigating the claim, & an order ought to be made for the examination of G.—*Re* AUSTIN, *Ex p.* AUSTIN (1876), 4 Ch. D. 13; 46 L. J. Bcy. 1; 35 L. T. 529; 25 W. R. 51, C. A.; *subsequent proceedings, sub nom. Re* AUSTIN, *Ex p.* SHEFFIELD (1879), 10 Ch. D. 434, C. A.

Annotation:—**Distd.** *Re* Wright, *Ex p.* Willey (1883), 52 L. J. Ch. 546, C. A.

2311. Right of creditor—Liability to be called as witness—Assistance of counsel.]—P., a creditor, proved under proceedings for the liquidation by arrangement of the affairs of R., the proof being made prior to the appointment of the trustee. Subsequently to the proof being made the trustee caused P. to be summoned for examination under 1869 Act, s. 96:—*Held:* not the proper mode of procedure, the creditor being thereby treated as a mere witness in a strange litigation, whereas he was in fact the principal party, & entitled to the assistance of counsel.—*Re* RUSSELL, *Ex p.* KEMP (1873), 42 L. J. Bcy. 26, C. A.

Annotations:—**Mentd.** *Re* Armitage, *Ex p.* Good (1877), 5 Ch. D. 46, C. A.; *Re* Tait, *Ex p.* Harper (1882), 21 Ch. D. 537, C. A.

See, now, 1914 Act, s. 25.

2312. —— To protection from arrest.]—A creditor attending to prove his debt is protected from arrest.—*Re* CUMMING, *Ex p.* LIST (1814), 2 Rose, 24; 2 Ves. & B. 373; 35 E. R. 361, L. C.

Annotations:—**Follid.** Franklyn *v.* Colqhoun (1816), 1 Madd. 580. **Consd.** Plomer *v.* Macdonough (1847), 1 De G. & Sm. 232. **Refd.** *Ex p.* Watkins (1837), 6 L. J. Ch. 225. **Mentd.** Dodd *v.* Holbrook, *Re* Pittman (1865), 35 L. J. Ch. 175.

SECT. 3.—WHO MAY PROVE.

See, now, 1914 Act, s. 32, Sched. II.

SUB-SECT. 1.—IN GENERAL.

2313. Creditor excepted from previous scheme of composition.]—The creditors of bkpt. agreed to a scheme, which was approved by the ct. The scheme provided that a composition should be paid to all the creditors but three, that bkpt. should take back his estate, & that the adjudication should be annulled. The three excepted creditors agreed to make no claim on bkpt. or his estate for three years from the date of the annulling of the adjudication. On Apr. 20, 1871, the order to annul was made. The composition was paid, bkpt. took back his estate, he traded again & contracted fresh debts, & on Oct. 1, 1875, he filed a liquidation petition:—*Held:* the excepted creditors were entitled to prove in the liquidation, & to receive dividends *pari passu* with the new creditors.—*Re* WINN, *Ex p.* RUSSELL (1876), 2 Ch. D. 424; 45 L. J. Bcy. 85; 34 L. T. 295; 24 W. R. 802.

See, further, Part XXIII., *post.*

2314. Workmen—Compensation under Workmen's Compensation Act, 1906 (c. 58)—Bankruptcy of employer & insurers.]—Where an employer has entered into a contract with any insurers in respect of any liability under the above Act, the effect of s. 5 of the Act is to give to the workman, in the event of the employer becoming bkpt., a right to enforce the policy against the insurance co. in substitution for the right which he possessed before the Act of proving against the estate of a bkpt. employer. The sect. does not give the workman merely an additional right, or, in other words, an option either to prove against the bkpt. employer's estate or to claim against the insurance

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PART VIII. SECT. 1.

a. *Limits of jurisdiction of court—Action for declaration of right to rank—County court.*]—An action asking for a declaration of right to rank is not within the jurisdiction of the county ct.—WHIDDEN *v.* JACKSON (1891), 18 A. R. 439.—**CAN.**

b. —— —— *Division Court.*]—An action for a declaration of the right to rank against an estate vested in an assignee under Assignments Act, R. S. O. 1897 (c. 147), is not within the jurisdiction of a Division Ct.—*Re* BERGMAN *v.* ARMSTRONG (1902), 23 C. L. T. Occ. N. 14; 4 O. L. R. 717; 1 O. W. R. 799.—**CAN.**

c. *In regard to proof.*]—Debts must be proved before the assignee & not before the judge.—*Re* STEVENSON, 1 C. L. J. 52.—**CAN.**

d. ——.]—Whether a debt may be proved or not, may be discussed in the matter of bkpt.; where property is sought to be devested, a bill is necessary.—GARDINER *v.* SHANNON (1804), 2 Sch. & Lef. 228.—**IR.**

PART VIII. SECT. 2.

e. 1849 *Act, s.* 182—*Application of.*]—Neither the Stat. of 1869 nor that of 1875 introduced the provision of 1849 Act, s. 182. 1849 Act does not provide for actions non-existing at the date of the assignment.—MURRAY *v.* ROSS (1877), 2 R. & C. 154; 11 N. S. R. 154.—**CAN.**

co.—CRAIG *v.* ROYAL INSURANCE CO., LTD. (1914), 84 L. J. K. B. 333 ; 112 L. T. 291 ; 8 B. W. C. C. 339 ; [1915] H. B. R. 57.

2315. —— —— ——.]—The effect of s. 5 of the above Act, is that, where an employer has entered into a contract with any insurers in respect of any liability under the Act, in the event of the employer becoming bkpt., the claim of the workman is against the insurers only, whether in liquidation or not. He has no right to prove in the bkpcy. of the employer, except in the case provided for by s. 5 (2), which applies only when the insurance does not cover the whole of the employer's liability. It makes no difference that the insurers have gone into liquidation before the bkpcy. of the employer.—*Re* RENISHAW IRON CO., LTD., WILSON *v.* THE CO., [1917] 1 Ch. 199 ; 86 L. J. Ch. 190 ; 115 L. T. 755 ; 61 Sol. Jo. 147 ; 10 B. W. C. C. 20.

See, further, COMPANIES ; MASTER & SERVANT.
See, also, Nos. 3100–3104, *post.*

SUB-SECT. 2.—ON BEHALF OF PARTIES OTHER THAN HIMSELF.

2316. On behalf of parishioners—Against bankrupt parish collector—Inhabitant.]—Bkpt. had been for several years a collector of land-tax for a parish, & at the issuing of the commission owed upon the balance £928 11*s.* to the Chamberlain of London. An inhabitant of the parish was admitted a creditor, & allowed to prove for himself & the rest of the parishioners.—*Re* CUFF, *Ex p.* CHILD (1751), 1 Atk. 111 ; 26 E. R. 73.

2317. On behalf of married woman—Husband—Though suing for debt due to himself.]—A person under a commission of bkpcy. may prove a debt in the right of his wife, & yet bring an action in his own right for a debt due to himself from bkpt. —*Ex p.* MATTHEWS (1754), 3 Atk. 816 ; 26 E. R. 1266.

2318. —— —— **Wife having divorced first husband—Proof of costs in divorce proceedings.**]—A wife, having obtained a decree *nisi* for a divorce, married again within the three months which had to expire before the decree *nisi* could be made absolute :—*Qu. :* whether the second husband was in conjunction with his wife entitled to prove against the estate of the first husband for the costs of suit, which the latter had been ordered to pay.—*Re* MALLETT, *Ex p.* COLLARD (1864), 10 L. T. 792.

2319. —— **Marriage trustees—Money lent to bankrupt husband.**]—A. entitled to £500 married whilst an infant, & the husband, by deed after marriage agreed that the £500 should be to her separate use for life, & after her death, to the issue of the marriage. In the deed was a proviso, empowering the trustee to lend a part, or the whole, to the husband, & the trustee lent the £500 to the husband, who fourteen months afterwards became bkpt. :—*Held :* the trustee should come in as a creditor under the commission for the money he paid to the husband.—MIDDLECOME *v.* MARLOW (1742), 2 Atk. 519 ; 26 E. R. 712.
Annotation :—**Consd.** *Re* Holland, Gregg *v.* Holland, [1902] 2 Ch. 360, C. A.

2320. —— —— **Income paid to bankrupt husband.**]—Where trustees under a marriage settlement lend the wife's money to the husband with her consent, & the husband becomes bkpt., they cannot, on behalf of the wife, prove for interest on the money, but only for principal, she having been supported by her husband since marriage, upon the principles applicable to wife's pin money. *Semble : secus,* if they prove to save themselves from the consequences of their own act, her consent not having been given.

If the act of suffering the husband to take this interest constituted a breach of trust, then the proof is correct by the trustees alone, because it is the trustees who are seeking to recover back money, just the same as a common creditor (SIR G. ROSE).—*Re* ELLIS, *Ex p.* GREEN (1832), 2 Deac. & Ch. 113 ; 2 L. J. Bcy 2, Ct. of R.

2321. —— **Next friend—Legacy for sole use transferred to bankrupt husband.**]—A *feme covert,* petitioning by her next friend, was permitted to prove the value of a legacy of stock bequeathed to her separate use, but transferred into the name of her husband, who sold it out & became bkpt., & a trustee was appointed to receive the dividends.—*Re* WHITMORE, *Ex p.* WELLS (1842), 2 Mont. D. & De G. 504.
Annotation :—**Mentd.** *Re* Ambler, Woodhead *v.* Ambler (1905), 74 L. J. Ch. 367, C. A.

2322. On behalf of married woman & children—Married woman herself.]—Bkpt.'s wife admitted to prove on behalf of herself & children.—*Ex p.* THRING (1839), 1 Mont. & Ch. 75, Ct. of R.

2323. On behalf of trust estate—Trustees alone—Whether cestui que trust must join.]—A trustee cannot prove a debt alone ; the *cestui que trust* must join in the proof.—*Ex p.* DUBOIS (1787), 1 Cox, Eq. Cas. 310 ; 29 E. R. 1180.
Annotation :—**Reid.** *Re* Gray, *Ex p.* Gray (1835), 2 Mont. & A. 283, Ct. of R.

2324. —— —— ——.]—A trustee cannot go in under a commission & prove a debt as due to himself, because he cannot swear that it is due to him alone. The *cestui que trust* must join with him.—*Re* GRAY, *Ex p.* GRAY (1835), 4 Deac. & Ch. 778 ; 2 Mont. & A. 283 ; 4 L. J. Bcy. 70, Ct. of R.
Annotation :—**Consd.** Hope *v.* Meek (1855), 10 Exch. 829.

2325. —— **Wife whose property settled on her in event of dissolution of marriage—Proof in name of trustee.**]—By the terms of bkpt.'s marriage settlement the wife's property was settled upon her in the case of bkpt.'s death, or the parties being divorced, but bkpt. was entitled to the interest for his life, & in case he survived his wife he was to have a share of the property :—*Held :* the wife might, in the name of her trustee, make such proof as the comrs. might think she was entitled to.—*Re* SAUNDERS, *Ex p.* SAUNDERS (1834), 3 Deac. & Ch. 568, Ct. of R.

2326. —— **One of several trustees.**]—M. & A. being in partnership, A. married M.'s daughter, upon which occasion M. gave to four trustees a bond for payment of £5,000 at the expiration of a twelvemonth after his decease, & A. also agreed to pay to the trustees £5,000 by instalments, subject to the trusts of the settlement, namely, to invest the money in the funds, & pay the interest of one moiety to A. & the other moiety to his wife, for her sole use, with remainders over to the children, etc. M. & A. became bkpt., only one instalment of £1,000 having been paid by A. Two of the four trustees were resident abroad. On the petition of the two trustees who were in England :—*Held :* petitioners, without the concurrence of the two other trustees, might prove against the separate estate of M. the sum of

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PART VIII. SECT. 3, SUB-SECT. 2.

2319 i. *On behalf of married woman—Marriage trustees—In respect of interest on bond settled on wife.*]—Trustees may prove in bkpcy. for interest on a bond settled on a wife in the event of bkpcy. —*Re* O'BRIEN (1863), 8 Ir. Jur. 217. —IR.

f. *On behalf of person in weak health—Clerk or book-keeper.*]—Where a creditor is unwell & unable to make the proof himself, proof by his clerk or book-keeper will be received.—*Re* PAUL (1853), 23 L. T. O. S. 40.—IH.

Sect. 3.—Who may prove: Sub-sects. 2 & 3.]

£5,000 secured by his bond, & also the sum of £4,000 against the separate estate of A., & might retain their costs out of the dividends.

I have always understood the practice to be that one of several exors. may go in & prove on behalf of himself & his co-exors., but that the comrs. refuse to permit one of several trustees to prove without an order of this ct. (ERSKINE, C.J.). —*Re* MANNING, *Ex p.* SMITH & ANDERDON (1836), 1 Deac. 385; 2 Mont. & A. 536, Ct. of R.

Annotation:—**Consd.** *Re* Good, *Ex p.* Good (1850), 15 L. T. O. S. 50.

See, also, No. 2380, *post.*

2327. —— Cestui que trust.]—A trustee up to his death employed bkpt. as solr. for the trust estate. Bkpt. received a portion of the trust estate, which he retained after the trustee's death, exercising control over the fund. There was no personal representative of the trustee, & bkpt. had died:—*Held:* the *cestui que trust* could prove against the estate for the trust money in his hands at the time of the bkpcy., & Stat. Limitations was no bar.—*Re* SEABER, *Ex p.* GOWERS (1837), 2 Deac. 207; 3 Mont. & A. 172; 6 L. J. Bcy. 49, Ct. of R.

2328. —— Residuary legatees—Executor refusing to prove.]—Where the exor. under the will of a creditor of a bkpt. firm declines to make proof against the estate of bkpts., on the ground that he is ignorant of the circumstances in which the debt accrued, the ct. will allow proof by the residuary legatees under the will, subject to a direction for payment of the dividend to the exor. —*Re* STRAHAN, PAUL & BATES, *Ex p.* CALDWELL (1865), 13 W. R. 952.

See, further, Part X., Sect. 5, *post.*

2329. —— Administered in Chancery—Party other than administratrix.]—A creditor of a bkpt. died before the commencement of the bkpcy., & his estate was administered in Ch. The ct. appointed a person who was not the administratrix to prove the debt against bkpt.'s estate:—*Held:* the person appointed by the ct. had a right to prove the debt.—*Re* ENGLAND, *Ex p.* HARE (1875), 10 Ch. App. 218; 44 L. J. Bcy. 50; 32 L. T. 291; 23 W. R. 412, L. JJ.

Annotations:—**Refd.** *Re* Muirhead, *Ex p.* Muirhead (1876), 2 Ch. D. 22, C. A. **Mentd.** *Re* Irving, *Ex p.* Barron (1875), 10 Ch. App. 269, L. JJ.

—— Against bankrupt trustee.]—*See* Sub-sect. 3, *post.*

2330. On behalf of partner—Copartner.]—A partner may act for another in bkpcy. to prove debts.—*Ex p.* MITCHELL (1808), 14 Ves. 597; 33 E. R. 650.

Annotation:—**Refd.** Keppell *v.* Bailey (1834), 2 My. & K. 517.

2331. —— ——.]—Proof of debts is always made by one partner, for himself & the others, who are not called upon to join.—*Ex p.* HODGKINSON (1815), 19 Ves. 291; Coop. G. 99; 34 E. R. 525, L. C.

Annotations:—**Mentd.** *Re* Mogg, *Ex p.* Mogg (1828), 6 L. J. O. S. Ch. 162; Butler *v.* Hobson (1838), 5 Bing. N. C. 128; *Re* English & Irish Church & University Assce. Soc. (1863), 11 W. R. 681.

2332. On behalf of Bank of England—Clerk or person without power of attorney.]—The Bank were admitted to prove by their clerk without a power of attorney.—*Re* BOWLES, *Ex p.* BANK OF ENGLAND (1810), 1 Rose, 142.

See, now, 1914 Act, Sched. II., r. 3.

2333. —— ——.]—*Held:* the Bank not entitled to prove under a commission of bkpcy. by a clerk without a power of attorney. A general order to enable them proposed.—*Ex p.* BANK OF ENGLAND (1811), 18 Ves. 228; 34 E. R. 303.

2334. —— ——.]—The Bank of England, like every other corpn., is entitled to prove a debt under a commission of bkpcy., by the affidavit of a person duly authorised by a general power of attorney under their common seal.—*Re* STEPHENS, *Ex p.* BANK OF ENGLAND (1818), 1 Wils. Ch. 296; 1 Swan. 10; 37 E. R. 129, L. C.

2335. On behalf of person of weak mind—Friend managing affairs at request of family—No commission issued.]—H., a creditor of bkpt., having become deranged in his mind, petitioner, at the request of his family, undertook the management & superintendence of his business. No commission of lunacy had issued:—*Held:* petitioner should be at liberty to prove the debt due from bkpt. to H., upon an affidavit of the above facts, & upon a medical certificate, that H. was deranged. —*Re* SIMMONS, *Ex p.* MALTBY (1813), 1 Rose, 387.

Annotation:—**Folld.** *Re* Farringdon, *Ex p.* Aylwin (1842), 11 L. J. Bcy. 31.

2336. —— Mother—Application of dividends.]—The mother of a creditor of weak intellect was permitted on her petition, which was not served on any one, to prove on his behalf, the dividends to be received & applied by her as trustee for the creditor, & to be applied by her for his sole benefit & advantage.—*Re* OXTOBY, *Ex p.* OXTOBY (1847), De G. 453, Ct. of R.

2337. On behalf of parties entitled to prove—Party entitled on payment to benefit of proof.]—The ct. will not, without the consent of the assignees, direct the proof of a debt against bkpt.'s estate to be made by a party not a creditor, but who, being bound to indemnify the creditor, is entitled to the benefit of the proof.—*Re* MARSH & Co., *Ex p.* BANK OF ENGLAND (1828), 6 L. J. O. S. Ch. 140.

2338. On behalf of creditor abroad—Agent—Public company.]—An agent for a public co. abroad may, to the prejudice of bkpt., prove, with the consent of the assignees, on behalf of the co., on bills of exchange.—*Re* VANZELLER, *Ex p.* COTESWORTH (1832), Mont. & B. 92; 1 Deac. & Ch. 281; 2 L. J. Bcy. 18, Ct. of R.;

2337 i. *On behalf of parties entitled to prove—Assignor of debt.*]—A creditor assigned his debt after sequestration of debtor's estate. No notice of the assignment was given:—*Held:* the creditor assignor could prove in his own name.—*Re* WARREN & Co., *Ex p.* GORDON (1892), 18 V. L. R. 563.—**AUS.**

g. *On behalf of legatees—Executor.*]—A member of a copartnership died; by his will he desired that all his money embarked in the partnership concern at his death, should remain in same. After his death interest on the sum left in the business was regularly paid by the surviving partners until the firm became insolvent. The exor. of testator claimed to prove on the insolvent estate for the sum so left:—*Held:* the exors. were entitled to prove & the legatees were creditors of the estate, & entitled to a ratable dividend on the net assets of the estate.—*Re* MCLEA & SONS (1868), 5 Nfld. L. R. 228.—**NFLD.**

h. *Agent—Though principal holding himself out as owner of bankrupt's business.*]—Action for a declaration that deft. was not entitled to rank upon the insolvent estate of D., trading with P. as the P. Co., on the ground that C. was the actual owner of the business & deft. merely his agent. C. was D.'s son-in-law and D. at times incapacitated himself from careful management of the business. C. was in good credit, made no secret of his interest in the business & had no motive to carry on a business of his own in another name. Pltfs. gave credit to D. & his partner P. & recovered judgment against them:—*Held:* there was no objection to the debt of the P. Co. being made payable to deft. as C.'s agent, nor in deft.'s proving against the P. & D. estate, & deft.'s claim was good, the business of the P. Co. not appearing to be C.'s, & pltfs. having for the purpose of getting a dividend treated the business as P. & D.'s could not for the purpose of opposing deft.'s claim say that the business belonged to C.—BARTHELMES *v.* CONDIE (1907), 10 O. W. R. 717.—**CAN.**

subsequent proceedings, sub nom. Re VANZELLER, *Ex p.* CHEVALIER (1834), 1 Mont. & A. 345, L. C.

2339. —— —— Private firm.]—A merchant, who swears that he is the sole London agent of the creditor seeking to prove, & is perfectly conversant with all the circumstances attending the contracting of the debt in question, with certainty & precision, the transaction having passed through his hands, is an agent within 1861 Act, s. 146, &, being duly authorised, may prove for his principal.—*Re* DOBSON, *Ex p.* GUILHON, *Re* DOBSON, *Ex p.* BARRINGTON (1864), 10 L. T. 103.

2340. On behalf of holders of bank notes—Against bankrupt banker—One of holders.]—Under a fiat against a banker, one person was allowed to prove on behalf of a large number of holders of one pound notes.—*Re* MABERLY, *Ex p.* GORDON (1834), 1 Mont. & A. 282, Ct. of R.

2341. On behalf of a company in winding up—Necessity for order.]—An order under Winding-up Acts is necessary to justify the official manager in proving under a bkpcy., but proof having been made without such order against bkpt., who had been committed for non-payment of a call :—*Held :* bkpt. was entitled to his discharge.—*Re* LIFE ASSURANCE TREASURY, *Ex p.* PEPPER (1863), 1 Hem. & M. 755 ; 2 New Rep. 351 ; 8 L. T. 533 ; 11 W. R. 820 ; 71 E. R. 330.

2342. On behalf of club—Against bankrupt collector of subscriptions—Treasurer.]—A person collected subscriptions on account of the treasurer from the members of a club to run greyhounds, & became bkpt. :—*Held :* the treasurer might prove for the amount.—*Re* WATKINS, *Ex p.* KING (1836), 2 Deac. 23 ; 2 Mont. & A. 676 ; 5 L. J. Bcy. 45, Ct. of R.

2343. On behalf of benefit society—Against bankrupt treasurer—Trustees of society.]—A trustee of a benefit society was allowed to prove for moneys, which bkpt. had received as treasurer of the society, notwithstanding bkpt., being a member of the society, was interested in the fund.—*Re* CLARBON, *Ex p.* CROWLEY (1837), 2 Deac. 555.

2344. On behalf of creditors under previous bankruptcy—Trustee in such bankruptcy.]—In 1899 debtor was adjudicated bkpt., the debts provable consisting of simple contract, specialty, & judgment debts. He had not obtained his discharge in that bkpcy., & the unsatisfied balance of the debts amounted to £2,643 13*s.* 11*d.* In 1909 he was again adjudicated bkpt., the debts incurred by him, simple contract debts, subsequent to the first adjudication amounting to £228 17*s.* 5*d.* He had not obtained his discharge in that bkpcy. when in 1916 he was adjudicated bkpt. again. In Oct., 1917, the trustee in the first bkpcy. lodged a proof against the estate in the second bkpcy. for £2,643 13*s* 11*d.*, which was admitted to rank for dividend. In Nov., 1917, the trustee in the second bkpcy. lodged a proof against the estate in the third bkpcy. for the two sums of £2,643 13*s.* 11*d.* & £228 17*s.* 5*d.* The proof was rejected by the trustee in the third bkpcy., on the ground that the claims were barred by Stat. Limitations, & alternatively that 1914 Act, s. 39 (1), gave no right of proof in respect thereof : —*Held :* the proof should be admitted for the full amount, as the effect of s. 39 (1) was to give a right of proof, not to individual creditors, but to the trustee against the estate in each succeeding bkpcy., & inasmuch as the trustee's right to prove in those circumstances was conferred for the first time by the sect. no question arose as to the operation of Stat. Limitations.—*Re* CULLWICK, *Ex p.* LONDON SENIOR OFFICIAL RECEIVER, [1918] 1 K. B. 646 ; 87 L. J. K. B. 827 ; 119 L. T. 31 ; 34 T. L. R. 343 ; [1918–19] B. & C. R. 33.

Annotation :—**Expld.** *Re* Cohen, *Ex p.* Official Receiver, [1919] 2 K. B. 271.

2345. —— ——.]—In successive bkpcies., where property is vested in the official receiver as trustee in the second bkpcy., the trustee in the first bkpcy. has the right to prove given by 1914 Act, s. 39 (1).—*Re* COHEN, *Ex p.* OFFICIAL RECEIVER, [1919] 2 K. B. 271 ; 88 L. J. K. B. 841 ; 121 L. T. 389 ; 35 T. L. R. 412 ; [1918–9] B. & C. R. 214.

SUB-SECT. 3.—AGAINST BANKRUPT TRUSTEE.

2346. Husband of party entitled to income—Bankrupt entitled to capital on death of life tenant.]—Bequest of stock to A. & B., in trust to pay the dividends to testator's brother for life, & after his death to testator's sister, & upon the death of the survivor to A. absolutely. A., the surviving trustee, sold out the stock, applied the proceeds to his own use, & became bkpt. Upon a petition by testator's sister & her husband, to prove the value of the stock sold :—*Held :* the comrs. should compute the value of the stock so bequeathed at the commission, & the husband should be at liberty to prove the amount of such value, the dividends to be paid into the bank, subject to the further order of the ct.—*Re* ANDREWS, *Ex p.* FAIRCHILD (1822), 1 Gl. & J. 221.

2347. Cestui que trust.]—Bkpt. had committed a breach of trust, by not investing a sum of £2,000, although he paid the dividends upon it for ten years :—*Held :* in the special circumstances of the case, the *cestui que trust* should be admitted to prove against the estate of bkpt.—*Re* ALDERSON, *Ex p.* FREEMAN (1832), 1 L. J. Bcy. 85, Ct. of R.

2348. —— Having vested interest subject to power of appointment.]—Bequest to J. B. & J. T. in trust for the wife of J. B. for life, & after her death for the children of the wife of J. B., in such shares as J. B. & his wife or the survivor should appoint, & in default of appointment for all the children equally, to be divided at twenty-one. There were five children of J. B. & his wife, & no appointment was made. J. B. sold out & advanced part of the trust funds to J. B. the younger & G. B., two of the children ; & J. B., J. B. the younger, & G. B. became bkpt. :—*Held :* M. B., one of the five children who had each a vested interest in one-fifth part of the trust funds after the death of their mother, subject to the power of appointment, was entitled to prove one-fifth part of the trust funds so misapplied against the estate of J. B., the dividends to be paid into the bank subject to the further order of the ct.—*Re* BOYES, *Ex p.* BEILBY, *Re* BOYES, *Ex p.* HALL & BOYES (1821), 1 Gl. & J. 167.

2349. —— Action for account pending—Claim admitted.]—Where bkpt. & his co-trustees had been guilty of a breach of trust, & a bill in Ch. had been filed against them by the *cestuis que trust* for an account, which suit was pending at the time of the bkpcy., the *cestuis que trust* were permitted to enter a claim for the amount due to them, without prejudice to the Ch. suit, & all dividends in respect of the claim were ordered to be transferred by the accountant in bkpcy. to the credit of the bkpcy. & of the suit.—*Re* M'NEILL, *Ex p.* STUTELY (1841), 1 Mont. D. & De G. 643, Ct. of R.

2350. —— Even though other trustee solvent.]—Leave was given for a third person to prove against the estate of a bkpt. trustee, though there was a solvent co-trustee.—*Re* OSBALDISTON, *Ex p.* HARRIS (1842), 11 L. J. Bcy. 16.

Sect. 3.—Who may prove: Sub-sects. 3 & 4.]

2351. —— Bankrupt carrying on testator's business.]—Testator, by his will dated 1806, gave the mass of his property to his wife for life, remainder to his children, & appointed his son, bkpt., & his widow, exors. The trusts of the will were *inter alia* that the exors. should carry on testator's business, retaining therein the sum of £1,200. Bkpt. & his mother carried on business till 1821, when the widow retired from business, & bkpt. by deed admitted that there was a sum of £497 odd in the business, & agreed to pay the widow an annuity, & allow interest on the capital remaining in the business. The adjudication took place in Nov., 1849 :—*Held :* the *cestuis que trust* had an equitable charge on bkpt.'s interest under the will for £479 odd, & such property under the will ought to be sold, & if insufficient to realise enough, the *cestuis que trust* might prove for the residue.—*Re* GOOD, *Ex p.* GOOD (1850), Fonbl. 78 ; 15 L. T. O. S. 50.

2352. —— With leave of court.]—Where trustees have become bkpt. the *cestuis que trust* may prove against bkpt. estate, if they obtain the leave of the ct.—*Re* BRADLEY, *Ex p.* WALTON (1910), 54 Sol. Jo. 377.

2353. Son of cestui que trust.] — Where a bkpt. trustee had suffered the trust fund to be misappropriated :—*Held :* the son of the *cestui que trust* might prove for the amount, retaining the dividends until further order.—*Re* HOOPER, *Ex p.* VINE (1832), 1 Deac. & Ch. 357 ; 1 L. J. Bcy. 44, Ct. of R.

2354. One of cestuis que trust—On behalf of himself & others.]—Testator gave his property to five persons, of whom bkpt. was one. The exor. had appointed as his agent bkpt., who had not surrendered, & who had applied part of the trust funds to his own use. There was no one authorised to prove without the order of the ct. :—*Held :* one of the *cestuis que trust*, on behalf of himself & the others, could prove for the amount misappropriated.—*Re* FORRESTER, *Ex p.* FORRESTER (1839), Mont. & Ch. 143, Ct. of R.

2355. Administrator of cestui que trust—Knowledge of breach of trust before appointment as administrator.] — A party, at the time of the misapplication of a trust fund by the trustee, was cognizant of the fact, but had then no right or interest whatever to the fund. Afterwards he acquired such right, as administrator to the *cestui que trust*. The trustee subsequently became bkpt. : —*Held :* the administrator's rights as administrator were not affected by his previous knowledge of the breach of trust, & he was not prevented from proving for the amount of the interest on the trust fund, which accrued due in the lifetime of the *cestui que trust*.—*Re* CLARKE, *Ex p.* SMITH (1841), 2 Mont. D. & De G. 113, Ct. of R.

2356. Parties presumed to be entitled—Settlement lost.]—A marriage settlement having been lost, which declared the trusts of a fund belonging to the wife, & there being every probability that petitioners were entitled to the fund under the provisions of the settlement, they were, after being admitted to prove for the amount, allowed to receive the dividends, without a reference, as the fund was too small to bear that expense.—*Re* DORNFORD, *Ex p.* HARRISON (1837), 3 Deac. 25, Ct. of R.

2357. Next friend on behalf of infants.]—Trustees for infants, in breach of trust, advanced trust funds to the father of the *cestuis que trust*. An order was made in Ch. that the trustees should pay the amount they admitted they had received into ct., but they did not comply with the order & became bkpt. :—*Held :* the order for payment into ct. was only evidence as against the assignees that a breach of trust had been committed, & the next friend on behalf of the infants might make such proof as he could establish, any dividends to be paid into ct.—*Re* WELCH, *Ex p.* COLES (1843), 3 Mont. D. & De G. 327, Ct. of R.

2358. Widow—Entitled to life interest—Remainder to children.]—The trustee of a testator's residuary estate in trust for his widow for life or widowhood, & with remainder to his infant children, having become bkpt., the widow obtained an order from the Ct. of Bkpcy. directing that she should be admitted to prove in respect of a breach of trust for a specified sum & such other amount as upon the accounts should appear due from bkpt. to the trust estate.—*Re* JAMES, *Ex p.* CADWALLADER (1862), 4 De G. F. & J. 499 ; 31 L. J. Bcy. 66 ; 6 L. T. 485 ; 45 E. R. 1277, L. JJ.

Annotation :—**Mentd.** *Re* Barfoot, *Ex p.* Prothero (1868), 3 Ch. App. 823, L.JJ.

2359. Bankrupt himself—Estate small—Beneficiary of unsound mind.]—By leave of the ct. a bkpt. trustee made a proof against his own estate for trust fund, where the fund was small & the person beneficially interested was of unsound mind, but who had not been declared so by an inquisition.—ANON. (1851), Fonbl. 220.

2360. —— Effect of failure to prove.]—Where a trustee indebted to the trust becomes bkpt., it is his duty to prove the debt, & if he neglect so to do, he is liable for the loss, notwithstanding his certificate.—ORRETT *v.* CORSER (1855), 21 Beav. 52 ; 25 L. T. O. S. 278 ; 1 Jur. N. S. 882 ; 3 W. R. 604 ; 52 E. R. 778.

See, generally, TRUSTS & TRUSTEES.

2361. —— Restriction as to dividends.]—A bkpt. trustee was allowed to prove, but not to receive trust dividends.—*Re* RAIKES, *Ex p.* STRETTELL (1839), Mont. & Ch. 165, Ct. of R.

2362. Solvent trustee—Each trustee entitled to moiety of residue.]—One of the residuary legatees under a will was the surviving trustee of it. The other was subsequently appointed a new trustee under a power, the trust estate then consisting of £9,000 due from the continuing trustee, & of shares in a co., valued at £6,000, which were transferred into the names of the two. After the death of certain *cestuis que trust* who were entitled for life, & when the trust estate constituted a clear fund belonging in moieties to the two residuary legatees, subject only to the payment of legacies, which amounted to £4,000, the continuing trustee became bkpt., still owing the £9,000 to the trust estate :—*Held :* the new trustee was not entitled to prove for such amount, & retain the dividends till he should be paid his share in full, but could only prove to the extent of his beneficial interest immediately before the bkpcy., &, as bkpt. could then have settled with him by paying £3,500, that was the amount provable.—*Re* CROSTHWAITE, *Ex p.* TURNER (1852), 2 De G. M. & G. 927 ; 42 E. R. 1134.

Annotations :—**Folld.** *Re* Chapman, *Ex p.* Parker (1887), 4 Morr. 109. **Refd.** Irby *v.* Irby (1858), 25 Beav. 632.

2363. —— Restrictions as to dividends.]—Three trustees were ordered to pay into ct. in an administration suit money found due from them. One became bkpt. & another died. On an application by the third trustee for leave to prove under the bkpcy. for such sum of money as bkpt. was indebted to the trust estate, including such sums as bkpt. was bound to pay as between himself & his co-trustees :—*Held :* the trustee should be allowed to go in & prove for such debt as he

might establish, but any dividend which might be realised should be dealt with by the ct. in which the administration suit was pending.—*Re* REDFEARN, *Ex p.* BROMLEY (1865), 34 L. J. Bcy. 33; 12 L. T. 783; 13 W. R. 1051, L. C.

2364. —— Advances to bankrupt's firm.]—Testator left half his residuary estate to trustees in trust for a married woman for her life, with remainder in default of appointment to her children. The trustees lent a portion of the trust funds to a partnership, of which one of the trustees was a member. There were several changes in the partnership, & eventually the existing partners, including the trustee, became bkpt. Before the bkpcy. the partners & others executed to T., the other trustee, their joint & several bond of indemnity by reason of the loans:—*Held:* T. was entitled to prove the amount due to himself & bkpt. trustee.—*Re* BOYES, *Ex p.* BEILBY, *Re* BOYES, *Ex p.* HALL & BOYES (1821), 1 Gl. & J. 167.

SUB-SECT. 4.—AGAINST BANKRUPT EXECUTOR.

2365. Relators.]—A bkpt. exor. committed a *devastavit.* A suit upon an information having been filed by relators against bkpt., as being indebted as bkpt. & exor.:—*Held:* the relators, but not bkpt., could prove.—*Re* POPJAY (1733), cited in 1 Gl. & J., at p. 160.

2366. Father of infants.]—Bkpt. was an exor., & had proved his testator's will & possessed himself of the property, keeping the legacies of infants in his own hands:—*Held:* the father of the infants, & not bkpt., might prove & receive the dividends for their use.—*Re* MERRYMAN, *Ex p.* ROE (1737), cited in 1 Gl. & J., at p. 160.

2367. Creditor of bankrupt's testator.] — A creditor of bkpt.'s testator, to whom he was exor., was admitted to prove the amount of testator's property in bkpt.'s hands, the dividend to be paid into the bank, subject to further order.—*Re* BECKETT, *Ex p.* LEEKE (1789), 2 Bro. C. C. 596; 29 E. R. 327.

Annotation:—**Consd.** *Re* Howard & Gibbs, *Ex p.* Shaw (1822), 1 Gl. & J. 127.

2368. Legatee on behalf of himself and others.]—An exor. & trustee having committed a *devastavit:*—*Held:* precluded from proving under his bkpcy., & liberty so to do given, in the first instance, & without previous application to the comrs., to a legatee on behalf of himself & others, with a direction that the dividends be paid into the bank, in trust in the matter.—*Re* WARNE, *Ex p.* MOODY (1816), 2 Rose, 413.

Annotation:—**Refd.** *Re* Howard & Gibbs, *Ex p.* Shaw (1822), 1 Gl. & J. 127.

2369. Bankrupt himself.]—A bkpt. exor. was ordered to be admitted a creditor, & dividends to be paid into the bank.—*Re* WALKER, *Ex p.* BROOKS (1793), 1 Gl. & J. 161, n.

2370. ——.]—A bkpt. exor. was ordered to prove against his own estate & the assignees to pay the dividends into the hands of the Accountant General to the credit of a cause pending for the administration of assets.—*Re* COLMAN, *Ex p.* COLMAN (1833), 2 Deac. & Ch. 584, Ct. of R.

2371. —— With consent of testator's creditors.]—A bkpt. exor. applied part of the assets to his own use. Petitioners, who were creditors of testator, having prayed to be admitted creditors under the commission for the amount of what had been misapplied:—*Held:* bkpt. should be admitted a creditor for the amount, & at the request of petitioners the dividends should be paid to bkpt., to be applied by him in course of administration. —*Re* PACK, *Ex p.* HOGG (1736), 1 Gl. & J. 161, n.

2372. —— Only under order of court.]—A bkpt. exor. proved a debt against himself due to him as exor., without an order of the ct., & voted in the choice of assignees, thereby turning the choice: —*Held:* there must be a new choice.

Bkpt. cannot prove against himself without an order; in that order originates his title to prove. The ct. has always annexed the condition that the funds should not come into the hands of bkpt. (LORD ELDON, C.).—*Re* HOWARD & GIBBS, *Ex p.* SHAW (1822), 1 Gl. & J. 127, L. C.

Annotations:—**Refd.** *Re* Rowe, *Ex p.* Rowe (1845), 14 L. J. Bcy. 17; *Re* James, *Ex p.* Cadwallader (1862), 4 De G. F. & J. 499, L.JJ.

2373. —— But not his agent.]—Bkpt. was an exor. & indebted to his *cestuis que trust,* & petitioner to prove against the estate was the agent of bkpt. transacting his business:—*Held:* bkpt. could prove in the usual way, & might state the debt to be still due & petitioner might be witness to prove the fact.—*Re* ANDERSON, *Ex p.* COLLINGTON (1839), Mont. & Ch. 156, Ct. of R.

2374. —— Bankrupt also residuary legatee—Application of dividends.]—A pecuniary legatee is entitled to be paid in full, out of a dividend payable on a proof made in respect of a *devastavit* committed by a bkpt., who is exor. & residuary legatee.—*Re* WEST, *Ex p.* TURNER (1842), 2 Mont. D. & De G. 613; 6 Jur. 840, Ct. of R.

2375. —— On petition by bankrupt & others.]—On petition by bkpt. & others:—*Held:* bkpt., who was sole exor. of a will, should be allowed to prove under the fiat for money belonging to the estate.—*Re* THOMAS, *Ex p.* THOMAS (1843), 1 L. T. O. S. 293, Ct. of R.

2376. Solvent executor.]—Where a bkpt. & another are exors. of a creditor of bkpt., the ct. will permit the other exor. to prove the debt, even though a suit is pending in the Ecclesiastical Ct., as to the exorship.—*Ex p.* SHAKESHAFT (1791), 3 Bro. C. C. 198; 29 E. R. 488.

2377. ——.]—Exors., liable for the default of their co-exor., who had become bkpt., are entitled, on payment by them, to prove against bkpt.'s estate.—LINCOLN *v.* WRIGHT (1841), 4 Beav. 427; 49 E. R. 404.

Annotations:—**Consd.** Stiles *v.* Guy (1849), 1 H. & Tw. 523. **Refd.** Chillingworth *v.* Chambers, [1896] 1 Ch. 685, C. A.

2378. —— Whether order necessary.]—Bkpt. was one of three exors. He had before his bkpcy. received a considerable amount of the assets belonging to the estate of his testator. His two co-exors. petitioned for an order to be permitted to prove the amount under the commission:—*Held:* the order should be made.—*Ex p.* BROWN (1832), 1 Deac. & Ch. 118, Ct. of R.

2379. —— ——.]—An exor. may prove against a bkpt. co-exor. without an order for that purpose. —*Re* DAVIS, *Ex p.* COURTNEY (1835), 4 Deac. & Ch. 456; 2 Mont. & A. 227; 4 L. J. Bcy. 76, Ct. of R.

2380. —— ——.]—Bkpt. was the acting one of three exors. & was indebted to the estate. His two co-exors. petitioned to prove for the balance due from him:—*Held:* petitioners might have proved without any order of that ct.; for though one trustee could not prove, without his co-trustee joining him in the proof, yet one exor. might prove without his co-exor.—*Re* WRIGHT, *Ex p.* PHILLIPS (1837), 2 Deac. 334; 6 L. J. Bcy. 74, Ct. of R.

PART VIII. SECT. 3, SUB-SECT. 4.

2368 i. *Legatee on behalf of himself & others—Application of dividends.*]—A surviving exor. used testator's assets in his own business without the knowledge of the legatees, one of whom was a minor, & became bkpt.:—*Held:* the legatee who was of age might prove for such assets, the dividend being retained in ct. for those interested.—*Re* SHEPHERD, *Ex p.* MOORE (1876), 10 I. L. T. 95.—IR.

Sect. 3.—*Who may prove: Sub-sects.* 5, 6, 7 & 8. *Sect.* 4: *Sub-sects.* 1 & 2.]

SUB-SECT. 5.—AGAINST BANKRUPT ASSIGNEE IN BANKRUPTCY.

2381. Creditor of original bankrupt—Proof in original bankruptcy not made till after assignee's bankruptcy.]—If an assignee, who has received effects, becomes bkpt., a creditor, under the commission in which he was the assignee, but who proved his debt after the bkpcy. of the assignee, is not entitled to any proof under the assignee's commission.—*Re* MOORE, *Ex p.* STONEHOUSE (1820), Buck, 531, L. C.

2382. Solvent co-assignee.] — Two of three assignees became bkpt. The solvent assignee paid a debt due to the estate from the three:—*Held:* he was entitled to prove a third of the debt against each of his co-assignee's estates. *Qu.:* if either of the estates should turn out deficient, whether proof for a moiety of the deficiency could be made against the estate of the other assignee.—*Re* JACKSON, *Ex p.* HUNTER (1820), Buck, 552, L. C.

SUB-SECT. 6.—CREDITOR CONTRACTING WITH BANKRUPT AFTER NOTICE OF ACT OF BANKRUPTCY.

See Sect. 8, sub-sect. 3, A., *post.*

SUB-SECT. 7.—SECURED CREDITOR.

See PART IX., *post.*

SUB-SECT. 8.—JOINT AND SEPARATE CREDITORS.

See Part XI., *post.*

SECT. 4.—WHAT DEBTS ARE PROVABLE AND FOR WHAT AMOUNT.

See 1914 Act, s. 30 (3).

SUB-SECT. 1.—IN GENERAL.

2383. Debts which if sued for would have resulted in non-suit or verdict against creditor.]—Where no fraud is established & where, if bkpts. had continued solvent & an action had been brought against them by petitioner for the purpose of recovering the money sought to be proved for or any part of it, there must have been a non-suit or verdict against him, that decides the question of the right of proof.—*Re* BURROWS, *Ex p.* TAYLOR (1856), 8 De G. M. & G. 254; 25 L. J. Bcy. 35; 26 L. T. O. S. 266; 2 Jur. N. S. 220; 4 W. R. 305; 44 E. R. 388, L. JJ.

Annotation:—**Mentd.** Hamilton *v.* Vaughan Sherrin Electrical Engineering Co., [1894] 3 Ch. 589.

2384. Meaning of provable balance.]—A moneylender having taken out execution on a warrant of attorney to secure repayment of £600, with interest, gave up the proceeds received from the sheriffs, under an agreement with the assignees, who gave him a release, that he should come in with the other creditors for the balance due to him:—*Held:* such agreement meant a provable balance, & not to let in the debt, if affected with usury.—*Re* POST, *Ex p.* BANGLAY (1811), 1 Rose, 168.

Annotation:—**Consd.** Long *v.* Storie (1852), 9 Hare, 542.

2385. Meaning of "debts provable"—1869 Act, s. 31.]—1869 Act, s. 31, contains one exception, & one exception only. It excepts any case in which the ct. on appeal thinks the value of the liability incapable of being fairly estimated, & makes an order to that effect. Such a case is conceivable, but it is one very unlikely to occur. According to the true construction of the sect., unless a judicial declaration has actually been made in the terms of that provision, the liability of bkpt. under a contract, however extreme the difficulty of valuing that liability may be, must be deemed to be a debt provable in bkpcy., & a

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PART VIII. SECT. 4, SUB-SECT. 1.

l. *Meaning of "debts due"—Insolvency Act,* 1890.]—The expression "debts due" in s. 154 of the above Act covers all demands provable against a debtor's estate.—*Re* MELBOURNE LOCOMOTIVE & ENGINEERING WORKS, LTD. (IN LIQUIDATION), NEAVE'S CASE (1895), 21 V. L. R. 442. —**AUS.**

m. *Unliquidated damages—Whether provable.*]—A claim for unliquidated damages should be substantiated by action, & not proved as a debt, against an insolvent estate.—*Re* LE ROUX, DE KLERK *v.* ZEEMAN (1896), 13 S. C. 181.—**S. AF.**

n. —— *Incapable of valuation—Insolvent Act,* 1864.]—A claim, not for a debt due & payable, or due but not then payable, nor upon a contract dependent on a condition or contingency which had not happened previous to the declaration of the first dividend, but for unliquidated damages incapable of valuation, is not under s. 5 of the above Act a provable debt.—BURROWES *v.* DE BLAQUIERE (1874), 34 U. C. R. 498.—**CAN.**

o. *Balance of debt proved in prior insolvency—Proof of original debt.*]—A proof against an insolvent estate under a second sequestration made by virtue of Insolvent Ordinance, s. 130, should be in respect of the original debt, & not of the account confirmed under the previous sequestration.—*Re* LE ROUX, DE KLERK *v.* ZEEMAN (1896), 13 S. C. 181.—**S. AF.**

p. —— *After release of debtor—Though special power to prove reserved.*]—Where in an assignment to trustees for the benefit of creditors under 5 Vict. No. 9, a release is granted to the assignors, the ct. will not allow the creditors who have executed the deed of assignment to come in & prove, under a subsequent insolvency, for debts which were already in existence at the time the release was given, although the deed may purport to reserve special power for them to do so.—*Ex p.* STUTCHBURY (1888), 9 N. S. W. L. R. 164.—**AUS.**

q. —— *For what credit may be given.*]—A creditor of an arranging debtor who failed to carry out his arrangement, & entered into a second arrangement, sought to reduce the amount due to him in the second arrangement by giving credit for the amount of an unpaid instalment in the first arrangement, for which he held a bill of debtor, with the name of a surety upon it, & to prove for the reduced amount in the second arrangement:—*Held:* the creditor was not entitled to do so.—*Re* R. (1888), 23 L. R. Ir. 19. —**IR.**

r. *Meaning of "creditor."*]—Any person to whom anything is owed from the estate is a creditor of the estate.—GROBLER *v.* GROBLER'S TRUSTEE (1908), T. S. 423.—**S. AF.**

2385 i. *Meaning of "debts provable"—Insolvency Act,* 1897.]—Every person entitled to prove on the estate of a debtor, & every person who has a security in respect of which he is entitled to prove, is a "creditor" within the above Act, although that which is called a "debt provable in insolvency" may not be in the ordinary sense a debt at all, & the insolvent is called, with regard to that liability, a "debtor."—*Re* MELBOURNE LOCOMOTIVE & ENGINEERING WORKS, LTD. (IN LIQUIDATION), NEAVE'S CASE (1895), 21 V. L. R. 442.—**AUS.**

s. *Debts contracted after act of bankruptcy but before commission.*]—Debts contracted after act of bkpcy., but prior to the commission, are not provable thereunder.—O'BRIEN *v.* GRIERSON (1813), 2 Ball & B. 323.—**IR.**

t. *Equitable debts.*]—Equitable as well as legal debts are provable.—*Re* MURPHY (1803), 1 Sch. & Lef. 44.—**IR.**

w. *Debt arising out of felony—Right to prove prior to prosecution.*]—Where a debt is founded on a felony, the creditor cannot prove until he prosecutes the offender. Success or failure of the prosecution cannot interfere with the right to prove, if it be *bonâ fide.* If the creditor declines to prosecute, the right to prove is lost.—*Re* M'MASTER (1858), 32 L. T. O. S. 288.—**IR.**

a. —— —— *Debtors & Creditors Act,* 1876.]—A clerk embezzled money, his employers did not take any steps to prosecute him therefor. The clerk became bkpt. The trustee rejected a proof of debt, for the money embezzled, lodged by the employers on the ground that they could not maintain their proof until prosecution of debtor. The employers then instituted criminal proceedings & debtor was committed for trial. The employers again claimed the right to prove:—*Held:* the employers, having *bonâ fide* criminally prosecuted debtor, had a right to prove. —*Re* PEMBERTON (1883), 1 N. Z. L. R. 61.—**N.Z.**

b. —— ——.]—A proof cannot be rejected on the ground that the debt arose in circumstances which would support a charge of felony, & that the creditor has not first prosecuted bkpt.—*Re* WATERS, *Ex p.* CITY ADVANCE CO. (1887), 5 N. Z. L. R. 449.—**N.Z.**

debt from which bkpt., is released by the order of discharge (LORD MACNAGHTEN).—HARDY *v.* FOTHERGILL (1888), 13 App. Cas. 351 ; 58 L. J. Q. B. 44 ; 59 L. T. 273 ; 53 J. P. 36 ; 37 W. R. 177 ; 4 T. L. R. 603, H. L.

Annotations :—**Folld.** Flint *v.* Barnard (1888), 22 Q. B. D. 90, C. A. ; Wolmershausen *v.* Gullick, [1893] 2 Ch. 514. **Consd.** *Re* Midland Coal, Coke & Iron Co., Craig's Claim, [1895] 1 Ch. 267, C. A. **Distd.** *Re* New Oriental Bank Corpn., [1895] 1 Ch. 753. **Consd.** Kerr *v.* Kerr, [1897] 2 Q. B. 439. **Folld.** *Re* Perkins, Poyser *v.* Beyfus, [1898] 2 Ch. 182, C. A. **Consd.** *Re* McMahon, Fuller *v.* McMahon, [1900] 1 Ch. 173 ; Victor *v.* Victor, [1912] 1 K. B. 247, C. A. **Refd.** Barnett *v.* King (1890), 63 L. T. 501, C. A. ; *Re* Panther Lead Co., [1896] 1 Ch. 978 ; *Re* Reis, *Ex p.* Clough, [1904] 2 K. B. 769, C. A. **Mentd.** *Re* Browne & Wingrove, *Ex p.* Ador, [1891] 2 Q. B. 574, C. A. ; Chaplin *v.* Hicks (1911), 27 T. L. R. 244 ; *Re* Lind, Industrials Finance Syndicate *v.* Lind, [1915] 2 Ch. 345, C. A.

2386. —— 1890 Act, s. 3 (9).]—The expression "debts provable" in 1890 Act, s. 3 (9), means "debts provable," not at the date of the receiving order, but at the time when the scheme of arrangement comes before the ct. for approval, & does not include debts which may have previously been withdrawn or released.—*Re* E. A. B., [1902] 1 K. B. 457 ; 71 L. J. K. B. 356 ; 85 L. T. 773 ; 50 W. R. 229 ; 9 Mans. 105, C. A.

Annotations :—**Consd.** *Re* Keet, [1905] 2 K. B. 666, C. A. **Refd.** *Re* Pilling, *Ex p.* Board of Trade, [1903] 2 K. B. 50, C. A. **Mentd.** *Re* Baines, *Ex p.* Board of Trade (1902), 86 L. T. 691, D. C. ; *Re* Aron (1905), 21 T. L. R. 693.

Debts incurred after notice of act of bankruptcy.] —*See* Sect. 8, sub-sect. 3, A., *post.*

Debt reduced by voluntary payment by third party.] —*See* No. 3142, *post.*

SUB-SECT. 2.—UNLIQUIDATED DAMAGES IN TORT.

2387. Distinction between actions for personal damage—& trover.]—It is not to be taken for granted that a demand in trover cannot be proved in bkpcy. Where the demand is liquidated it may. It is only personal damage, as for assault, etc., that cannot be proved (BULLER, J.).—JOHNSON *v.* SPILLER (1784), 1 Doug. K. B. 167, n. ; 99 E. R. 109.

Annotations :—**Expld.** Parker *v.* Norton (1796), 6 Term Rep. 695. I understand BULLER, J., in using the words attributed to him, to have meant only this, that if a person has his election of two remedies, and may either bring trover or any other action, the possibility of his electing to bring trover shall not prevent his proving his debt under the commission of bkpt. if he will waive the tort ; & I assent to the proposition so qualified (LORD KENYON, C. J.). **Refd.** De Tastet *v.* Walker (1818), Buck, 153 ; Woolley *v.* Smith (1846), 3 C. B. 610. **Mentd.** Betteley *v.* Stainsby (1862), 12 C. B. N. S. 477 ; *Re* Dunn, *Ex p.* Paynter (1862), 6 L. T. 510.

2388. Cause of action arising before bankruptcy.] —When the action arises *ex delicto* before the bkpcy. of deft., pltf. need not go before the comrs. of bkpt. to receive a satisfaction, but he may bring his action, to which deft.'s certificate will be no bar.—HAMOND *v.* TOULMAN (1798), 7 Term Rep. 612 ; 101 E. R. 1159.

Annotation :—**Mentd.** Green *v.* Bicknell (1838), 8 Ad. & El. 701.

See, further, Part XXI., *post.*

2389. —— Sale of stock against orders.]—Bkpcy. & certificate are no bar to an action in tort against a broker for selling out pltf.'s stock contrary to orders.—PARKER *v.* CROLE (1828), 5 Bing. 63 ; 2 Moo. & P. 150 ; 6 L. J. O. S. C. P. 229 ; 130 E. R. 983.

2390. —— Infringement of patent.]—The right of a patentee to an account of profits made by an infringer is not a demand in the nature of unliquidated damages, & the amount of such profits is provable in the bkpcy. of the infringer.—WATSON *v.* HOLLIDAY (1883), 52 L. J. Ch. 543 ; 48 L T. 545 ; 31 W. R. 536, C. A.

2391. —— Fraud.]—Debtors deposited goods with wharfingers, who issued warrants thereon, on which debtors obtained advances. The goods so deposited turned out to be valueless, their contents having been falsely represented to the wharfingers, who had to pay damages to the persons who had made the advances. The wharfingers sought to prove the amount so paid, together with the costs :—*Held :* the proof being for fraud, & the damages unliquidated, & not arising out of contract, was rightly rejected.—*Re* SEAGER, *Ex p.* SEAWARD BROTHERS (1891), 7 T. L. R. 616 ; 8 Morr. 216.

2392. —— ——.]—An insolvent trader assigned his business to a one man co. for shares & debentures, & induced a *bonâ fide* mtgee. of his business, who was no party to the formation of the co., to accept some of the debentures in substitution for his mtge. Shortly afterwards the trader became bkpt., & his assignment to the co. was set aside as fraudulent under 13 Eliz. c. 5 & as an act of bkpcy. under 1883 Act, s. 4 (1) (*b*). The co.'s debentures were worthless :—*Held :* the mtgee. only had a right to prove in the bkpcy. for the damages he had sustained by reason of debtor's fraud in inducing him to accept worthless debentures for his security.—*Re* GOLDBURG, *Ex p.* SILVERSTONE, [1912] 1 K. B. 384 ; 81 L. J. K. B. 382 ; 19 Mans. 44.

2393. —— Verdict during bankruptcy—Judgment after certificate.]—In assault & battery before bkpcy., during the bkpcy. pltf. had a verdict with damages, but had not judgment till after the certificate :—*Semble :* pltf. could not come in under the commission, & it was not a provable debt, or a debt due at the time of the bkpcy.—WALTER *v.* SHERLOCK (1750), cited 3 Wils., at p. 272 ; 95 E. R. 1051.

Annotations :—**Consd.** *Ex p.* Hill (1804), 11 Ves. 646. **Refd.** Goddard *v.* Vanderheyden (1771), 3 Wils. 262 ; *Re* Cable, *Ex p.* Poucher (1824), 1 Gl. & J. 385.

2394. Verdict before bankruptcy—Judgment after.]—Pltf. recovered a verdict & £10 damages in an action of slander. Between the verdict & judgment, deft. became bkpt. After final judgment was signed, deft. was taken in custody in execution. On a rule to show cause why deft., who had obtained his certificate, should not be discharged out of custody :—*Held :* the debt was provable under the commission & was discharged by the certificate, there being no distinction between a tort & a contract, where a judgment followed the verdict, & the rule should be made absolute.—LONGFORD *v.* ELLIS (1788), 1 Hy. Bl. 29 ; 14 East, 202, n. ; 126 E. R. 20.

Annotations :—**Folld.** Watts *v.* Hart (1797), 1 Bos. & P. 134. **Consd.** *Ex p.* Hill (1804), 11 Ves. 646 ; *Ex p.* Charles (1811), 14 East, 197 ; Buss *v.* Gilbert (1813), 2 M. & S. 70 ; Jones *v.* Thompson (1858), E. B. & E. 63. **Refd.** *Ex p.* Hill (1802), 2 Bos. & P. N. R. 191, n. ; Walker *v.* Barnes (1814), 5 Taunt. 778 ; *Re* Cable, *Ex p.* Poucher (1824), 1 Gl. & J. 385.

See, further, Sub-sect. 5, *post.*

2395. —— —— Action for seduction.]—A debt due on a judgment signed in an action for damages for seduction after an act of bkpcy. committed by deft., & a commission issued thereon, is not discharged by the certificate, though the verdict was obtained before the bkpcy.—BUSS *v.* GILBERT (1813), 2 M. & S. 70 ; 105 E. R. 308.

Annotation :—**Mentd.** Jones *v.* Thompson (1858), E. B. & E. 63.

2396. —— ——.]—Damages recovered in an action of tort are not provable in the bkpcy. of deft., unless judgment is signed before the adjudication. If judgment is not signed till after the adjudication, even though the verdict was obtained

Sect. 4.—What debts are provable and for what amount: Sub-sects. 2 & 3, A.]

before, bkpt. is not discharged from the liability. —*Re* NEWMAN, *Ex p.* BROOKE (1876), 3 Ch. D. 494; 25 W. R. 261, C. A.

Annotations:—**Refd.** Watson *v.* Holliday (1882), 20 Ch. D. 780; *Re* British Gold Fields of West Africa, [1899], 2 Ch. 7, C. A.

2397. —— Judgment between act of bankruptcy & commission.]—Pltf. in an action of trespass, having obtained a verdict, signed final judgment after deft. had committed an act of bkpcy., but before the issuing of a commission:—*Held:* the debt was provable under a commission subsequently issued.—ROBINSON *v.* VALE (1824), 2 B. & C. 762; 4 Dow. & Ry. K. B. 430; 2 L. J. O. S. K. B. 171; 107 E. R. 566.

Annotations:—**Folld.** Boyer *v.* —— (1826), 5 L. J. O. S. K. B. 71. **Mentd.** *Re* Pickering, *Ex p.* Thornthwaite (1854), 1 Bankr. & Ins. R. 201.

2398. Verdict after bankruptcy.]—A claim for damages caused by malicious injury to property in an action pending at the date of the adjudication, & subsequently converted into a debt by the verdict of the jury, does not constitute a "debt or money due" from bkpt. within 1861 Act, s. 159. —*Re* BOSWALL, *Ex p.* GLASS & ELLIOTT (1862), 31 L. J. Bcy. 73; 6 L. T. 407; 10 W. R. 533, L. JJ.

Annotations:—**Refd.** *Re* Clayton, *Ex p.* Clayton (1869), 5 Ch. App. 13, L. J.; *Re* Goodier, *Ex p.* Goodier (1870), 22 L. T. 426. **Mentd.** *Re* Delamere (1862), 31 L. J. Bcy. 67.

2399. Judgment after bankruptcy.]—An action was begun against G., a director of a co., for damages for issuing a fraudulent prospectus, on the faith of which pltf. was induced to accept debentures in the co. After G. became bkpt. judgment was obtained against G. in the action, & the pltf. tendered a proof for the damages recovered:—*Held:* the proof must be disallowed, the receiving order having been made previous to the judgment.—*Re* GILES, *Ex p.* STONE (1889), 61 L. T. 82; 37 W. R. 767; 6 Morr. 158, D. C.

2400. Verdict subject to award before bankruptcy—Award after bankruptcy.]—Deft., against whom in an action for damages, on a tort, a verdict had been taken, subject to the award of an arbitrator:—*Held:* to be discharged from the debt by his certificate, obtained before the entering up of judgment, where he had become bkpt. between the verdict & the making up of the award, & execution could not be sued out on the judgment, because pltf. might have proved the damages recovered under the commission by production of the record.—BEESTON *v.* WHITE (1819), 7 Price, 209; 146 E. R. 950.

2401. —— ——.]—Before the filing of a petition for adjudication of bkpcy. a verdict for £1,000 was obtained against bkpt., in an action of tort, subject to a reference as to the amount of damages to be paid. After the petition was filed & the adjudication was made, the arbitrator made his award, fixing the amount of damages, the assignees of bkpt. taking no part in the proceedings. Pltf. in the action filed final judgment, & applied to prove under the bkpcy., for the amount of certified damages & taxed costs:—*Held:* the proof could not be admitted.—*Re* WILLIAMSON, *Ex p.* TODD (1855), 6 De G. M. & G. 744; 24 L. J. Bcy. 20; 25 L. T. O. S. 285; 1 Jur. N. S. 897; 3 W. R. 644; 43 E. R. 1422, L. JJ.

Annotations:—**Consd.** *Re* Routledge, *Ex p.* Bateman (1855), 25 L. J. Bcy. 19, n. **Distd.** *Re* Strahan, *Ex p.* Barwis (1855), 6 De G. M. & G. 762, L. JJ. **Consd.** Betteley *v.* Stainsby (1867), L. R. 2 C. P. 568.

See, further, Sub-sect. 5, *post*.

SUB-SECT. 3.—CLAIMS ARISING OUT OF CONTRACT.

A. Whether Consideration sufficient.

2402. Moral obligation.]—A moral obligation to pay is a sufficient consideration to support a proof (SIR G. ROSE).—*Re* BUTLER, *Ex p.* DE GROUCHY (1836), 3 Mont. & A. 22; 6 L. J. Bcy. 3, Ct. of R.

2403. ——.]—A. died intestate & insolvent, having abstained from making a provision by will for his daughters, in consequence of a promise from his son to pay an annuity of £50 to each of them while single, & £500 to each upon her marriage, but it did not appear what the nature or amount of the provision was which A. abstained from making. Upon the bkpcy. of the son:—*Held:* such promise, though morally, was not legally binding upon the son, & it did not constitute a debt provable under the fiat.—*Re* JAMES, *Ex p.* MUDIE (1842), 3 Mont. D. & De G. 66; 12 L. J. Bcy. 25; 6 Jur. 1093, Ct. of R.; *subsequent proceedings* (1843), 7 Jur. 208, Ct. of R.

Annotations:—**Refd.** *Re* Ames, *Ex p.* Ames (1868), 19 L. T. 270, L. JJ. **Mentd.** *Re* Preston, *Ex p.* Preston (1861), 5 L. T. 89.

2404. New loan—Proof for same & balance due under previous bankruptcy.]—S., formerly a trader in Holland failed there, upon which there was a *cessio bonorum*. He came to England, & having been appointed a governor abroad, applied to petitioner to be his security, & to advance him a sum of money. Petitioner agreed to it, provided S. would give him a bond, which should comprise the remainder of an old debt due before the *cessio bonorum* as well as the further sum advanced, which was done. S. having become a bkpt.:—*Held:* petitioner was entitled to be admitted a creditor for the whole money upon his bond.—*Ex p.* BURTON (1744), 1 Atk. 255; 26 E. R. 163.

2405. —— ——.]—A. advanced to bkpt., after his first bkpcy., £585, & took a security, including in it £375, the balance of an usurious debt incurred before the first bkpcy., but not then attempted to be proved:—*Semble:* the security being tainted with usury, could not be proved on, either in the whole or in part. *Qu.:* whether the effect of the certificate under the first bkpcy. did not extinguish the usury, so as to prevent its being set up, & make the security merely voluntary, with regard to the £375.—*Re* BUTLER, *Ex p.* DE GROUCHY (1836), 3 Mont. & A. 22; 6 L. J. Bcy. 3, Ct. of R.

2406. Cancellation of voluntary bond—Proof on new bond for like amount.]—A voluntary bond, though void against creditors, is valid as between the parties, & its surrender is a consideration, that will sustain a substituted bond against creditors, unless with a fraudulent design, as by an insolvent to substitute a valid for an invalid security against creditors.—*Ex p.* BERRY (1812), 19 Ves. 218; 34 E. R. 499, L. C.

Annotations:—**Consd.** *Re* Gundry, *Ex p.* Hookins (1849), 3 De G. & Sm. 549. **Apld.** Carter *v.* Hungerford, [1917] 1 Ch. 260.

2407. —— ——.]—A partner in a bank gave a bond to his sister in performance, as it

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PART VIII. SECT. 4, SUB-SECT. 3. —A.

c. Forbearance by creditor—Of bankrupt & deceased—Bankrupt executor de son tort.]—A trader died intestate & insolvent. Bkpt. by his acts constituted himself exor. *de son tort*, carried on the business & accepted bills covering the debt of deceased as well as his personal liability in respect of fresh goods supplied by one of the creditors of deceased; by arrangement the creditor appropriated the payments, made from time to time, in discharge as well of the debt of deceased as of the personal liability of bkpt.:—*Held:* there was sufficient consideration of forbearance to support the bills as valid securities, & a proof of debt founded upon them could not be expunged.—*Re* MONTGOMERY (1876), 10 I. R. Eq. 479.—**IR.**

was alleged, of a promise voluntarily made to their father on his deathbed. The sister died, having specifically bequeathed the sum secured by the bond. The partner gave the legatees fresh bonds for sums amounting together to the sum secured by the original bond, in consideration of the delivery up of that instrument. Six years afterwards the partners in the bank, including the obligor, became bkpt. It appeared that at the times of both the transactions the firm must have been insolvent, & that the obligor must have then known or suspected that to be the case, but that the transactions were entered into fairly, & without reference to that circumstance. There was no evidence, however, of any notice or suspicion on the part of the obligees :—*Held :* they were entitled to prove upon the bonds.—*Re* GUNDRY, *Ex p.* HOOKINS (1849), 3 De G. & Sm. 549 ; 18 L. J. Bcy. 11 ; 12 L. T. O. S. 429 ; 13 Jur. 114 ; 64 E. R. 601.

See 1914 Act, s. 42.

2408. Marriage with bankrupt's mistress—Proof on bond given to husband.]—A single woman went to reside with an innkeeper to serve him for a year, a payment of £5 5*s.* to be made to her for such service. After the elapse of five months, a course of intimacy ensued for nearly eight years, during which period she had two children by the innkeeper but never had any wages from him. By agreement the innkeeper then promised that if a certain blacksmith married the woman, he would pay him £42 for eight years' wages & give a bond for payment of £400 by instalments. On the innkeeper's bkpcy., the blacksmith claimed to come in as a creditor :—*Held :* the consideration was good, & petitioner was entitled to come in as a creditor.—*Re* EAVES, *Ex p.* COTTRELL (1778), 2 Cowp. 742 ; 98 E. R. 1338.

2409. Mistress ceasing to molest bankrupt—Proof on bond to pay sum on mistress' marriage.]—Under 1883 Act, s. 40, debts arising upon voluntary bonds or covenants of bkpt. may be proved for equally with debts for valuable consideration.

Upon an agreement that a woman, with whom a debtor had co-habited, should leave & live apart from him, & should not molest or make any further claim upon him, such debtor, previous to his bkpcy., executed a deed, by which he agreed to pay to the woman an annuity of £200 a year, & it was provided that in case she should at any time thereafter marry & should thereupon request debtor in writing to purchase the annuity, he would pay the sum of £2,000 in full satisfaction thereof. The woman having married, & debtor having become bkpt., a proof for £2,000 was after due notice tendered against his estate which was rejected by the trustee :—*Held :* such rejection was wrong, & the proof must be admitted.—*Re* COATES, *Ex p.* SCOTT (1892), 9 Morr. 87.

2410. Wife's waiver of equity to settlement—Proof on settlement for money lent to bankrupt's husband.]—H. was married to his wife in 1864, & she subsequently became entitled to certain money under the wills of her father & grandfather. Those moneys she lent to her husband for the purposes of his business, upon the terms that he would execute a settlement of the moneys upon her, which was done. Upon the bkpcy. of H. a proof was tendered upon the settlement & rejected on the grounds (*inter alia*), (1) the deed was voluntary within 13 Eliz. c. 5 ; (2) it was a voluntary settlement within 1869 Act, s. 91 ; (3) the circumstances were covered by Married Women's Property Act, 1882 (c. 75), s. 3 :—*Held :* the settlement was not fraudulent within 13 Eliz. c. 5, & there had been a good consideration by reason of the fact that the wife had waived her equity to a settlement.—*Re* HOME, *Ex p.* HOME (1885), 54 L. T. 301.

See 1914 Act, s. 36 (2), replacing Married Women's Property Act, 1882 (c. 75), s. 3.

See, also, Part XII., Sect. 2, sub-sect. 1, *post.*

2411. Gambling debt—Avoidance of result of failing to pay—Proof on bond given in respect of same.]—A member of the Jockey Club incurred racing debts. Being threatened with proceedings which would have resulted in his expulsion from the club, he entered into a compromise, by which he paid a sum down, & gave his creditors a bond for £10,000 :—*Held :* the bond having been given not to pay racing debts, but to avoid the consequences of not having paid them, was good, & could be proved against the obligor's estate.—BUBB *v.* YELVERTON (1870), L. R. 9 Eq. 471 ; 39 L. J. Ch. 428 ; 22 L. T. 258 ; 18 W. R. 512.

Annotations :—**Distd.** *Re* Deerhurst, *Ex p.* Seaton (1891), 64 L. T. 118 ; Cooper *v.* Willis (1906), 22 T. L. R. 582, D. C. **Consd.** Hyams *v.* Stuart King, [1908] 2 K. B. 696, C. A. **Refd.** *Re* Deerhurst, *Ex p.* Seaton (1891), 64 L. T. 273, C. A. ; *Re* Browne, *Ex p.* Martingell, [1904] 2 K. B. 133 ; Chapman *v.* Franklin (1905), 21 T. L. R. 515, D. C. ; Goodson *v.* Grierson, [1908] 1 K. B. 761, C. A.

2412. —— Proof on judgment in respect of same.]—In an action by A. against B. to recover money won by betting, B. obtained unconditional leave to defend. A. appealed against that order, but before the appeal was heard A. signed judgment upon default by B. in delivering a defence. B. took out a summons to set aside the judgment, which was abandoned, in consideration of A. abstaining from posting B. as a defaulter. A scheme of arrangement was subsequently entered into by B., under which the trustee was authorised to admit proof provable in bkpcy :—*Held :* the judgment debt was not provable.—*Re* DEERHURST, *Ex p.* SEATON (1891), 60 L. J. Q. B. 411 ; 64 L. T. 273 ; 7 T. L. R. 373 ; 8 Morr. 97, C. A.

Annotations :—**Distd.** *Re* Browne, *Ex p.* Martingell, [1904] 2 K. B. 133. **Refd.** Ward *v.* Fry (1900), 17 T. L. R. 37.

See, further, Sub-sect. 5, *post.*

2413. —— Proof on bills given for same.]—Debtor, being sued for a gambling debt, successfully pleaded Gaming Act, 1892 (c. 9). Thereupon the creditor wrote to the committee of debtor's club informing them of the fact. Debtor then agreed to pay the creditor £100 in cash, & to give bills for £400 in consideration of the creditor withdrawing his letter. Upon debtor becoming bkpt., the creditor proved for the amount of the bills then due, but the proof was rejected by the trustee :—*Held :* the bills were given not for the gaming debt, but for a wholly new consideration, which was not illegal, & the proof was wrongly rejected.—*Re* BROWNE, *Ex p.* MARTINGELL [1904], 2 K. B. 133 ; 73 L. J. K. B. 446 ; 90 L. T. 291 ; 52 W. R. 384 ; 20 T. L. R. 289 ; 48 Sol. Jo. 300 ; 11 Mans. 148.

Annotation :—**Consd.** Hyams *v.* Stuart King, [1908] 2 K. B. 696, C. A.

See, further, GAMING & WAGERING.

2414. Purchase of shares in provisionally registered company.]—A purchase by brokers, in pursuance of the order of a customer, of shares in a projected railway co., provisionally registered :—*Held :* not illegal, but a sufficient ground for the admission of a proof tendered by the brokers for the loss occasioned by non-completion of the purchase by the customer.—*Re* CHARLES, *Ex p.* BARTON (1846), De G. 316 ; 4 Ry. & Can. Cas. 371 ; 7 L. T. O. S. 143 ; 10 Jur. 442, Ct. of R.

Sect. 4.—What debts are provable and for what amount: Sub-sect. 3, A. & B.]

2415. Remarriage in England—Previous irregular marriage in Scotland valid.]—Parties eloped & were married in Scotland without licence or banns. Having doubts about the legality of the marriage the wife's father wished to have the ceremony performed again, but the husband's father objected. He was induced to consent by an offer of the wife's father to settle an annuity on the daughter, & a bond to secure the annuity was executed on the settlor before the marriage was resolemnised in England. The settlor was solvent at the time & paid the annuity regularly until his bkpcy. The husband & wife applied to prove the bond under the commission of bkpt. :—*Held :* the Scotch marriage being valid there was no consideration for the bond, & petitioners should be allowed to prove upon the surplus of the separate estate after the joint creditors were satisfied.—*Re* DICKENSON, *Ex p.* HALL (1810), 1 Rose, 30, L. C.

2416. Trifling assets sold for excessive figure—Restraint of proof.]—Where it appears that bkpt. has contracted for the purchase of a business of a trifling value, for a large consideration, the ct. will take the deficiency of value into account, & restrain the proof accordingly.—*Re* BOWERMAN, *Ex p.* BOWERMAN (1836), 6 L. J. Bcy. 9.

2417. Excessive price for goods sold—No fraud or deceit.]—The comr. had reduced a proof for the agreed price of goods sold & delivered, on the ground that it was excessive. The goods were of the agreed quantity and quality :—*Held :* in the absence of deceit or fraud, where there was a stipulated price, the creditor might prove for that price without regard to whether it was high or low, & the ct. could not undo a bargain which the parties had entered into with their eyes open, nor suffer the proof to be reduced merely because bkpt. agreed to pay too high a price.—*Re* LEECH, *Ex p.* REAY (1833), 3 Deac. & Ch. 175, Ct. of R.

Consideration in regard to proof on bills of exchange, etc.]—*See* Nos. 2613 *et seq., post.*

2418. Secret verbal agreement to pay bankrupt's trade debts—Proof for payments made under—Agreement in fraud of creditors.]—Debtor assigned the whole of his property to a creditor. The consideration stated in the deed was a debt of £3,271, but in fact £1,370 was only due, & the real consideration was a verbal agreement by the assignee to pay the assignor's trade debts. Debtor became bkpt., & the assignment was declared void as against the trustee. At the date of the bkpcy. most of debtor's trade debts had been discharged : —*Held :* the assignee would be entitled to prove in the bkpcy. in respect of any sums properly paid by him under the agreement.—*Re* SINCLAIR, *Ex p.* CHAPLAIN (1884), 26 Ch. D. 319 ; 53 L. J. Ch. 732 ; 51 L. T. 345, C. A.

Annotations :—**Consd.** *Re* Cranston, *Ex p.* Cranston (1892), 9 Morr. 160, D. C. **Mentd.** Shears *v.* Goddard (1895), 65 L. J. Q. B. 151 ; *Re* Sharp, *Ex p.* Gundry *v.* Johnston (1900), 83 L. T. 416.

2419. Overdraft secured by forged bills—Bills given up for notes signed by relatives—Forbearance to prosecute.]—A bank allowed a customer, G., to overdraw upon depositing with them certain bills as security. G. was afterwards convicted of forgery, & it was also discovered that the bills were forgeries. At the request of G. & his family the bank gave up to the latter the forged bills in exchange for promissory notes by G. & some relatives. G. having become bkpt., the bank claimed to prove for the amount of the overdraft & interest :—*Held :* the debt was founded on the original transaction, *viz.*, the overdraft, & was not founded on a felony or on forbearance to prosecute, & the proof must be allowed.—*Re* GUERRIER, *Ex p.* LESLIE (1882), 20 Ch. D. 131 ; 51 L. J. Ch. 689 ; 46 L. T. 548 ; 30 W. R. 344 ; 15 Cox, C. C. 125, C. A.

See, generally, ACTION, Vol. I. pp. 60 *et seq.*

Consideration in regard to proof on annuities.]—*See* Nos. 2762 *et seq., post.*

B. Sale and Purchase.

Bankruptcy of purchaser—Vendor having lien.]—*See* No. 3450, *post.*

2420. —— Assignee purchasing himself—Return of goods remaining in specie—Proof for balance.]—An assignee having purchased goods at a sale, under the commission, became bkpt. :—*Held :* such of the goods as remained in specie should be redelivered, & what he had resold should be proved as a debt.—*Re* BALL, *Ex p.* SPONG (1811), 1 Rose, 133, L. C.

2421. —— Discount to be allowed in event which did not happen—Whether proof for full price.]—Goods were sold, to be paid for at the end of the year in which they were purchased, but if paid for before the end of the year, 20 per cent. discount was to be allowed. They were not paid for within the year. On the bkpcy. of the purchaser :—*Held :* proof could not be made of the whole debt, without deduction for discount.—*Re* HARVEY, *Ex p.* PIGOU (1818), 3 Madd. 136 ; 56 E. R. 460.

2422. —— —— ——.]—Wholesale traders supplied goods to a retailer on the terms that he was to be allowed a discount from the invoice prices on payment in cash within a month :—*Held :* cash payments not having been made, proof must be admitted in the bkpcy. of the retailer for the full amount of the invoice prices of the goods.—*Re* CUMBERLAND, *Ex p.* WORTHINGTON (1876), 3 Ch D. 803 ; 45 L. J. Bcy. 135 ; 34 L. T. 951.

Annotation :—**Distd.** Chambers *v.* Gunstone (1897), 76 L. T. 780, D. C.

2423. —— Discount regularly deducted—Whether proof for net price.]—A retail trader had been allowed by a creditor discount whenever the account was settled, although the invoices stated that no discount would be allowed after three months. The trader having made an assignment for the benefit of his creditors, under which his estate was to be administered as in bkpcy. :—*Held :* the creditor was only entitled to a dividend on the invoice price, less the discount, under 1883 Act, Sched. II. r. 8.—CHAMBERS & Co. *v.* GUNSTONE (1897), 76 L. T. 780, D. C.

2424. —— Contract for future delivery of goods at fixed price—Bankruptcy before date of delivery.]—A person, who had contracted for a certain quantity of oil, to be delivered to him at a future date at a certain price, became bkpt. before that day arrived, & obtained his certificate :—*Held :* the right of the seller to maintain an action for not accepting & paying for the oil depended upon the question, whether he could or could not have proved his demand under the commission of bkpcy. issued against the purchaser, & the seller could not so prove it, for at the time when the commission issued, it was uncertain not only what amount of damage but whether any damage would be sustained.—BOORMAN *v.* NASH (1829), 9 B. & C. 145 ; Dan. & Ll. 269 ; 7 L. J. O. S. K. B. 150 ; 109 E. R. 54.

Annotations :—**Consd.** Green *v.* Bicknell (1838), 8 Ad. & El. 701. **Distd.** *Re* Barlow, *Ex p.* Sheppard (1841), 2 Mont. D. & De G. 431 ; Knight *v.* Burgess (1864), 10 L. T. 90. **Refd.** Gibson *v.* Carruthers (1841), 8 M. & W. 321 ; *Re* Whitmore (1843), 3 De G. & Sm. 565 ; *Re* Willis (1849), 4 Exch. 530 ; Johnson *v.* Skafte (1869), L. R. 4 Q. B. 700. **Mentd.** *Re* Gales, *Ex p.* Harrison (1843), 1 L. T. O. S. 456 ; Brown *v.* Muller (1872), L. R. 7 Exch. 319.

2425. —— —— Contract for future delivery of stocks.]—The damages arising from a breach of contract to accept goods at a certain price on a certain day, are not provable under a commission of bkpcy :—*Semble :* contracts to deliver stock on a certain day are an exception to this rule.—GREEN *v.* BICKNELL (1838), 8 Ad. & El. 701 ; 3 Nev. & P. K. B. 634 ; 1 Will. Woll. & H. 504 ; 7 L. J. Q. B. 271 ; 112 E. R. 1004.

Annotations :—**Distd.** *Re* Tate, *Ex p.* Moffatt & O'Meara (1840), 1 Mont. & D. & De G. 282 ; *Re* Barlow, *Ex p.* Sheppard (1841), 2 Mont. D. & De G. 431. **Expld.** *Re* Coles, *Ex p.* Twining (1841), 1 Mont. & D. & De G. 691. **Apld.** *Re* Peters (1845), 5 L. T. O. S. 222. **Consd.** Woolley *v.* Smith (1846), 3 C. B. 610. **Expld.** Owen *v.* Routh (1854), 14 C. B. 327. **Distd.** *Re* Routledge, *Ex p.* Bateman (1856), 8 De G. M. & G. 263. **Consd.** Betteley *v.* Stainsby (1862), 12 C. B. N. S. 477. **Refd.** Bury *v.* Allen (1845), 1 Coll. 589 ; Johnson *v.* Skafte (1869), L. R. 4 Q. B. 700. **Mentd.** *Re* Gales, *Ex p.* Harrison (1843), 1 L. T. O. S. 456.

2426. —— Part delivery before bankruptcy—Balance stopped in transitu—Dividends retained until rights established at law.]—Bkpt. bought five hogsheads of sugar. Three were delivered before the bkpcy., but the other two had been stopped *in transitu :—Held :* proof as to the three hogsheads delivered should be received, but the right of the vendor to the property retained being questionable, the dividend should be retained until the right to the property was established in a ct. of law.—*Re* STANTON (1846), 7 L. T. O. S. 119.

2427. —— —— Cancellation of contracts.]—Where three contracts to supply cotton cloth goods to a firm, who were subsequently adjudicated bkpts., had been made, & at the date of the bkpcy. there had been part deliveries under two of the contracts in respect of which a sum of money was due & owing, but no delivery in respect of the third contract, & the persons subject to the burden of the contracts applied, under 1914 Act, s. 54 (5), for an order rescinding the three contracts :—*Held :* (1) there must be some co-ordination between the three contracts to make it inequitable that appcts. should not be relieved from carrying out one & not the others ; (2) there was no such co-ordination, & the proper order would be that the two contracts in respect of which there had been part deliveries should be rescinded, & appcts. should prove in the bkpcy. for the sum due in respect of such deliveries ; (3) appcts. had made out no case for the cancellation of the other contract.—*Re* CASTLE, *Ex p.* HASLAM BROTHERS, [1917] 2 K. B. 725 ; 87 L. J. K. B. 753 ; 117 L. T. 792 ; [1917] H. B. R. 205.

—— **Price to be secured on property.**]—*See* Part IX., Sect. 2, Part XX., Sect. 16, sub-sect. 1, *post.*

2428. —— Resale by vendor—Proof for loss on resale.]—Teas were sold to be paid for at appointed days, the sales being made according to the custom of the trade, whereby the goods, when sold, were left as a pledge for full payment with the vendor, who, in case of non-payment, was at liberty to resell & charge the loss to the original purchaser. The purchase-money was not paid at the appointed time ; the purchaser became bkpt. & the vendor, having sold part of the teas before the fiat & the rest afterwards, gave the estate credit for the clear proceeds of the sales, tendering a proof for the residue of the original purchase-money :—*Held :* although there was no delivery of the goods, the original sale was a binding contract within Stat. Frauds, & the claim of the vendor constituted, not unliquidated damages, but a provable debt.—*Re* TATE, *Ex p.* MOFFATT (1841), 2 Mont. D. & De G. 170, L. C.

Annotation :—**Mentd.** *Re* Gales, *Ex p.* Harrison (1843), 1 L. T. O. S. 456.

2429. —— —— ——.]—A. agreed to purchase a ship from B. when she should arrive at port, in default of payment by A. within one month after her arrival B. to be at liberty to resell, & A. within one month after the resale to pay to B. any loss on the resale. A. became bkpt. before the arrival of the ship, &, his assignees refusing to complete the contract, B. resold the ship :—*Held :* B. could not prove for the loss on the resale.—*Re* GALES (1845), 1 De G. 100 ; 10 Jur. 166, L. C.

Annotations :—**Consd.** Betteley *v.* Stainsby (1862), 12 C. B. N. S. 477. **Refd.** *Re* Dunn, *Ex p.* Paynter (1862), 6 L. T. 510. **Mentd.** *Re* Lawford, *Ex p.* Harrison (1856), 3 Jur. N. S. 228, C. A.

2430. —— —— ——.]—Where the purchaser of an estate at auction does not complete his purchase, & the estate is afterwards put up to sale again, & resold in pursuance of the conditions of sale, but at a less price, & the first purchaser afterwards becomes a bkpt., the vendors may prove for the deficiency & expenses against his estate.—*Re* PETERS (1845), 5 L. T. O. S. 222.

2431. —— —— ——.]—H. & Co. purchased a cargo, the buyers to name the port of delivery. On the arrival of the ship they declined to name the port of delivery, & signified their inability to perform the contract. The sellers named the port & sold the cargo at a loss, but before that was done H. & Co. executed a deed of trust under 1861 Act, s. 192 :—*Held :* the contract was still subsisting at the date of the deed, & the sellers could not prove for the loss.—*Re* HALL & JONES, *Ex p.* HALLIDAY (1865), 2 De G. J. & Sm. 312 ; 46 E. R. 396, L. C.

Annotation :—**Consd.** *Re* Agra Bank, *Ex p.* Tondeur (1867), L. R. 5 Eq. 160.

2432. —— —— —— Bankruptcy before delivery.]—When the purchaser of goods sold on credit becomes bkpt. before the vendor has parted with possession of the goods, the trustee in the bkpcy. has a right to elect to complete the contract by paying the agreed price in cash within a reasonable time. But, if he does not do so, the vendor is entitled to treat the contract as broken, & to resell the goods, without first tendering them to the trustee, & to prove in the bkpcy. for damages for the breach of contract, the measure of damages, if the market is falling, being the difference between the contract price & the price obtained on the resale.—*Re* NATHAN, *Ex p.* STAPLETON (1879) 10 Ch. D. 586 ; 40 L. T. 14 ; 27 W. R. 327, C. A.

Annotations :—**Mentd.** Pitts *v.* La Fontaine (1880), 6 App. Cas. 482, P. C. ; *Re* Mackenzie, *Ex p.* Hertfordshire, [1899] 2 Q. B. 566, C. A. ; Tolhurst *v.* Associated Portland Cement Manufacturers (1900), [1902] 2 K. B. 660, C. A.

2433. —— Resale by broker—Proof for loss on resale.]—Bkpts. employed W. & Co., metal-brokers, to purchase iron for them, to be delivered & paid for at a future day. W. & Co., as the custom of the trade was, entered into contracts for the purchase of the iron, without disclosing the names of their principals. Before the day for delivery & payment arrived the adjudication in bkpcy. took place, & the assignees having declined to complete the contract, W. & Co. completed the purchase on their own account, & resold the iron at a loss, & carried in a proof against bkpts.' estate for the amount of the loss so sustained :—*Held :* the claim could not be supported either as a liability to pay money on a contingency, under the 1849 Act, s. 178, or as a debt payable upon a contingency, under s. 177, nor could it be sustained as a demand in the nature of damages, to which bkpts. were liable at the time of the adjudication, under 1861 Act, s. 153, & the proof must be disallowed.—*Re* BARKER,

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Ex p. KEMPSON (1865), 5 New Rep. 343; 34 L. J. Bcy. 21; 11 L. T. 723; 11 Jur. N. S. 165; 13 W. R. 418, L. C.

2434. —— Bankruptcy before delivery—Proof for loss of profit.]—A mtge. deed contained a covenant by bkpts. that, during the existence of the security, they would purchase a stated amount of goods from the mtgee.:—*Held:* the damages for loss of profits in consequence of the non-fulfilment of the contract were capable of estimation, & a proof must be admitted, but the amount should be referred to the registrar for assessment.—*Re* ALLEN & Co., *Ex p.* STRONG & HANBURY (1893), 9 T. L. R. 302; 10 Morr. 84.

2435. —— Unpaid vendor proving for purchase price.]—A vendor of cotton, by direction of the purchasers, shipped the cotton on board a vessel belonging to the latter. The purchasers became bkpt. before the arrival of the vessel. A mtgee. of the ship, who happened to be an agent of the vendor, took possession of the ship under his mtge., & sold the cotton under a supposed right of his principal to stop it *in transitu*. The principal sanctioned the transaction. The assignees of bkpts. recovered in an action against the mtgee. the amount for which the cotton sold:—*Held:* the contract was not rescinded by the seizure of the cotton, but the vendor was entitled to prove for the purchase-money.—*Re* HUMBERSTON (1846), De G. 262; 15 L. J. Bcy. 10; 6 L. T. O. S. 449.

2436. —— Sale of copyright for royalties—Whether proof for royalties in full.]—An author sold the copyright of his book to a publisher, upon terms that the publisher should print & publish it & should pay him certain royalties upon the sales of the book. The publisher became bkpt., and the trustee in bkpcy. carried on bkpt.'s business until he sold it as a going concern with all copyrights. During the time the trustee carried on the business sales of the book were effected, & the trustee received the proceeds of the sales. The author claimed to be paid in full the royalties on the sales:—*Held:* the transaction between the author & the publisher was analogous to that of a sale of goods at a price varying in amount & depending on certain events, & the author was only entitled to prove in the bkpcy. for the damages sustained by breach of the contract.—*Re* GRANT RICHARDS, *Ex p.* WARWICK DEEPING, [1907] 2 K. B. 33; 76 L. J. K. B. 643; 96 L. T. 712; 23 T. L. R. 388; 14 Mans. 88.

Annotation:—**Consd.** Barker *v.* Stickney, [1918] 2 K. B. 356.

2437. —— Payment by dishonoured bills.]—Goods were sold, to be paid for by bill at three months. The drawers & acceptors becoming bkpt., before the bills were due, the vendors, having received dividends under their commissions:—*Held:* entitled to prove under a commission against the vendees, who had not indorsed the bills, the deficiency, as a debt: till that should be ascertained, a claim & dividends reserved for the whole.—*Ex p.* BLACKBURNE (1804), 10 Ves. 204; 32 E. R. 823, L. C.

Annotations:—**Folld.** *Re* Brown, *Ex p.* Rathbone (1818), 3 Madd. 134. **Refd.** Rose *v.* Edwards (1836), 1 M. & W. 734. **Mentd.** Nicholl *v.* Thomas (1850), 2 Rob. Eccl. 157.

2438. —— ——.]—A. being indebted to B. gave him a cheque upon his bankers to pay him in a bill at three months. The bankers drew a bill for the amount upon their correspondents in London, who accepted it. The drawers & acceptors became bkpt., & B. proved & received a dividend under both commissions:—*Held:* B. was entitled to prove his debt also under A.'s commission.—*Re* BROWNE, *Ex p.* RATHBONE (1818), Buck, 215; 3 Madd. 134; 56 E. R. 459.

2439. Bankruptcy of vendor—Misrepresentation as to title—Special damage.]—A. sold a ship to B. with a covenant that he had a good title, though in fact he had none. Afterwards A. became a bkpt., & B. sustained damage by paying the value of the ship to the true owner. In an action on the covenant by B. against A. stating the special damage:—*Held:* B.'s certificate was no bar.—HAMOND *v.* TOULMAN (1798), 7 Term Rep. 612; 101 E. R. 1159.

Annotation:—**Refd.** Green *v.* Bicknell (1838), 8 Ad. & El. 701.

2440. —— Failure to deliver—Liquidated damages provided for.]—Bkpt. undertook to supply a creditor, who was under pecuniary engagements for him, with five pieces of cloth per week, or "to forfeit & pay £10 per piece, as liquidated penalty for every piece deficient." Bkpt. made such frequent default in the regular supply of the cloth, that he incurred penalties to the amount of £3,870, which the creditor claimed to prove, although no specific damage was alleged to have been sustained by him by the non-performance of the agreement, & the only balance really due to him was £48 18*s.* 6*d.*—*Held:* this was a claim for unliquidated damages founded on a penalty, & was not the subject of proof.—*Re* EVANS, *Ex p.* MACLEAN (1842), 2 Mont. D. & De G. 564; 6 Jur. 609, Ct. of R.

2441. —— —— Effect of 1861 Act. s. 153.]—A trader, who had contracted to deliver oil in Jan., executed on Jan. 30 a deed of assignment for the benefit of his creditors, the date of the deed being equivalent to that of an adjudication in bkpcy. The purchaser claimed to be admitted to prove against the trust estate in respect of damages sustained by reason of the non-delivery of the oil:—*Held:* the above sect. only applied to cases in which the cause of action was complete before the adjudication, as at the date of the deed there was an interval of time, during which debtor might have delivered the oil, the proof was rightly rejected.—*Re* MOOR'S ASSIGNMENT, *Ex p.* MENDEL (1864), 1 De G. J. & Sm. 330; 3 New Rep. 546; 33 L. J. Bcy. 14; 9 L. T. 793; 10 Jur. N. S. 189; 12 W. R. 451; 46 E. R. 133, L. C.

Annotations:—**Distd.** *Re* Thompson, *Ex p.* Wilmot (1867), 2 Ch. App. 795, L. C. & L.JJ. **Apld.** Selby *v.* Greaves (1868), L. R. 3 C. P. 594. **Consd.** Kellock *v.* Enthoven (1873), L. R. 8 Q. B. 458. **Apprvd. & Folld.** Kellock *v.* Enthoven (1874), L. R. 9 Q. B. 241, Ex. Ch. **Refd.** *Re* Moore & Thomas, *Ex p.* Beer (1868), 18 L. T. 418.

PART VIII. SECT. 4, SUB-SECT. 3.—B.

2440 i. *Bankruptcy of vendor—Failure to deliver.*]—Insolvent bought a farm & applt. agreeing to join him in business there, bought & paid him for one-fifth share in the farm. The insolvent having failed to pay the vendor the balance of purchase-money, the farm was sold in execution. Shortly afterwards insolvent surrendered. Applt. claimed to prove for the sum paid by him to insolvent:—*Held:* there was no partnership in the ownership of the farm, whatever there might have been in the business, & applt. was entitled to prove for damages for breach of insolvent's contract to sell him one-fifth of the farm.—CHISHOLM *v.* ALDERSON'S TRUSTEE, 2 Buch. A. C. 34.—**S. AF.**

2440 ii. —— —— *After part payment of purchase-money.*]—Where the estate of the vendor has been sequestrated after payment of part of the purchase price, & before transfer *coram lege loci*, the dominium vests in the master of the Supreme Ct., &, ultimately, in the insolvent's trustee for the benefit of creditors. The purchaser, in such circumstances, has merely a personal claim against the estate for damages sustained by him owing to the non-fulfilment of the vendor's undertaking to perfect the sale by making legal transfer & for restitution of the price, & is entitled for such personal claim to rank concurrently only.—HARRIS *v.* BUISSINNE'S TRUSTEE (1840), 2 Men. 105.—**S. AF.**

2442. —— —— Proof for loss.]—A trader entered into a contract to deliver goods at a stated time at a specified price. He performed part of the contract, but before the time or times for the performance of the remainder he petitioned under 1849 Act, s. 211 *et seq.*, but no arrangement being effected, he was adjudicated bkpt. on that petition. In the account of debts filed, he inserted a sum as due from him for loss on the unfulfilled parts of the contract. A proof was tendered by the purchaser of the goods, for the amount (less than that specified by bkpt.) of the loss by reason of the non-delivery of the goods :—*Held :* the admission of the debt by bkpt. in his account was evidence of a debt as against the assignee, & the purchaser was entitled to prove for the amount he claimed.—*Re* LAWFORD, *Ex p.* HARRISON (1856), 26 L. J. Bcy. 30 ; 28 L. T. O. S. 197 ; 3 Jur. N. S. 228 ; 5 W. R. 193, L. JJ.

Annotations :—**Expld.** Monk *v.* Sharp (1857), 2 H. & N. 540. **Mentd.** *Re* Robinson & Robson, *Ex p.* Robinson's Assignees *v.* Robson (1858), 32 L. T. O. S. 230.

2443. —— —— —— Certain goods not within contract.]—Bkpt., a seed crusher, traded under the firm of A. & Co., & imported large quantities of linseed from Calcutta in bags, which, when emptied, were called "gunny bags." They were articles of commerce, sold by bkpt. separate from the seed, though not usually delivered until the seed was used. The following contract was entered into between applt., a merchant and sack manufacturer, & bkpt. : "We beg to inform you that we accept your offer of 8½ net cash for all the double Calcutta gunny bags we may have to receive during the next twelve months, say from June 1, 1862 to June 1, 1863, taking them as they may arrive, damaged or sound, of which please take a note, & hand us your acknowledgment of this. A. & Co." Between the dates mentioned in the contract, & before the bkpcy., bkpt. himself or his brokers, received sixteen thousand three hundred and seventeen of such bags, of which five thousand three hundred and eighty-one were delivered to applt. Of the remaining ten thousand nine hundred & thirty-six, about nine thousand were sold in the market by the brokers before the bkpcy., with the seed, & about one thousand nine hundred had been delivered at bkpt.'s premises before the bkpcy., which took place on Feb. 14, 1863. Of these latter one thousand three-hundred were empty & the rest full. Applt. claimed £249 7*s.* 3*d.* as the amount of damages & loss sustained by him by reason of the non-delivery of the bags, the value of the bags having risen since the date of the contract & fallen since the bkpcy. :—*Held :* as to the one thousand three hundred bags, they did not come within the contract, & with regard to the nine thousand, which in reality never became bkpt.'s property at all, as bkpt. had not paid for them or their contents, applt. was not entitled to prove in respect of any damages for their non-delivery.—*Re* ALT, *Ex p.* CROWTHER (1863), 9 L. T. 249, L. C.

2444. —— —— —— Method of calculation in continuing contracts.]—A claim for damages in respect of loss of supposed profit, calculated upon an estimated average arising out of a breach of contract for non-delivery of coals contracted for, there being no evidence before the ct. of the existence of any actual contract of resale, is not provable under 1861 Act, s. 153.

A contract for the delivery of a large quantity of coals, ranging over a period of sixteen months, at the rate of a certain number of tons per month, cannot be split up into so many monthly contracts, but must be read as one entire contract upon a claim to prove for unliquidated damages upon a breach of contract.

Unliquidated damages for breach of contract are to be calculated not merely to the date of the adjudication, but prospectively upon the whole contract.—*Re* MOORE & THOMAS, *Ex p.* BEER (1868), 18 L. T. 418.

2445. —— —— —— ——.]—A manufacturer contracted to sell to a co. one hundred & fifty tons of iron at a specified price per ton, delivery to be twenty tons per month. The deliveries were not duly made under the contract, & the vendor filed a petition for liquidation by arrangement. At that time a considerable quantity of iron remained to be delivered, & the market price of iron had risen very much. In some cases the co. had bought iron in the market to supply the deficiency in the monthly deliveries, but it did not appear that any actual request had been made by the vendor for the postponement of the deliveries :—*Held :* the co. could prove only for the differences between the contract price of the iron & the market prices of the days when the respective deficient deliveries were made.—*Re* VOSS, *Ex p.* LLANSAMLET TIN PLATE CO. (1873), L. R. 16 Eq. 155.

2446. —— —— —— Whether damage ascertainable.]—H. entered into a written agreement with S. & A. to supply them with steam-power for any looms that might be put up in their weaving shed for a term of twenty-one years, at a fixed annual rent per loom payable in advance. S. & A. assigned their weaving shed & the benefit of the agreement to W. H. mtged. his mill, which contained the steam-power, & filed a petition for liquidation by arrangement, under which a trustee was appointed. The mtgee. took possession of the mill & repudiated the agreement. W. was, in consequence, obliged to obtain steam-power for his looms at a much higher cost, & he claimed to prove for the injury which he had sustained :—*Held :* the damages sustained by the owner of the weaving shed were such as could be fairly estimated, & W. was entitled to prove for them.—

2447 i. —— *Failure to make title—Proof for amount paid in paying off mortgage.*]—Deft. conveyed land to A., with a covenant for title, which was broken by the existence of a mtge., which A. was obliged to pay :—*Held :* the amount so paid was liquidated damages, & provable under Bkpt. Act, 5 Vict. c. 43.—CUNNINGHAM *v.* SCOULLAR (1895), 4 All. 385 ; 9 N. B. R. 385.—**CAN.**

2447 ii. —— ——.]—Declaration : first count, on the covenant for right to convey in a deed of three lots of land by deft. to pltfs. alleging that at the time of making the conveyance, deft. had granted one of the lots to S. Second count, on the covenant for quiet possession in the same deed. Breach, that before making it deft. had mortgaged one of the lots to S. in fee, & afterwards S. proceeded against pltfs. in Ch. & foreclosed his mtge., by which pltfs. lost such lot. Third count, that deft. being possessed of a lot of land, mortgaged it to S. for £258 in fee, & afterwards conveyed his equity of redemption in that & other lots to pltfs. in fee, for $22,400, before then advanced by pltfs. to deft., & in the conveyance covenanted to pay off the mtge. to S., & indemnify pltfs. against it, but that he neglected to do so, & S. obtained a decree of foreclosure against pltfs., whereby they lost their security & the land & were put to costs. Plea : that after the time when deft. was alleged to have become indebted & liable to pltfs., & after 1864 Act, deft. made an assignment under it, & in his schedule the alleged claim of pltfs., which was then, if they ever had any claim, provable against deft.'s estate, was included, & that afterwards deft. duly obtained an absolute discharge under the Act from the claim of his creditors, including pltfs., which was duly confirmed : —*Held :* plea bad, for pltfs.' claim could not have been proved against deft.'s estate, not being a debt due & payable, or due but not then payable, nor upon a contract dependent on a condition or contingency which had not happened before the first dividend, but for unliquidated damages.—BURROWES *v.* DE BLAQUIERE 1874), 34 U. C. R. 498.—**CAN.**

Sect. 4.—What debts are provable and for what amount: Sub-sect. 3, B. & C.]

Re HOYLE, *Ex p.* WATERS (1873), 8 Ch. App. 562 ; 28 L. T. 757 ; 21 W. R. 554, L. J.

Annotations :—**Consd.** Hardy *v.* Fothergill (1888), 13 App. Cas. 351, H. L. **Refd.** Chaplin *v.* Hicks, [1911] 2 K. B. 786, C. A. **Mentd.** *Re* Wood, *Ex p.* Naden (1874), 30 L. T. 743, C. A. ; *Re* Blakemore, *Ex p.* Blakemore (1877), 36 L. T. 783, C. A.

2447. —— Failure to make title—Proof for principal, interest, & costs incurred in paying off mortgage.]—A liability in respect of a breach of covenants for title, contained in a purchase-deed arises immediately upon the execution of the deed & where the bkpcy. of the vendor occurred after the execution of the purchase-deed, but before the amount of damage sustained by the purchaser was ascertained :—*Held :* the latter was entitled to prove for the amount.

D. mtged. lands in fee to W. for £1,000, but fraudulently retained the title-deeds & a portion of the property. He afterwards sold & conveyed such portion for £675 to E., & entered into covenants for title, & delivered over the title-deeds to him. D. afterwards became bkpt., & W. instituted a foreclosure suit, in which he obtained a decree, which was affirmed, on appeal. E. paid the principal & interest, & costs, & tendered a proof for the amount against the estate of bkpt. :—*Held :* he was entitled to prove for the principal & interest, & costs up to & including the original hearing, but not for the costs of the appeal.—*Re* HUGHES, *Ex p.* ELMES (1864), 4 New Rep. 3 ; 33 L. J. Bcy. 23 ; 10 L. T. 314 ; 12 W. R. 778, L. C.

C. Leases.

See, now, 1914 Act, ss. 33 (4), 35, Sched. II., r. 20.

2448. Proof by landlord—Against tenant—For rent.]—If bkpt. takes a lease & covenants to pay rent, & is then stripped of all his property by his bkpcy., so that he had no fund to which he can resort, yet he is liable for rent in an action on his covenant made before the bkpcy. (KENYON, C.J.).—HAMOND *v.* TOULMAN (1798), 7 Term Rep. 612 ; 101 E. R. 1159.

Annotation :—**Mentd.** Green *v.* Bicknell (1838), 8 Ad. & El. 701.

2449. —— —— For failure to reconvert premises.]—A. let to B., as tenant from year to year, premises adjoining other premises occupied by B. About three years later, A. permitted B. to make a communication through the party-wall, & to make other alterations, upon condition that B. should, at the termination of his tenancy, restore the premises to their original state. About seven years later, B. became bkpt., & gave notice to A. that he would deliver up possession of the premises, under 1849 Act, s. 145, the assignees having declined to take them :—*Held :* the damages resulting from the non-compliance with the conditions upon which the permission to alter was given, did not constitute "a liability to pay money upon a contingency," within s. 178, & the condition or agreement above specified, to restore the premises to their previous state, was not a condition or agreement within s. 145.—MAPLES *v.* PEPPER (1856), 18 C. B. 177 ; Saund. & M. 142 ; 25 L. J. C. P. 243 ; 27 L. T. O. S. 68 ; 20 J. P. 279 ; 2 Jur. N. S. 739 ; 4 W. R. 480 ; 139 E. R. 1334.

Annotations :—**Refd.** Warburg *v.* Tucker (1858), E. B. & E. 914 ; Hopkins *v.* Thomas (1860), 7 C. B. N. S. 711 ; Betteley *v.* Stainsby (1867), L. R. 2 C. P. 568 ; *Re* Kelson Tritton, *Ex p.* Wiseman (1871), 7 Ch. App. 35, L. JJ.

2450. —— —— For dilapidations.]—The landlord of a house occupied by bkpt., under a lease, which the assignees, declining to accept, have given up to the landlord, is entitled to prove for dilapidations ascertained by a surveyor, named by both parties.—*Re* BARNARD & ROSENTHALL (1862), 5 L. T. 806.

2451. —— —— Difference between agreed & obtainable rent.]—The owners of houses entered into an agreement with H. to grant him a lease of the premises for ten years, at an annual rent of £500. After the first year H. filed a petition for liquidation by arrangement. The trustee under the liquidation disclaimed the agreement under 1869 Act. s. 23, & the lessors claimed to prove as creditors for the injury they had sustained "by the operation of the sect." :—*Held :* they were entitled to prove, & the measure of the injury sustained was the difference between the rent to be paid under the agreement & what they could obtain for the property.—*Re* HIDE, *Ex p.* LLYNVI COAL & IRON CO. (1871), 7 Ch. App. 28 ; 41 L. J. Bcy. 5 ; 25 L. T. 609 ; 20 W. R. 105, L. JJ.

Annotations :—**Refd.** Hopkinson *v.* Lovering (1883), 11 Q. B. D. 92. **Mentd.** *Re* Hoyle, *Ex p.* Waters (1873), 8 Ch. App. 562, L. J. ; Harding *v.* Preece (1882), 9 Q. B. D. 281 ; Morgan *v.* Hardy, Fothergill, Third Party (1887), 35 W. R. 588, C. A. ; Hardy *v.* Fothergill (1888), 13 App. Cas. 351, H. L. ; *Re* McMahon, Fuller *v.* McMahon (1899), 81 L. T. 715.

2452. —— —— —— Amount necessary for repairs.]—A lease of a house for twenty-one years, at a rent of £130 a year, was determinable by the lessee at the end of the first seven or fourteen years of the term on his giving six months' previous notice in writing to the lessor, & paying the rent & performing the covenants up to the day of the term being determined. Near the end of the sixth year of the term the lessee filed a liquidation petition. The trustee in the liquidation disclaimed the lease. There

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PART VIII. SECT. 4, SUB-SECT. 3. —C.

2448 i. *Proof by landlord—Against tenant—Damages for holding over.*]—A claim for damages against an overholding tenant for double the yearly value of the land under 4 Geo. 2, c. 28, s. 1, is an unliquidated claim, & is not provable against an estate in the hands of an assignee for creditors under R. S. O. 1897, s. 147.—MAGANN *v.* FERGUSON (1898), 29 O. R. 235.—**CAN.**

2448 ii. —— —— *For future rent.*]—Pltf. leased a store to the C. Co. by lease under Short Forms of Indenture Act, for a term certain at a rent payable monthly. Before the expiration of the term the co. transferred all its goods, chattels & book accounts to deft. as trustee for creditors. The lease remained in force & pltf. declined to exercise his option of declaring it void although the C. Co. vacated the premises. Pltf., who was one of the creditors named in the trust agreement, claimed to rank as a creditor for all the rent unpaid of the total rent reserved for the entire term :—*Held :* he was not a creditor in respect of rent which has not become due & payable by effluxion of time when the trust for creditors was created.—GARDNER *v.* NEWTON (1916), 33 W. L. R. 949 ; 10 W. W. R. 51 ; 26 Man. L. R. 251.—**CAN.**

2448 iii. —— —— *For acceleration rent.*]—Pltf. leased premises to L. by lease in writing, by which L. covenanted to make certain repairs & alterations in the premises demised. Nine months later, & before the work had been done by L., he made an assignment for the benefit of his creditors to M., the official assignee, of all his property except property of leasehold tenure, which he declared he would stand possessed of upon trust to convey, etc., as directed by the assignee. The assignee in pursuance of an arrangement with pltf. continued in possession for two months, paying an occupation rent as agreed upon with pltf. :—*Held :* pltf. was entitled to prove for a further sum of one month's rent as a part of the acceleration rent provided for the lease.—CRISTALL *v.* LONEY & MACKINNON (1916), 33 W. L. R. 563 ; 9 W. W. R. 1205.—**CAN.**

2451 i. —— —— *Difference between agreed & obtainable rent.*]—Where the official assignee disclaims, the lessor may prove for the difference between the present letting value of the premises & the rent payable under the lease.—*Re* PAULIN, *Ex p.* INGLIS (1886), 4 N. Z. L. R. 338.—**N.Z.**

was evidence that the house could only be let at a diminished rent :—*Held :* the lessor was entitled to prove in the liquidation for the diminution in the rent up to the end of the seventh year of the term, & the amount necessary to put the house in repair.—*Re* McEWAN, *Ex p.* BLAKE (1879), 11 Ch. D. 572 ; 40 L. T. 859 ; 43 J. P. 556 ; 27 W. R. 901, C. A.

Annotations :—**Refd.** *Re* Carruthers, *Ex p.* Tobit (1895), 2 Mans. 172 ; *Re* New Oriental Bank Corpn., [1895] 1 Ch. 753.

See, also, No. 2464, *post.*

2453. —— —— Who assigns lease.]—Contracts which are not put an end to by the bkpcy., such as the liability of a lessee who has assigned his lease, cannot form the subject of proof, as the covenants have not been put an end to, & it is impossible properly to estimate whether an assignee would at any future period commit a breach, or if he did, whether he would pay for it himself (MELLISH, L.J.).—*Re* HOYLE, *Ex p.* WATERS (1873), 8 Ch. App. 562 ; 28 L. T. 757 ; 21 W. R. 554, L. J.

Annotations :—**Refd.** Hardy *v.* Fothergill (1888), 13 App. Cas. 351, H. L. **Mentd.** *Re* Wood, *Ex p.* Naden (1874), 30 L. T. 743, C. A. ; *Re* Blakemore, *Ex p.* Blakemore (1877), 36 L. T. 783, C. A. ; Chaplin *v.* Hicks, [1911] 2 K. B. 786, C. A.

See, also, No. 2463, *post.*

2454. —— —— For proportionate part of rent up to date of bankruptcy.]—1869 Act, s. 35, gives the landlord a right of proof for the proportionate part of the rent up to the date of the adjudication. —*Re* SOLOMON, *Ex p.* DRESSLER (1878), 9 Ch. D. 252 ; 48 L. J. Bcy. 20 ; 39 L. T. 377 ; 43 J. P. 23 ; 27 W. R. 144, C. A.

Annotations :—**Mentd.** Wilson *v.* Wallani (1880), 5 Ex. D. 155 ; Titterton *v.* Cooper (1882), 9 Q. B. D. 473, C. A. ; Hopkinson *v.* Lovering (1883), 11 Q. B. D. 92.

2455. —— —— For damages for breach of covenant.]—On the bkpcy. of a tenant of land, the only remedy of the landlord, in respect of breaches of covenant committed by the tenant during his occupation, is to prove for damages in the bkpcy. ; the landlord has no right of set-off as against money due by him to the trustee for severed crops.—*Re* MORRISH, *Ex p.* HART DYKE (SIR W.) (1882), 22 Ch. D. 410 ; 52 L. J. Ch. 570 ; 48 L. T. 303 ; 31 W. R. 278, C. A.

Annotations :—**Mentd.** Lybbe *v.* Hart (1885), 54 L. J. Ch. 860, C. A. ; Ware *v.* Booth (1894), 10 T. L. R. 446 ; Serjeant *v.* Nash Field, [1903] 2 K. B. 304, C. A.

2456. —— —— For unliquidated damages in respect of disclaimer—Proof too late.]—The lessee of a house & premises having filed a liquidation petition early in Aug., 1881, the trustee on Nov. 24 disclaimed the lease. The lessor tendered a proof on Dec. 14 in respect of rent & dilapidations for £117 14*s.* 4*d.*, which was admitted, & also claimed unliquidated damages sustained by reason of the disclaimer, but naming no amount. At a meeting of the creditors held on Jan. 6, 1882, a dividend of 1*s.* 6*d.* in the pound was declared payable on the 20th, & at the same meeting a resolution was passed to release the trustee as from that day. The lessor on Mar. 4 sent in a second proof for £309 7*s.* 6*d.* in respect of unliquidated damages, & claimed to be paid the dividend thereon :—*Held :* in the absence of fraud the remedy of the lessor was by an action at law outside the bkpcy., as if any default had been made by the trustee, his liability for such default had been discharged by the release, no fraud was alleged against him. *Semble :* a creditor, who, with full knowledge of his rights, neglects to assert them until after the estate has been fully administered & the trustee released, comes too late to prove for unliquidated damages & claim a dividend thereon.—*Re* GILL, *Ex p.* BARNARD (1882), 46 L. T. 824.

2457. —— —— Lease with proviso for determination on bankruptcy.]—A lease contained a proviso to the effect that if the lessee should become bkpt. or insolvent, the lease should "cease, determine, & be void." The lessee having become bkpt., the trustee in the bkpcy. rejected a proof put in by the lessors founded on such lease, upon the ground that on the bkpcy. the lease became void :—*Held :* the above provision must be construed to mean void at the election of the lessor, & the rejection of the proof by the trustee was wrong, & must be reversed.—*Re* TICKLE, *Ex p.* LEATHER SELLERS' CO. (1886), 3 Morr. 126.

2458. —— —— Under covenant to rebuild insured premises—Destroyed by fire.]—Debtor was

2454 i. —— —— *For proportionate part of rent up to date of bankruptcy.*]—Upon disclaimer the lessor may prove for an apportioned part of the rent which accrued due between the last gale-day & the date of adjudication.—*Re* LEEKS, [1902] 2 I. R. 339 ; 36 I. L. T. 74.—**IR.**

2455 i. —— —— *Damages for breach of covenant to repair.*]—Pltf. leased premises to L. who covenanted to make repairs. Before the work had been done by L., he made an assignment for the benefit of his creditors :—*Held :* pltf.'s claim for unliquidated damages for L.'s failure to make the repairs could not be treated as rent, & in respect of this claim pltf. was not a creditor within the meaning of Assignments Act, Alberta.—CRISTALL *v.* LONEY & MACKINNON (1916), 33 W. L. R. 563 ; 27 D. L. R. 717.—**CAN.**

2455 ii. —— —— ——.]—Damages for breach of covenant to keep in repair do not constitute a provable debt unless & until assessed under Bkpcy. (Ireland) Amendment Act, 1872, s. 46.—CINNAMOND *v.* M'CURDY, [1909] 2 I. R. 185.—**IR.**

2456 i. —— —— *Damages in respect of disclaimer.*]—E. agreed to rent certain premises for ten years on condition that certain improvements were made. After the alterations were completed E. entered, & became insolvent. The inspectors cancelled the lease, & delivered up the premises at the end of the current year, whereupon the landlord claimed to be allowed damages under Insolvent Act, 1875, ss. 70–73 :—*Held :* the landlord was entitled to prove for damages for the cancellation.—*Re* ERLY (1878), 2 A. R. 617.—**CAN.**

2456 ii. —— —— —— —— *Costs of order revesting in lessor.*]—Where the official assignee disclaims a lease the reversioner is not entitled out of the estate to the costs of an order revesting the property in him, but if he sustains damage by the revesting of the property he may prove for the costs of the proceedings.—*Re* ROUGHTON, *Ex p.* COMMERCIAL PROPERTY, FINANCE, & AGENCY CO., LTD. (1890), 8 N. Z. L. R. 510.—**N.Z.**

e. —— —— —— *Damages in respect of unexpired portion of term.*]—A. entered on premises under an executory agreement for a lease for fourteen years. During the term A. became bkpt. The official assignee disallowed proof by the lessor against A.'s estate in bkpcy. for damages in respect of the unexpired portion of the term :—*Held :* the proof must be admitted.—*Re* ALEXANDER, *Ex p.* GRAINGER (1893), 11 N. Z. L. R. 682.—**N.Z.**

2457 i. —— —— *Lease with proviso for determination on bankruptcy.*]—A farming lease provided that in the event of the tenant's bkpcy. the lease should *ipso facto* become void & that all the tenant's rights thereunder should be forfeited to the landlord. On the tenant's sequestration his trustee intimated to the landlord that the lease had come to an end, but arranged to remain on the farm for a certain time. The landlord let the farm at a reduced rent from the end of the time arranged for, & subsequently lodged a claim for the loss occasioned by the tenant failing to fulfil his obligations under the lease :—*Held :* the landlord could rank for the claim ; the effect of the lease was to give him an option to put an end thereto, & he had not acquiesced in the tenant's renunciation of the lease so as to bar his claim.—BIDOULAC *v.* M'KIDD (SINCLAIR'S TRUSTEE) (1889), 17 R. (Ct. of Sess.) 144 ; 27 Sc. L. R. 93.—**SCOT.**

f. —— —— *Against one of two joint tenants—Whose trustee disclaims.*]—An agricultural lease, of which the terms excluded assignees, contained a declaration that, in the event of either of the joint tenants granting a trust deed for behoof of creditors, the lease should, in the option of the landlord, become *ipso facto* null & void. Before the expiry of the lease the tenants executed a trust-deed for behoof of creditors, & the trustee declined to take up the lease. One of the tenants was subsequently sequestrated, but the other intimated to the landlord his intention of continuing the tenancy under the lease, & the landlord refused to accept him as tenant :—*Held :* a claim by the landlord to rank on the trust-estate for damages, representing future rents under the lease, was invalid.—TAIT (BUTTERCASE & GEDDIE'S TRUSTEE) *v.* GEDDIE (1897), 34 Sc. L. R. 844.—**SCOT.**

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the lessee of premises, which were destroyed by fire. The lessor received from an insurance co. a sum of money in full discharge of his rights under the policy. Debtor subsequently became bkpt., & the lessor proved under debtor's covenant to rebuild the demised premises:—*Held:* credit need not be given for the amount received from the insurance co., & there being no privity of contract between the co. & debtor, the rule as to proof against a surety on negotiable instruments had no application.—*Re* BLACKBURNE, *Ex p.* STROUTS (1892), 36 Sol. Jo. 668; 9 Morr. 249, D. C.

2459. —— Against assignee of lease—Restriction on further assignments—Loss on assignment without consent.]—A co. were assignees of a lease, containing a covenant by the lessee not to assign the demised premises without the lessor's previous licence & consent in writing not to be unreasonably withheld in case of a respectable & responsible person being offered as tenant. The co. went into voluntary liquidation, in which the liquidator, without the licence or consent of the lessor, assigned the lease without offering a responsible person as tenant:—*Held:* the lessor electing to avoid the lease could assess once for all the amount which he had lost by having an insolvent tenant instead of the co., & could prove for that amount in the liquidation, & was not bound to wait & prove for each quarter's rent as it fell due.—COHEN *v.* POPULAR RESTAURANT, LTD., [1917] 1 K. B. 480; 86 L. J. K. B. 617; 116 L. T. 477; 33 T. L. R. 107.

2460. Proof by tenant—Against sub-lessee—On obligation of latter to indemnify for rent.—A declaration stated that by indenture dated July 11, 1761, which recited a former indenture of June 14, 1760, whereby J. C. demised to pltf. & deft., then brewers & co-partners, a malthouse & other buildings at Knightsbridge, for fifteen years & three-quarters, at the yearly rent of £18, pltf. released to deft. all his estate & interest in the same malthouse & premises, for the residue of the term, & that deft. covenanted with pltf., by such latter indenture, that he would pay the yearly rent of £18 & perform the covenants on the lessee's part, & indemnify & save harmless plft. on account thereof, all which he had neglected & refused to do:—*Held:* pltf. could not have been admitted under deft's. commission, to have proved that as a debt, for it was not a debt at the time of bkpcy. & might, perhaps, never have been one.—MAYOR *v.* STEWARD (1769), 4 Burr. 2439; 98 E. R. 279.

Annotations:—**Refd.** *Re* Colnaghi, *Ex p.* Marks (1838), 2 Jur. 398. **Mentd.** Wadham *v.* Marlow (1784), 4 Doug. K. B. 54; Mills *v.* Auriol (1790), 1 Hy. Bl. 438; Onslow *v.* Corrie (1817), 2 Madd. 330.

2461. —— Against assignee of lease—Bond forfeited before bankruptcy.]—One of two assignees of a lease gave a bond to the lessee, by whom the assignment was made, conditioned for the payment of the rent to the lessor, & the performance of the other covenants in the lease, & for indemnifying the lessee against the non-performance of the covenants. Both the assignees of the lease having become bkpt., & the bond having been forfeited before the bkpcy.:—*Held:* (1) the lessee could not prove, in respect of the penalty, under the commission, the bond being incapable of valuation; (2) he could not prove for the damages which had accrued previous to the bkpcy., not having paid them to the lessor; (3) 49 Geo. 3, c. 121, s. 19, did not apply to cases between the lessee & the assignee of the lease.—TAYLOR *v.* YOUNG (1820), 3 B. & Ald. 521; 106 E. R. 752.

Annotations:—**Consd.** Manning *v.* Flight (1832), 3 B. & Ad. 211. **Apld.** Lane *v.* Burghart (1841), 3 Man. & G. 597. **Consd.** Betteley *v.* Stainsby (1862), 12 C. B. N. S. 477. **Refd.** Clements *v.* Langley (1833), 5 B. & Ad. 372; Lyde *v.* Mynn (1833), Coop. *temp.* Brough. 123; *Re* Colnaghi, *Ex p.* Marks (1838), 3 Deac. 133, Ct. of R. **Mentd.** Marchman *v.* Brookes (1864), 2 H. & C. 908.

2462. —— —— Contingent liability for rent during remainder of lease.]—The assignee of a lease of premises having become bkpt., & rent being in arrear, judgment for same was recovered against his assignor, who was under covenant to pay such rent. The assignor thereupon proved against the estate of bkpt. for the amount so paid, & also sought to prove in respect of his contingent liability for the rent during the time the lease had yet to run:—*Held:* the last-mentioned proof must be admitted, & an estimate must be made by the trustee in the bkpcy. of the value of the liability under 1883 Act, s. 37 (4).—*Re* HINKS, *Ex p.* VERDI (1886), 3 Morr. 218.

2463. —— —— —— On covenant to indemnify against breaches of covenants in lease—Whether liability ascertainable.]—In an assignment of a lease the assignee covenanted to indemnify the lessee against breaches of the covenants in the lease. Before the term expired the assignee filed a petition under 1869 Act, for liquidation by arrangement & obtained an order of discharge. The lessees made no claim in the liquidation in respect of the liability on the covenant for indemnity, nor was that liability scheduled by the assignee. On the expiration of the term damages were recovered against the lessees for breach of a covenant to deliver up the demised property in repair. The lessees having claimed indemnity from the assignee:—*Held:* the claim was barred by the liquidation proceedings under s. 49, the contingent liability to indemnify being a debt provable in the liquidation in the absence of an order under s. 31 declaring it incapable of being fairly estimated.—HARDY *v.* FOTHERGILL (1888), 13 App. Cas. 351; 58 L. J. Q. B. 44; 59 L. T. 273; 53 J. P. 36; 37 W. R. 177; 4. T. L. R. 603 H. L.

Annotations:—**Distd.** *Re* New Oriental Bank Corpn., [1895] 1 Ch. 753. **Apld.** *Re* Perkins, Poyser *v.* Beyfus, [1898] 2 Ch. 182, C. A. **Distd.** *Re* Reis, *Ex p.* Clough, [1904] 2 K. B. 769, C. A. **Refd.** Flint *v.* Barnard (1888), 22 Q. B. D. 90, C. A.; Barnett *v.* King (1890), 63 L. T. 501, C. A.; Wolmershausen *v.* Gullick, [1893] 2 Ch. 514; *Re* Midland Coal Coke & Iron Co., Craig's Claim, [1895] 1 Ch. 267, C. A.; *Re* Panther Lead Co., [1896] 1 Ch. 978; Kerr *v.* Kerr, [1897] 2 Q. B. 439, D. C.; *Re* McMahon, Fuller *v.* McMahon, [1900] 1 Ch. 173; Chaplin *v.* Hicks (1911), 27 T. L. R. 244; Victor *v.* Victor, [1912] 1 K. B. 247, C. A. **Mentd.** *Re* Browne & Wingrove, *Ex p.* Ador, [1891] 2 Q. B. 574, C. A.; *Re* Lind, Industrial Finance Syndicate *v.* Lind, [1915] 2 Ch. 345, C. A.

2464. —— —— Rent during time for repairing dilapidations—Diminution of letting value.]—

2460 i. *Proof by tenant—Against sub-lessee—On obligation of latter to indemnify.*]—Lessees of a coalfield entered into a sublease, which provided that the sublessees should pay an annual dead rent, & should keep the mines drained (which the principal lessees were bound to do by their lease), & that the sublessees might, in certain circumstances, surrender the sublease. The sublessees were sequestrated, & the trustee in the sequestration declined to take up the sublease. The lessees lodged a claim in the sequestration (1) for the capitalised value of the dead rent for the unexpired portion of the sublease & (2) for the expense of keeping the mines drained during the same period:—*Held:* in assessing the damage, the contingency that the sublease might have been brought to an end must be taken into account, but, subject to a deduction for this contingency & the possibility of a rise in the price of coal, the lessees' claim fell to be admitted to a ranking.—EBBW VALE STEEL, IRON & COAL CO., LTD. *v.* WOOD'S TRUSTEE (1898), 25 R. (Ct. of Sess.) 439; 35 Sc. L. R. 329. —**SCOT.**

Where the assignee of a repairing lease had become bkpt., & his trustee had disclaimed the premises, which had become depreciated in letting value, the ct. allowed the assignor under his covenant of indemnity to prove as damages (1) two quarters' rent from the date of disclaimer so as to allow him time to repair & re-let; (2) the diminution in letting value for the residue of the term; (3) the amount of the dilapidations.—*Re* CARRUTHERS, *Ex p.* TOBIT (1895), 2 Mans. 172; 15 R. 317.

2465. Proof by sub-tenant—Against tenant—For sum paid to release goods from landlord's distress.]—Pltf. rented a room of deft., who was tenant of the whole house under P., the owner. Deft.'s rent being in arrear P. put in a distress, & seized pltf's. goods. To obtain the release of his goods pltf. was obliged to pay £15 to P. Deft. then became bkpt., & obtained his order of discharge, subsequently to which pltf. commenced an action, to recover from deft. compensation for the injury & loss sustained by pltf. in consequence of deft. allowing the rent to be in arrear:—*Held:* the right of action was not barred by the discharge in bkpcy., as deft. was not liable, "by reason of any contract or promise, to a demand in the nature of damages," within 1861 Act, s. 153, so as to make the claim of pltf. provable under the bkpcy.—JOHNSON *v.* SKAFTE (1869), L. R. 4 Q. B. 700; 10 B. & S. 727; 38 L. J. Q. B. 318; 20 L. T. 909; 17 W. R. 1098.

Annotation:—**Refd.** Holmes *v.* Symons (1871), L. R. 13 Eq. 66.

2466. —— —— For loss of goods distrained by landlord.]—A declaration alleged that A. held & occupied premises of W. at a certain rent, & in consideration that B., at the request of A., had become tenant to him at a certain rent, A. promised B. to indemnify & save him harmless from the rent payable to W., & from & against any distress or action, costs, charges, damages, or expenses, by reason of the non-payment thereof, & alleged as a breach that A. did not indemnify & save harmless B., by reason whereof a distress was made by W. on his goods for rent in arrear by A., & they were sold to satisfy that rent, etc. To this A. pleaded that (1) after the supposed promise, & before the distress, he petitioned the Ct. of Bkpcy., was adjudged bkpt., & obtained his certificate, & the rent distrained for was due at the time of filing the petition, that B. was the tenant of A., & by reason of that tenancy was liable to W. for the rent due from A., concluding with an averment of the performance & happening of all things necessary to discharge A. from the action; (2) A. obtained his certificate, etc., & the promise was made, & B. became tenant to A. before the bkpcy. & petition; that the rent distrained for became due after the petition, but both it & the liability of A. to B. were at the time of the petition a liability to pay money upon a contingency which had not happened, & B.'s demand had not been then ascertained, concluding as the former plea:—*Held:* (1) the first plea was bad, as the facts therein stated did not render B. a surety, or liable for the debt of deft. within 1849 Act, s. 173; (2) the second plea could not be supported.—HOARE *v.* WHITE (1857), 29 L. T. O. S. 164; 3 Jur. N. S. 445.

2467. —— —— For difference between rent payable by tenant & that payable by sub-tenant.]—If bkpt. has granted an underlease of property demised to him, & the underlease is made at a rent less than the rent reserved by the original lease, the underlessee is, after a disclaimer of the original lease by the trustee in bkpcy., entitled to prove in the bkpcy. for the value of the difference between the two rents.—*Re* LEVY, *Ex p.* WALTON (1881), 17 Ch. D. 746; 50 L. J. Ch. 657; 45 L. T. 1; 30 W. R. 395, C. A.

Annotations:—**Mentd.** *Re* Clarke, *Ex p.* East & West India Dock Co. (1881), 17 Ch. D. 759, C. A.; *Re* Latham, *Ex p.* Glegg (1881), 19 Ch. D. 7, C. A.; East & West India Dock Co. *v.* Hill (1882), 22 Ch. D. 14; Harding *v.* Preece (1882), 9 Q. B. D. 281; *Re* Morrish, *Ex p.* Hart Dyke (1882), 22 Ch. D. 410, C. A.; Hill *v.* East & West India Dock Co. (1884), 9 App. Cas. 448, H. L.; Wood *v.* Hayes (1885), 1 T. L. R. 207; *Re* Cock, *Ex p.* Shilson (1887), 20 Q. B. D. 343; Heritable Reversionary Co. *v.* Millar, [1892] A. C. 598, H. L.; De Vesci *v.* O'Connell, [1908] A. C. 298, H. L.

D. Sums payable on Happening of Event which may or may not happen.

(a) Marriage Provisions.

2468. General statement.]—In cases where there has been a covenant with trustees by the husband to pay money immediately to be placed out at interest upon future & contingent trusts, if the husband becomes a bkpt. after the time the money is by the covenant payable to the trustees & before it is due on the future trusts, the trustees are to be admitted as creditors, & the ct. will do equity upon the covenant. So, where a future & contingent payment is to be made, & a judgment given in a penal sum to secure it, they are admitted creditors, though there be a contingent defeasance. The reason is that in both these cases the covenant might in the one be sued at law as broken, & execution on the judgment be taken out immediately on the other. But, where the security is by bond, the question has always turned upon this, whether the bond was forfeited at law, for, if so, the assignees can only be relieved upon the equitable terms against the penalty. The bonds described by the Act [of 7 Geo. 2] are bonds payable at a certain day & place; but a bond payable as to the interest at several days & as to the principal sum at a day future & uncertain is not within the Act, & the assignees will only be relieved upon equity being done according to the condition (LORD HARDWICKE, C.).—*Ex p.* WINCHESTER (1744), 9 Mod. Rep. 471; 1 Atk., at p. 116; 88 E. R. 581.

Annotations:—**Consd.** *Re* Rowlatt, *Ex p.* Rowlatt (1816), 2 Rose, 416; Murray *v.* Stair (1823), 2 B. & C. 82. **Refd.** *Ex. p.* Groome (1744), 1 Atk. 115; Hancock *v.* Entwisle (1789), 3 Term Rep. 435; Hodgson *v.* Bell (1797), 7 Term Rep. 97; Higinbotham *v.* Holme (1812), 19 Ves. 88; *Re* Williams, *Ex p.* Elder (1817), 2 Madd. 282; *Re* Gibbins, *Ex p.* Tindal (1832), 1 Deac. & Ch. 291; *Re* Cawood, *Ex p.* Shaw (1850), Fonbl. 159; Whitmore *v.* Mason (1861), 31 L. J. Ch. 433; **Mentd.** Wyllie *v.* Wilkes (1780), 2 Doug. K. B. 519; *Ex p.* Barker (1803), 9 Ves. 110.

2469. Obligation to pay if survived by wife.]—A. on his marriage gave a bond to leave his wife £500 or a third of his personal estate at her election. A. became bankrupt:—*Held:* the wife should come in as creditor on her bond, & what should be paid in respect thereof should be put

PART VIII. SECT. 4, SUB-SECT. 3.—D. (a).

2469 i. *Obligation to pay if survived by wife.*]—Prior to his marriage, a trader gave a bond to a trustee, & by marriage settlement of the same date, it was covenanted that the sum mentioned in the bond was to be payable only in the event of the wife surviving the husband, & also, that in case of the husband failing in his circumstances, but not otherwise, the trustee should sue on the bond; the husband became bkpt., the wife being still alive:—*Held:* the trustee ought not to be admitted a creditor.—*Re* MURPHY (1803), 1 Sch. & Lef. 44.—**IR.**

2469 ii. ——.]—Where a husband by ante-nuptial contract settled a sum of money on his wife to become hers, if she survived him, but if not, to revert to & form part of his estate, as a preferent claim, payable on his death or insolvency, & he became insolvent:—*Held:* the claim might be admitted as a contingent claim.—LEIGH'S TRUSTEES *v.* LEIGH (1881), 1 S. C. 75.—**S. AF.**

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out at interest, which was to be received by the creditors during bkpt.'s life, & the principal should be paid to the wife, if she survived him.—HOLLAND *v.* CALLIFORD (1710), 2 Vern. 662 ; 1 Eq. Cas. Abr. 54, pl. 2 ; 23 E. R. 1030.

Annotations :—**Consd.** Whitaker *v.* Hall (1822), 1 Gl. & J. 213. The authority of *Holland* v. *Calliford* may be questioned ; but there the debt due from bkpt. arose upon the same contract which entitled him to the money to be raised upon the estate (LEACH, V.-C.). **Refd.** *Re* Greenaway, *Ex p.* Greenaway (1740), 1 Atk. 113.

See 1914 Act, s. 42 (2).

2470. ——.]—A trader on marriage gave a bond to a trustee to secure £1,000 to the wife if she survived him. The trader became bkpt. :—*Held :* such debt should not be allowed, nor any reservation made for it, nor should it stop the distribution, as it might never be a debt ; but if the contingency happened before bkpt.'s estate were fully distributed, such creditor should come in.—*Ex p.* CASWELL, *Ex p.* CAZALET, *Ex p.* BATEMAN (1728), 2 P. Wms. 497 ; 24 E. R. 833 ; *sub nom. Ex p.* GAZALET, Mos. 28, 79, L. C.

Annotations :—**Consd.** *Re* Greenaway, *Ex p.* Greenaway (1740), 1 Atk. 113. **Dbtd.** *Ex p.* Groome (1744), 1 Atk. 115. **Refd.** *Ex p.* Michell (1751), 1 Atk. 120 ; Goddard *v.* Vanderheyden (1771), 3 Wils. 262 ; *Ex p.* Barker (1803), 9 Ves. 110 ; *Re* Gibbins, *Ex p.* Tindal (1832), 1 Deac. & Ch. 291.

2471. ——.]—A bond was granted by W., with condition that if the heirs, exors., & administrators of W. should pay to T. & P. or the survivor, £400 within two months after the death of W. in case his wife survived him, then the bond should be void. W. having become bkpt. & been discharged, died leaving his wife surviving :—*Held :* it being uncertain whether the bond would ever become due or not, it depending on two conditions which had not both happened at the time of the act of bkpcy., it was impossible to make such abatement as 7 Geo. 1, c. 31, directed, & the bond was not within the Act, & the estate of W. was not discharged therefrom by virtue of the discharge in bkpcy. obtained by W.—TULLY *v.* SPARKES (1728), 2 Ld. Raym. 1546 ; 1 Barn. K. B. 59, 79 ; 2 Stra. 867 ; 92 E. R. 503.

Annotations :—**Consd.** Hockrell *v.* Merry (1736), Lee *temp.* Hard. 262 ; *Ex p.* Groome (1744), 1 Atk. 115 ; *Ex p.* Winchester (1744), 9 Mod. Rep. 471. **Apld.** Chilton *v.* Whiffin (1768), 3 Wils. 13. **Consd.** *Ex p.* Barker (1803), 9 Ves. 110. **Refd.** *Ex p.* Gazalet (1728), Mos. 28 ; Goddard *v.* Vanderheyden (1771), 2 Bos. & P. 8, n. ; *Ex p.* Tindal (1832), 8 Bing. 402. **Mentd.** *Re* Greenaway, *Ex p.* Greenaway (1740), 1 Atk. 113 ; Crookshank *v.* Thompson (1741), 2 Stra. 1160 ; *Ex p.* Michell (1751), 1 Atk. 120 ; Paris *v.* Salkeld (1762), 2 Wils. 139.

2472. ——.]—Petitioner's husband before marriage gave her father a bond in the penalty of £600, conditioned for the payment of £300 to her in case she survived him. The husband had a commission of bkpcy. taken out against him, & died in ten days after. The ct., thinking it a doubtful case, whether she should or should not be admitted a creditor, did not give an absolute opinion, but on assignees consenting she should come under the commission for £150, ordered her a dividend accordingly.—*Re* GREENAWAY, *Ex p.* GREENAWAY (1740), 1 Atk. 113 ; 26 E. R. 74.

Annotations :—**Refd.** *Ex p.* Michell (1751), 1 Atk. 120 ; Goddard *v.* Vanderheyden (1771), 2 Bos. & P. 8, n. ; *Ex p.* Tindal (1832), 8 Bing. 402.

2473. —— **Husband dying before any dividend made.**]—A husband, by articles previous to marriage, covenanted to leave his wife £600 in case she survived him ; he became a bkpt., & died before any dividend made :—*Held :* the wife could not be admitted a creditor under a commission against the husband.—*Ex p.* GROOME (1744), 1 Atk. 115 ; 9 Mod. Rep. at p. 471 ; 26 E. R. 75.

Annotations :—**Consd.** *Ex p.* Barker (1803), 9 Ves. 110 ; *Re* Rowlatt, *Ex p.* Rowlatt (1816), 2 Rose, 416. **Refd.** Goddard *v.* Vanderheyden (1771), 2 Bos. & P. 8, n. ; Hancock *v.* Entwisle (1789), 3 Term Rep. 435 ; Hodgson *v.* Bell (1797), 7 Term Rep. 97 ; *Re* Williams, *Ex p.* Elder (1817), 2 Madd. 282 ; *Re* Brown, *Ex p.* Turpin (1832), 1 Deac. & Ch. 120 ; *Re* Gibbins, *Ex p.* Tindal (1832), 1 Deac. & Ch. 291 ; *Re* Prior, *Ex p.* Young (1835), 4 Deac. & Ch. 645 ; *Re* Good, *Ex p.* Good (1850), 15 L. T. O. S. 50 ; *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, C. A. **Mentd.** Hardy *v.* Fothergill (1888), 13 App. Cas. 351, H. L.

2474. —— **Or by issue by her.**]—B. made provision in marriage articles for his wife, or, in case she should not survive him, to the use of her child or children. A commission of bkpcy. issued against B., who died on Apr. 1, 1749. On 28th of same month a dividend was made of 9*s.* in the pound. The comrs. having declined to admit the wife as a creditor without an order of the ct. :—*Held :* she should be admitted a creditor & to a dividend of 9*s.* in the pound.—*Ex p.* MICHELL (1751), 1 Atk. 120 ; 26 E. R. 79.

Annotations :—**Consd.** Goddard *v.* Vanderheyden (1771), 2 Bos. & P. 8, n. **Refd.** *Re* Gibbins, *Ex p.* Tindal (1832), 1 Deac. & Ch. 291.

2475. ——.]—Covenant in marriage articles that in case the wife should survive the husband, or he should leave any issue by her, his heirs, exors., & administrators, should raise £500, etc.—Upon a petition by the trustees to be admitted as creditors under a commission of bkpcy. against the husband :—*Held :* the debt was contingent, & not provable, though a warrant of attorney to confess judgment had been granted previous to the bkpcy., & judgment entered up.—*Re* NELSON, *Ex p.* JACOB (1759), 1 Eden, 174 ; 28 E. R. 651.

2476. ——.]—In Feb., 1772, A. covenanted by his marriage settlement for the payment of £2,000, in case his intended wife, or any issue of the marriage, should survive him. In 1803, a commission of bkpcy. issued against A., under which he obtained his certificate. In Feb., 1825, A. died, leaving issue of the marriage. In May, 1828, there being funds remaining for distribution amongst the creditors of A., a renewed commission was issued, & a final dividend advertised : —*Held :* 6 Geo. 4, c. 16, s. 56, was retrospective in its operation, &, although the event upon which the debt was contingent had happened after the commission issued, & before 6 Geo. 4, c. 16, came into operation, the sum of £2,000 was provable as a debt under the commission.—*Re* RUSSELL, *Ex p.* GRUNDY (1829), Mont. & M. 293 ; 8 L. J. O. S. Ch. 54, L. C.

Annotations :—**Distd.** *Re* Gibbins, *Ex p.* Tindal (1832), 1 Deac. & Ch. 291. **Consd.** *Re* Sudell, *Ex p.* Myers (1833), 2 Deac. & Ch. 251 ; *Re* Whitmore (1843), 3 De G. & Sm, 565. **Expld.** *Re* Foster, *Ex p.* Evans (1849), 13 Jur. 183. **Refd.** *Re* Aaron, *Ex p.* Lowe (1832), 1 L. J. Bcy. 54 ; *Re* Fox, *Ex p.* Marshall (1834), 3 Deac. & Ch. 120 ; South Staffordshire Ry. Co. *v.* Burnside (1850), 16 L. T. O. S. 415. **Mentd.** *Re* West, *Ex p.* Hooper (1834), 3 Deac. & Ch. 655.

2477. —— **Without issue—Cesser of husband's interest on bankruptcy.**]—By settlement previous to the marriage of bkpt., £6,000 stock, £3,000 of which was the fortune of the wife, was assigned to trustees in trust, to pay the dividends thereof to bkpt. for life, or until he should become bkpt., & from & after his decease, or from the time of his becoming bkpt., if the wife should be then alive, to pay the same to her for her support, & on her receipt, notwithstanding her coverture, the same, after the death of bkpt., to be in the nature of her jointure, & in bar of dower, & the trustees were thereby directed to stand possessed of a bond for £2,000, given by bkpt. to the trustees, in trust, if there should be no issue of the marriage, or, being such, all should die in the lifetime of bkpt., as therein mentioned, after the death of

bkpt., if the wife should survive, to raise the sum of £2,000, & pay the interest thereof to the wife for life, by way of increase to the provision therein before made for her in the nature of jointure, in the events therein-before mentioned; & in case of issue of the marriage living at the death of bkpt. the bond was to be delivered up to be cancelled :—*Held :* the wife living & no issue, the bond was not provable.—*Re* MACDONNELL, *Ex p.* TAAFFE (1821), 1 Gl. & J. 110.

Annotation :—**Refd.** *Ex p.* Tindal (1832), 8 Bing. 402.

2478. —— & if dower released.] — Bkpt., previous to his marriage, entered into a bond that in case his wife should survive him, & should within two months after his death, at the costs & charges of his heirs or devisees, release her dower, his heirs or exors. should, within three months after his death, pay to her £2,000. The wife survived bkpt., but did not within two months after his death release her dower, although she was always ready & willing to do so :—*Held :* the bond was not provable, as the contingency had not happened, & no value could be set upon it.—*Re* HARVEY, *Ex p.* DAVIES (1835), 1 Deac. 115.

2479. —— Contingent annuity.] — Bkpt., previous to his marriage, became bound to trustees in the penal sum of £3,000, conditioned for payment to them by his exors. of an annuity of £150, in case his intended wife should survive him, in trust for her use & benefit. Bkpt. & his wife were both living :—*Held :* the trustees could prove for the value of the annuity, under 6 Geo. 4, c. 16, s. 54, although it was not an annuity in possession.—*Re* PILCHER, *Ex p.* BROADLEY (1842), 2 Mont. D. & De G. 524; 11 L. J. Bcy. 28; 6 Jur. 200.

2480. Obligation to pay if predeceased by wife —Without issue surviving her.] — Under a marriage settlement, the husband covenanted that if the wife should die in his lifetime without leaving issue to survive her thirty days, he would within three months after her decease transfer £500 stock to the trustees, for the sole use & property of her nearest & next of kin. The husband having become bkpt. before the death of the wife, who subsequently predeceased him without issue :—*Held :* his covenant did not create a debt provable under his commission.—BRANDON *v.* BRANDON (1819), 3 Swan. 312; 2 Wils. Ch. 14; 36 E. R. 876.

Annotations :—**Mentd.** Hinckley *v.* Maclarens (1832), 1 My. & K. 27; Elmsley *v.* Young (1835), 2 My. & K. 780; *Re* Marsh, *Ex p.* Gonne (1837), 6 L. J. Bcy. 57; Withy *v.* Mangles (1843), 10 Cl. & Fin. 215, H. L.; Stoddart *v.* Nelson (1855), 4 W. R. 109, L. C.

2481. Obligation to pay on death or bankruptcy.]—A., on marriage executed a bond to trustees for payment of £1,000 within three months after his death in trust for the wife & issue of the marriage in the events therein mentioned, with a proviso that if A. should become insolvent or bkpt., & the wife or any of the issue should be then living, the trustees should be at liberty immediately to claim & should be creditors for the sum of £1,000, & receive dividends ratably with the other creditors of A. to be applied solely to the use of the wife & children. A. became bkpt. :—*Held :* there was not a debt which could be proved under the commission.—*Ex p.* HILL (1786), 1 Cox, Eq. Cas. 300; 1 Cooke's Bankrupt Laws, 7th ed. p. 238; 29 E. R. 1176.

Annotation :—**Consd.** *Ex p.* Hodgson (1812), 19 Ves. 206.

2482. —— Contingent rights given to husband in wife's settlement.]—By a settlement previous to a marriage, there was a covenant by the husband that his exors. should pay £3,000 to trustees six months after his death, & if he should become a bkpt., that sum should be provable under his commission. By a settlement made by the wife of her property before the marriage contingent interests were given to the husband. The husband became bkpt., & on a petition by the trustees to be allowed to prove the £3,000 under his commission :—*Held :* they could only prove to the amount of what the husband's contingent interest in the wife's property sold for under his bkpcy.—*Re* LARK, *Ex p.* YOUNG (1818), 3 Madd. 124; Buck, 179; 56 E. R. 456.

2483. Obligation to pay on bankruptcy—Settlement by wife.]—Though a bond by a husband to pay a sum in the event of his bkpcy. or insolvency to trustees for the purpose of settlement cannot stand against the creditors, the property of the wife may be limited to the husband, until he becomes bkpt., etc., & from that event for his wife & children; & where in articles for such a settlement the husband covenanted to give a bond for £5,000 upon the same trusts, & had received all her fortune without making any settlement, proof was admitted under his bkpcy., not only for the amount of her property agreed to be settled, but the £5,000, or so much as the value of the property of the wife would extend to beyond the sum agreed to be settled.—*Ex p.* COOKE (1803), 8 Ves. 353; 32 E. R. 391.

Annotation :—**Refd.** Mackintosh *v.* Pogose (1895), 2 Mans. 27.

2484. —— ——.]—Bkpt. settled his wife's fortune, & gave a bond for its amount to trustees, payable on his bkpcy. :—*Held :* although the bond by its form was void against creditors, the stipulation was that the husband should possess his intended wife's estate, subject to returning it if he became bkpt., & the bond could be proved.—*Ex p.* HODGSON (1812), 19 Ves. 206; 34 E. R. 495.

Annotations :—**Refd.** *Re* Shute, *Ex p.* Shute (1833), 3 Deac. & Ch. 1; Mackintosh *v.* Pogose, [1895] 1 Ch. 505.

2485. Obligation to be performed on demand—Time of demand must be ascertained.]—A proof in bkpcy. may be allowed under a covenant by bkpt. in consideration of marriage immediately after the marriage, or whenever afterwards requested by the trustees, to transfer £2,000 stock,

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2481 i. *Obligation to pay on death or bankruptcy.*]—Where a bond was given to trustees for the benefit of bkpt.'s wife, on their intermarriage, with an agreement that it should not be enforceable till death or bkpcy. :—*Held :* a fraud on the bkpcy. laws, it not being possible to enforce it against debtor before his bkpcy., & therefore not provable.—*Ex p.* HENECY (1802), cited 1 Sch. & Lef. at p. 47.—**IR.**

2481 ii. ——.]—A trader, on his marriage, agreed in consideration of £500, to assign his house to trustees for himself for life, or until bkpcy., & on the same day a collateral bond for £1,000 was prepared to secure this £500. By accident, the settlement bond was not executed until the day after the marriage. The trader became bkpt. :—*Semble :* this settlement was not post-nuptial, & the wife's claim against the husband's assignees was good.—*Ex p.* WOOD (1830), 4 Ir. L. Rec. 1st ser. 57.—**IR.**

2481 iii. ——.]—A trader on his marriage received £600, his wife's fortune, & gave a bond for £1,000 to a trustee, the interest payable to himself for life, if he continued solvent, but in case of his death or insolvency, to his wife for her life, & the principal amongst the children of the marriage: on his bkpcy. :—*Held :* the trustee might prove on behalf of the wife, for interest, as far as the £600, but not for the remaining £400.—*Re* MEAGHAN (1803), 1 Sch. & Lef. 179.—**IR.**

2483 i. *Obligation to pay on bankruptcy —Interest on wife's fortune advanced to husband.*]—A wife's fortune was, upon her marriage, advanced to the husband upon his bond, with interest. The bond was put in settlement, & vested in trustees for the wife's benefit, on condition that the interest should not be payable, except in the event of bkpcy., etc. Bkpcy. happened :—*Held :* the trustees might prove for interest from the time when the money was advanced up to the bkpcy. —*Re* O'BRIEN (1863), 15 Ir. Jur. 217. —**IR.**

Sect. 4.—What debts are provable and for what amount: Sub-sect. 3, D. (a) & (b) i.]

alleged to be standing in his name, though not the fact, but the specific time of the request must be ascertained.—*Ex p.* CAMPBELL (1809), 16 Ves. 244; 33 E. R. 977.

Annotations:—**Refd.** *Re* Biddulph, *Ex p.* Eyre (1841), 6 Jur. 41, Ct. of R. **Mentd.** *Re* McBurnie, *Ex p.* McBurnie's Trustees (1852), 16 Jur. 807, L. JJ.

2486. —— Liberty to refrain from making demand during life of grantor.]—A covenant in a marriage settlement, to transfer stock into the names of trustees, upon receiving one month's notice, with liberty to the trustees to forbear giving the notice during the life of the covenantor, is a contingent debt not provable under his bkpcy., the bkpcy. not being equivalent to, or superseding the necessity of notice.—*Re* KENSINGTON, *Ex p.* ALCOCK (1813), 1 Rose, 323.

2487. —— —— Interest payable in meantime.]—On the marriage of W., then in good circumstances, he gave a bond to trustees for £4,000 conditioned to pay to them £2,000 within one month after demand, & for payment to them in the meantime of interest upon the £2,000 by half-yearly payments upon such trusts as were contained in an indenture of settlement. By the settlement it was provided that the trustees should not call in or demand payment of the £2,000 or any part thereof, during the life of W. The interest of the £2,000 was several years in arrear. W. afterwards became bkpt., never having consented to a demand upon him for the £2,000:—*Held:* the £2,000 was provable against the separate estate of W.—*Re* WILLIAMS, *Ex p.* ELDER (1817), 2 Madd. 282; 56 E. R. 339.

2488. —— Demand before bankruptcy.]—A sum covenanted by the husband to be paid when demanded by the trustees, on the request of the wife, is, if demanded before the bkpcy., provable.—*Re* BRENCHLEY, *Ex p.* BRENCHLEY (1826), 2 Gl. & J. 174.

2489. —— No demand before bankruptcy.]—Bkpt. having received £550 with his wife on his marriage, gave a bond to trustees conditioned for the payment of £1,100 "on receiving notice from the trustees":—*Held:* although no notice was given to bkpt. before his bkpcy., it was nevertheless a contingent debt provable within 6 Geo. 4, c. 16, s. 56.—*Re* WEST, *Ex p.* HOOPER (1834), 1 Mont. & A. 395; 3 Deac. & Ch. 655; 3 L. J. Bcy. 88, Ct. of R.

2490. Obligation to pay sum out of funds of which bankrupt should have become possessed—Whether event had happened before bankruptcy.]—By an ante-nuptial settlement, a trader covenanted with trustees to pay £3,000 out of the first capital money or real or capital personal estate, or capitalised income, of or to which he should be or become possessed or in anywise entitled after the solemnisation of the marriage within six months after he should "have become" so possessed or entitled. The trader was at the time possessed of stock-in-trade & effects exceeding in value £3000, & so continued for more than six months after the date of the settlement, but did not after the marriage acquire additional property to that amount. He became bkpt. after the expiration of the six months:—*Held:* the event contemplated by the covenant had happened before the bkpcy., & there was a breach of the covenant entitling the trustees to prove.—*Re* WASS, *Ex p.* EVANS (1852), 2 De G. M. & G. 948; 22 L. J. Bcy. 5; 20 L. T. O. S. 149; 1 W. R. 69; 42 E. R. 1143, L. JJ.

Annotation:—**Distd.** *Re* Tonnies, *Ex p.* Bishop (1873), 42 L. T. Bcy. 107, n.

2491. Obligation to transfer after-acquired property.]—Debtor by his marriage settlement covenanted to transfer all his after-acquired property, except business assets, upon trust for his wife & children. He became bkpt. & after obtaining his discharge under 1869 Act, in 1882 purchased & furnished a house. He was adjudicated a bkpt. a second time in 1903:—*Held:* the liability under the covenant was not a provable debt under the first bkpcy., & was not released by his discharge.—*Re* REIS, *Ex p.* CLOUGH, [1904] 2 K. B. 769; 73 L. J. K. B. 929; 91 L. T. 592; 53 W. R. 122; 20 T. L. R. 547; 11 Mans. 229, C. A.; *affd.* without reference to this point, *sub nom.* CLOUGH v. SAMUEL, [1905] A. C. 442, H. L.

Annotations:—**Mentd.** *Re* Magnus, *Ex p.* Salaman, [1910] 2 K. B. 1049, C. A.; *Re* Hart, *Ex p.* Green, [1912] 3 K. B. 6, C. A.; *Re* Midgley (1913), 108 L. T. 45, D. C.; *Re* Lind, Industrials Finance Syndicate *v.* Lind, [1915] 1 Ch. 744.

Obligation to be performed on happening of event which must happen.]—*See* Nos. 2596 *et seq.*, 2611, 2612, *post.*

Obligation to be performed at once.]—*See* Nos. 2892 *et seq.*, *post.*

(b) Guarantees.

i. *Proof by Creditor against Bankrupt Surety.*

2492. Bail bond forfeited.]—A. became bail to the sheriff upon a *testatum capias* against B. returnable the 13th, the 16th being the *quarto die post.* The four days after the *quarto die post* expired on Apr. 20, A. became bkpt. on the 19th:—*Held:* the bail bond was forfeited on the *quarto die post*, the other four days being allowed merely *ex gratiâ*, & the penalty of the bond was a debt provable under the commission, & was barred by the certificate.—COULSON *v.* HAMMON (1824), 2 B. & C. 626; 4 Dow. & Ry. K. B. 160; 2 L. J. O. S. K. B. 114; 107 E. R. 516.

2493. Bond not forfeited before bankruptcy.]—If a bond by a principal & surety has not been forfeited before the bkpcy. of the surety, the debt

PART VIII. SECT. 4, SUB-SECT. 3.—D. (b) i.

2493 i. *Bond not forfeited before bankruptcy.*]—C., one of the obligors in a bond of indemnity to the sheriff under a writ of attachment, obtained a final order for protection from process, & judgment was obtained in an action against the sheriff, subsequently to the filing of the petition & the bond, but was not referred to in C.'s schedule thereto:—*Held:* C. was not discharged by such final order, the claim not being one which could have been proved against his estate either in insolvency or bkpcy.—MOODY *v.* BULL (1856), 7 C. P. 15.—**CAN.**

f. *Debt not due at date of assignment—Promissory note—Guarantee of—Maturity after assignment.*]—Pltfs. accepted an offer made by a co.'s president in a letter addressed to pltfs. "personally" to guarantee payment of the co.'s debt, & promissory notes were made by the co. payable to the order of pltfs., & indorsed by the president. Before the maturity of the notes the president made an assignment for the benefit of his creditors & pltfs. sought to rank upon his estate in respect of the notes:—*Held:* proof could not be made upon such contract when the notes guaranteed had not matured at the date of the assignment.—CLAPPERTON *v.* MUTCHMOR (1899), 30 O. R. 595.—**CAN.**

g. —— *Provable in arrangement.*]—B. & C. entered into a contract to supply certain forage to the cavalry stationed at certain barracks. C. undertook to supply the oats necessary, & to furnish money to purchase the hay & straw necessary to carry out the contract. B., his wife, & three others joined in a bond to the extent of £500 each, to secure to C., in priority to all other claims, the sums advanced by him, together with a commission of sixpence in the pound upon such advances. B., & his wife in the bond, petitioned the Ct. of Bkpcy. as arranging traders, under 20 & 21 Vict. c. 60, s. 343, both in respect of their joint & separate estates; & C., to whom a large sum was due by B. for the advances made, sought to be paid, out of the separate estate of the wife, the £500 for which she was liable on foot of the bond:—*Held:* such debt was a contingent liability, & provable as such in an arrangement, as well as in bkpcy., & C. would be allowed to prove as a separate creditor upon the estate of the surety in the bond.—*Re* BRACKEN (1868), 2 I. R. Eq. 495.—**IR.**

cannot be proved under his commission, & he may be sued upon it after he has obtained his certificate.—ALSOP *v.* PRICE (1779), 1 Doug. K. B. 160; 99 E. R. 104.

2494. No default until after bankruptcy.]—B. being indebted to pltf. for goods sold & delivered, A. became surety with B. in a bond given to pltf., payable by instalments. Before the first default A. became bkpt. & a commission issued, under which pltf. neglected to prove his debt. On a rule to set aside a writ of *fi. fa.* on the ground that the bond might have been proved under the commission under which A. had obtained his certificate:—*Held:* as under 7 Geo. 1, c. 31, pltf. could have proved the bond under the commission & had neglected to do it, the rule must be made absolute.—BROOKS *v.* LLOYD (1785), 1 Term Rep. 17; 99 E. R. 947.

Annotation:—**Distd.** Paul *v.* Jones (1787), 1 Term Rep. 599.

2495. ——.]—A. advanced £2,000 to B., to be repaid on a day certain, & secured by the bond of C., conditioned that if B. made default in payment on the day named, C. should pay within one week. C. became bkpt., & B. afterwards made default:—*Held:* the debt was provable under the commission against C.—*Re* CHARMAN, *Ex p.* LEWIS (1830), Mont. & M. 426; 8 L. J. O. S. Ch. 56.

Annotation:—**Folld.** *Re* Sudell, *Ex p.* Myers (1833), 2 Deac. & Ch. 251.

2496. Debt not due at date of bankruptcy.]—A. in consideration of £1 10*s.* 7*d.* received of B. undertook in writing to make himself liable for the due payment of a note, upon which H. was then indebted to B., & B. thereupon consented to furnish H. with more goods. A. before the note was due became bkpt.:—*Held:* A.'s undertaking was intended as a collateral engagement only, in case H. should not pay the note when due, &, as it rested in contingency, whether it would ever become a debt or not, it could not be proved as such under A.'s commission.—*Ex p.* ADNEY (1776), 2 Cowp. 460; 98 E. R. 1187.

Annotations:—**Consd.** Cowley *v.* Dunlop (1798), 7 Term Rep. 565. **Distd.** Atwood *v.* Partridge (1827), 4 Bing. 209. **Folld.** *Re* Sudell, *Ex p.* Myers (1832), Mont. & B. 229, Ct. of R. **Consd.** Guy *v.* Newson (1833), 4 Tyr. 31; *Re* Sudell, *Ex p.* Myers (1833), 2 Deac. & Ch. 251, Ct. of R.; *Re* Willis (1849), 4 Exch. 530.

2497. ——.]—Under a guarantee the debt is contingent only; & a debt accrued by default after the bkpcy., of the surety cannot be proved under the commission.—*Ex p.* GARDOM (1808), 15 Ves. 286; 33 E. R. 762.

Annotations:—**Dbtd.** Brettel *v.* Williams, Aykroyd & Price (1849), 4 Exch. 623. **Mentd.** Boehm *v.* Campbell (1819), 8 Taunt. 679; Jenkins *v.* Reynolds (1821), 6 Moore, C. P. 86; Morley *v.* Boothby (1825), 3 Bing. 107.

2498. ——.]—If a surety become bkpt., the creditor cannot under 49 Geo. 3, c. 121, s. 8, prove the debt, if it became due after the bkpcy.—*Re* SOWERBY, *Ex p.* MACMILLAN (1818), Buck, 287.

2499. ——.]—In consideration of A. allowing B. to draw upon him & accepting his drafts, C. guaranteed to him the payment of the amount of all such acceptances. C. became bkpt. when the acceptances were not yet due:—*Held:* after the acceptances had become due & B. had neglected to provide for them, A. was entitled to prove the amount against C.'s estate, under 6 Geo. 4, c. 16, s. 56.—*Re* SUDELL, *Ex p.* MYERS (1833), 2 Deac. & Ch. 251; Mont. & B. 229; 2 L. J. Bcy. 41, Ct. of R.; *subsequent proceedings Re* SUDELL, *Ex p.* SIMPSON (1834), 1 Mont. & A. 541, Ct. of R.

Annotations:—**Apld.** *Re* Fox, *Ex p.* Marshall (1834), 1 Mont. & A. 145, Ct. of R. **Folld.** *Re* Sudell, *Ex p.* Simpson (1834), 1 Mont. & A. 541, Ct. of R. **Distd.** Thompson *v.* Thompson, (1835), 2 Bing. N. C. 168; Abbott *v.* Hicks (1839), 5 Bing. N. C. 578. **Folld.** Hinton *v.* Acraman (1846), 10 Jur. 203; *Re* Willis, *Ex p.* Brook (1848), 17 L. J. Bcy. 8; *Re* Willis (1849), 4 Exch. 530.

2500. ——.]—A. accepted bills under the following document, given by B.: "In consequence of your allowing C. & Co. to draw on you to the extent of £12,000, I hereby guarantee to you that amount, it being understood that payment of these drafts is to be provided for by myself, or C. & Co., in direct discountable bills, fourteen days at least before they fall due," etc. C. & Co. drew bills, & B. became bkpt. before some of the bills became due:—*Held:* there was a debt provable, the document being, not a guarantee, but an original undertaking. *Semble:* it would have been provable, if a mere guarantee.—*Re* SUDELL, *Ex p.* SIMPSON (1834), 3 Deac. & Ch. 792; 1 Mont. & A. 541; 3 L. J. Bcy. 113, Ct. of R.

Annotations:—**Folld.** *Re* Rostron, *Ex p.* Raleigh (1838), 3 Mont. & A. 670, Ct. of R. **Distd.** Lane *v.* Burghart (1841), 3 Man. & G. 597. **Folld.** *Re* Willis, *Ex p.* Brook (1848), 17 L. J. Bcy 8; *Re* Willis (1849), 19 L. J. Ex. 30. **Mentd.** Abbott *v.* Hicks (1839), 7 Scott, 715.

2501. ——.]—In July, 1850, A. & B. gave C. a continuing guarantee for goods to be supplied to D., with a stipulation that the security should subsist, "until C. received a notice in writing to the contrary." Goods were supplied to D. upon the faith of the guarantee, & a balance exceeding £200 was due in respect thereof. In June, 1854, B. became bkpt., & duly obtained his certificate. No notice having been given to determine the guarantee:—*Held:* B.'s liability thereon was not a "contingent liability" within 1849 Act, s. 178, & his certificate was no bar to a claim in respect of goods supplied to D. after the bkpcy. of B.—BOYD

2496 i. *Debt not due at date of bankruptcy—Liability under dissolved partnership.*]—On a dissolution of partnership F., one of the partners, in consideration of the cession of the said assets, undertook to hold A., the other partner, harmless against all claim or demand, all losses, costs, damages & expenses which he might be put to n respect of the partnership. Shortly after F. surrendered his estate, & on the same day the estate of A. & Co. was provisionally sequestrated, being adjudicated as insolvent a few days later. A. proved on F.'s estate for the amount of debts due by A. & Co. at the date of dissolution of the firm as being the amount he might be legally called upon to pay to the creditors of A. & Co. On application by certain creditors of F. to set aside:—*Held:* the proof should stand & if during the six weeks after the date of the order A. should have to pay any of the debts owing to the creditors of A. & Co. he should be entitled to a dividend in respect of the amounts paid or ordered by him.—COPESTOKE *v.* ALEXANDER, *Re* FISHER (1883), 2 S. C. 137.—S. AF.

2496 ii. —— *Credit continued to principal debtor—After bankruptcy of surety.*]—Bankers trading with A. got a bond from B. for £5,000, conditioned that A. should keep the bankers harmless. B. became bkpt., & A. owed the bankers £7,000. They refused further credit to A., until C. gave a guarantee to secure them in the very same manner they had been secured by B. A. afterwards became bkpt., owing the bankers £700:—*Held:* they could not prove such debt under the commission against B.—*Re* BREBNER, *Ex p.* RANSOM & Co. (1830), 4 Ir. L. Rec. 1st ser. 58.—IR.

2502 i. *Debt accrued due before bankruptcy—Action on bond—Pleading.*]—Debt on a bond for the payment by S. of ten notes, assigning breaches as to the last six. Plea, that S. did not pay the first two notes, whereupon the bond became forfeited, & S. became bkpt., & afterwards deft. became bkpt., & the debt accrued before his bkpcy.:—*Held:* the bond, being forfeited before deft.'s bkpcy., the penalty became a debt, which pltf. might have applied to have retained in the hands of deft.'s assignee till the contingency happened, & then have proved & the plea was good.—PERRIN *v.* HAMILTON (1855), 5 C. P. 57.—**CAN.**

h. *Guarantee of debts—Creditor receiving payment by discounting bills—Discounting bank proving for unpaid bills in creditor's bankruptcy—Proof by creditor's trustee in guarantor's bankruptcy.*]—A. guaranteed payment of the debts due by B. to C.; C., by discounting B.'s bills, obtained full payment of B.'s debt; but in consequence of B. & C. afterwards becoming bkpt., the bank with whom the bills had been discounted ranked on C.'s estate for the full amount of the bills & obtained payment of a dividend. A. became bkpt.:—*Held:* C.'s trustee could be ranked on A.'s estate for the amount of the dividend repaid to the bank.—ANDERSON *v.* MACKINNON (1876), 3 R. (Ct. of Sess.) 608; 13 Sc. L. R. 385.—**SCOT.**

Sect. 4.—What debts are provable and for what amount: Sub-sect. 3, D. (b) i.]

v. ROBINS & LANGLANDS (1859), 5 C. B. N. S. 597; 28 L. J. C. P. 73; 5 Jur. N. S. 915; 7 W. R. 78; 141 E. R. 240, Ex. Ch.

Annotations:—**Folld.** White *v.* Corbett (1859), 1 E. & E. 692, Ex. Ch. **Consd.** Betteley *v.* Stainsby (1862), 12 C. B. N. S. 477. **Expld.** General Discount Co. *v.* Stokes (1864), 17 C. B. N. S. 765. **Refd.** Parker *v.* Ince (1859), 32 L. T. O. S. 279.

2502. Debt accrued due before bankruptcy.]—C. & Co., before their bkpcy., guaranteed to A. payment of £300 for the erection by A. of a building for D., on production of a certificate by an engineer that the work was done according to a certain specification. A. produced the certificate, which showed a deviation from the original plan, with the consent of D. C. & Co. made no objection on the ground of the deviation:—*Held:* A. might prove for the £300 in their bkpcy.—*Re* CAZENOVE, *Ex p.* ASHWELL (1832), 2 Deac. & Ch. 281, Ct. of R.

2503. Guarantee of interest & principal—Bankruptcy before principal due—Interest not paid on due date.]—A bond executed by deft., as surety for J., Mar. 1, 1832, was conditioned for payment of £5 interest on a principal sum of £200 on Mar. 1, 1833, £5 on Mar. 1, 1834, & £205 on Mar. 1, 1835. The first year's interest was not paid till Mar. 30, 1833. In June, 1833, deft. became bkpt.:—*Held:* the bond had been forfeited, & was provable under deft.'s commission.—SKINNERS' CO. *v.* JONES (1837), 3 Bing. N. C. 481; 3 Hodg. 18; 4 Scott, 271; 6 L. J. C. P. 113; 132 E. R. 495.

2504. Advances made after date of guarantee.]—A. guaranteed to a banking co. "all current obligations in their hands, to which B. may be a party, & also all his future obligations & engagements that may come into their hands":—*Held:* the latter part of the guarantee, as to the future obligations, implied of itself a consideration, & did not require the specific statement of one in the body of the guarantee, according to Stat. Frauds, & the banking co. might, on the bkpcy. of A., prove for the amount of their advances to B., subsequent to the date of the guarantee.—*Re* DUNCAN, *Ex p.* LITTLEJOHN (1843), Mont. D. & De G. 182; 12 L. J. Bcy. 31; 7 Jur. 474.

2505. Guarantee mere nudum pactum—Guarantee of bills given at surety's request.]—M. & B., on Aug. 5, 1833, entered into partnership. By an indenture made between them of Jan. 11, 1837, after reciting that B. had agreed to pay to M. £558 for his share in the business, & that such sum should be secured by three notes of hand of B., payable at eight, sixteen, & twenty-four months, & that the due payment thereof should be guaranteed by the written undertaking of G., who was to deliver to M. his undertaking in writing to enter into a bond to him in a penalty sufficient to cover the existing debts of the firm, it was witnessed that M., in consideration of the sum of £558 so to be secured to him, assigned his share of the business to B. By the same indenture, B. covenanted to indemnify M. against the debts of the firm. On the same day B., pursuant to the agreement, signed & gave to M. three promissory notes for £186 each. G. on July 31, 1837, signed the following undertaking:—"B. has this day given to M. three bills, dated, etc., & payable, etc., for £186, of each of which notes I guarantee the payment." On Oct. 4 following, he also signed an undertaking to the effect that he would execute to M., when he should be required, a bond of indemnity in accordance with the recital relating thereto contained in the indenture of assignment. At the dissolution of the partnership, M. & B. owed their bankers £733 15*s.* 6*d.*, to meet which M. drew seven bills for £100 each on B. These were accepted by B., & indorsed by M. to their bankers. On Jan. 19, 1838, G. signed a memorandum to the effect that the bills were to cover the debt due to the bankers, & were drawn at his request, & that he would indemnify M. from the payment of them. B. subsequently became insolvent, & one of the promissory notes & three of the bills were dishonoured. In May, 1839, G. was declared a bkpt., & M. had to pay the bankers the amount of the dishonoured promissory note & bills:—*Held:* the undertakings signed by G. of July 31 & Oct. 4, 1837, were a *nudum pactum*, & did not entitle M. to prove on his estate for the amount paid by him on account of the dishonoured note, but the memorandum of Jan. 19, 1838, did entitle him to prove for the amount paid by him on account of the dishonoured bills.—*Re* GEACH, *Ex p.* MORRISON (1843), 7 Jur. 267.

2506. Guarantee of payment for goods by due honour of bill—Bankruptcy before bill due.]—A bkpt. had, in consideration of the payment of a sum of money to him by the vendors of goods, guaranteed the payment of the purchase-money by the purchasers, according to the contract of purchase, viz. by the due honour of a bill of exchange accepted by the purchasers. The bill did not fall due till after the fiat issued against the surety. On its being dishonoured:—*Held:* the vendors were entitled to prove.—*Re* WILLIS, *Ex p.* BROOK (1850), 6 De G. M. & G. 771; 17 L. J. Bcy. 8; 11 L. T. O. S. 111, 475; 12 Jur. 411; 43 E. R. 1433.

Annotation:—**Consd.** Kent *v.* Thomas (1871), 40 L. J. Ex. 186.

2507. Administration bond—Forfeiture before bankruptcy.] — An administration bond, forfeited before the bkpcy. of the surety, is not provable under 1849 Act, & a certificate under that Act is no bar to an action on the bond.—MARCHMAN *v.* BROOKES & HUGHES (1864), 2 H. & C. 908; 3 New Rep. 579; 9 L. T. 726; 159 E. R. 376.

2508 i. *Guarantee of indebtedness to bank—Sum recovered from bankrupt debtor's estate—Surety also principal debtor trading under separate style.*]—P. carried on business at Cork, as a sole trader, under the style of D. Brothers, & at Glasgow (in partnership with M.), under the style of S. & Co. On June 3, 1878, P., both trading as D. Brothers, & in his individual capacity, gave a guarantee to the U. Bank, for advances to S. & Co. At a meeting of the creditors of S. & Co. at which the U. Bank was represented, P. proposed to liquidate the debts of S. & Co. by acceptances of D. Brothers, which was accepted by resolution. On the same day the partnership between P. & M. was dissolved, & M. transferred his estate & interest in the partnership property & business to P. & the business of S. & Co. was carried on by P. alone. P., being unable to meet the composition bills, was adjudicated a bkpt. in Ireland on his own petition. On a petition filed in Scotland by the U. Bank on foot of their original debt, a sequestration of the estates of S. & Co. & of M. was ordered. The U. Bank also claimed to be admitted to prove unconditionally, in the Irish bkpcy., for the amount of the guarantee:—*Held:* P., at the time of the Irish bkpcy. was a sole trader, trading in Ireland as D. Brothers, & in Scotland as S. & Co., & consequently there was but one estate to be administered under the Irish adjudication: & the U. Bank could not, therefore, be allowed to prove except upon the condition of giving credit for so much of the Scottish estate of bkpt. as they had received or might receive under the sequestration.—*Re* PIM (1881), 7 L. R. Ir. 458.—**IR.**

2508 ii. —— *Debt not due at date of bankruptcy.*]—Bankers trading with A. got a bond from B. for £5,000, conditioned that A. should keep the bankers harmless. B. became bkpt., & A. owed the bankers £7,000. They refused further credit to A. until C. gave a guarantee to secure them in the very same manner they had been secured by B. A. afterwards became bkpt., owing the bankers £700:—*Held:* they could not prove this debt under the commission against B.—*Re* BREBNER, *Ex p.* RANSOM & CO. (1830), 4 Ir. L. Rec. 1st ser. 58.—**IR.**

2508. Guarantee of indebtedness to bank—Sums recovered from bankrupt principal debtor's estate—Before & after proof.]—Bkpt. guaranteed his son's account with a German bank. The son liquidated his assets in Germany, & the bankers received £1,593 as dividend. On bkpt. becoming bkpt. in England, the German bank claimed to prove for the whole amount guaranteed, without giving credit for the £1,593 received before proof, or for other amounts alleged to have been received as dividends in the German liquidation after proof: —*Held:* credit must be given for the dividends received before proof, but not for any received after proof.—*Re* BLAKELEY, *Ex p.* AACHENER DISCONTO GESELLSCHAFT (1892), 9 Morr. 173, D. C.

2509. —— Sum deposited by certain solvent sureties but not appropriated.]—Bkpt. & others became sureties to applts. of a principal debtor's liability for the sum of £6,250, & three of the sureties thereafter entered into agreement with applts. that their liability as between them & applts. should be limited in that there should be substituted for it a deposit of £3,000 in the bank, to be carried to a suspense account, with power to applts. to appropriate that sum whenever they thought fit in discharge *pro tanto* of the principal debt:—*Held:* (1) such deposit did not until appropriation operate as payment, & applts. were entitled to prove for the full amount of their debt against the estate of a bkpt. co-surety, who was not a party to the above agreement; (2) the transaction was not an evasion of the bkpcy. law. —COMMERCIAL BANK OF AUSTRALIA, LTD. *v.* WILSON & CO.'S ESTATE OFFICIAL ASSIGNEE, [1893] A. C. 181; 62 L. J. P. C. 61; 68 L. T. 540; 41 W. R. 603; 9 T. L. R. 307; 1 R. 331, P. C.

Annotation:—**Distd.** Edwards *v.* Hood-Barrs, [1905] 1 Ch. 20.

2510. Guarantee of payment by instalments—Instalments accruing after bankruptcy.]—A covenant in an indenture made between A. & B., assigning to A. £4,350 payable under articles of agreement by S. to B. by instalments, that in case the sum, or any instalment thereof, should not be paid to A. at the times & in the manner provided for by the articles, B. would, upon demand, pay to A. the sum, or so much thereof as should not be paid at the times, etc.:—*Held:* not to be discharged by the bkpcy. of B. as to any instalments accruing due after the bkpcy., not being provable under the commission by 49 Geo. 3, c. 121, ss. 9 or 17.—HOFFHAM *v.* FOUDRINIER (1816), 5 M. & S. 21; 105 E. R. 959.

Annotations:—**Folld.** *Re* Wyatt, *Ex p.* Thompson (1833), Mont. & B. 219; *Re* Fox, *Ex p.* Marshall (1834), 3 Deac. & Ch. 120.

2511. —— ——.]—Pltfs., having taken B. in execution for a debt, discharged him upon the following undertaking of deft.: "In consideration of your discharging B. out of custody, I undertake that he shall pay the debt due to you by four half-yearly instalments," etc.:—*Held:* pltfs. might have proved the unpaid instalments under a fiat in bkpcy. against deft., & deft.'s certificate was a bar to an action upon the contract, for instalments becoming due since his bkpcy.—LANE *v.* BURGHART (1841), 1 Q. B. 933; 1 Gal. & Dav. 311; 10 L. J. Q. B. 343; 6 Jur. 125; 113 E. R. 1389; *S. C.* in Common Pleas, 3 Man. & G. 597.

2512. —— ——.]—A joint & several covenant was entered into by a principal debtor & his surety that the principal would pay a sum of money by three instalments, with interest, on three specified days. The first instalment was duly paid, but before the second instalment became payable the surety became bkpt. The creditor was allowed by the comr. to be admitted to claim against bkpt.'s estate in respect of the amount of the two unpaid instalments & interest: —*Held:* the claim was properly admitted as upon a contingent liability under 1849 Act, s. 178. —*Re* STRAHAN, *Ex p.* BARWIS (1855), 6 De G. M. & G. 762; 25 L. J. Bcy. 10; 26 L. T. O. S. 115; 2 Jur. N. S. 5; 4 W. R. 106; 43 E. R. 1429, C. A.

Annotations:—**Consd.** Boyd *v.* Robins (1858), 4 C. B. N. S. 749; Warburg *v.* Tucker (1858), E. B. & E. 914, Ex. Ch. **Distd.** General Discount Co. *v.* Stokes (1864), 17 C. B. N. S. 765. **Consd.** Cary *v.* Dawson (1869), L. R. 4 Q. B. 568.

2513. —— Dividend received in bankruptcy of principal debtor.]—*Re* RITCHIE, *Ex p.* REID, No. 2522, *post.*

2514. —— Debtor & surety afterwards granting joint notes—One note paid before bankruptcy—Whether proof on original guarantee or for remaining notes only.]—A. agreed to be responsible to B. for the due payment to him by C. of £24,000, by yearly instalments of £1,200. B. afterwards agreed to accept six joint notes of A. & C., for £2,000 each, & delivered up the original agreement to C., but only one of the notes was paid:—*Held:* B. could not prove, under a fiat against A., the original debt of £24,000 but only the amount of the five notes remaining unpaid.—*Re* LORYMER, *Ex p.* POWELL (1836), 1 Deac. 378, Ct. of R.

2515. Guarantee of annuity—Whether value of annuity provable.]—An annuity granted by A. to B. was secured by a covenant by C., a surety, to pay the annuity in case A. made default, & by a judgment for £2,100 entered up against A. & C. The annuity remained unpaid from Jan., 1823, A. having left the country, & in Feb., 1824, C. became bkpt., & afterwards obtained his certificate. C. having died, B. filed a bill to have the arrears of the annuity paid out of his real & personal estates:—*Held:* neither the value of the annuity, nor the sum due on the judgment, was provable under C.'s commission, & his certificate was not a bar to pltf.'s demand.—JOHNSON *v.* COMPTON (1830), 4 Sim. 37; 58 E. R. 15.

2510 i. *Guarantee of payment by instalments—Instalments accruing after bankruptcy—Composition.*]—A cautioner for a composition, accepted by the creditors of an insolvent, became bkpt. after payment of one instalment. The principal debtor was afterwards sequestrated, & the creditors claimed on his estate for the full amount of their debts, under deduction of the first instalment. The trustees for the creditors also claimed on their behalf upon the sequestrated estate of the cautioner for the five unpaid instalments:—*Held:* the claim by the creditors in the sequestration of the principal debtor involved no discharge or abandonment of the claim against the cautioner by the trustees under the composition arrangement, & these trustees were entitled to be ranked.—THOMSON & CRAIG *v.* LATTA (1863), 1 Macph. (Ct. of Sess.) 913.—**SCOT.**

2510 ii. —— —— —— *Proof on principal's estate.*]—V. became security for payment of a composition. When two instalments had been paid, the case was turned into bkpcy. The creditors proved against the principal's estate for their first bills, giving credit for the instalments. V. then became bkpt. The creditors, having elected, were not allowed to prove on his estate for two sets of unpaid bills.—*Re* SHEEHAN & FEEHAN'S ESTATE (1863), 16 Ir. Jur. 198.—**IR.**

k. *Guarantee of excess over fixed amount—After demand made.*]—A., a mtgor., by will appointed his wife C. sole extrix. & devised to her the mortgaged property. C. subsequently charged the property with the repayment of further advances, & B. mortgaged other property as a further security, the mtge. containing a stipulation for repayment, within one month after notice of the balance due in excess of the original mtge. debt. B. became insolvent. No demand was made. The liquidators of the mtgees. sought to prove against B.'s estate for the amount owing after deducting the original mtge. debt:—*Held:* the liquidators (if entitled to prove at all) could only prove for the difference between the amount owing after such deduction & the value of the mtge. security after realising or giving credit for the value of the first security.—*Re* AGABEG, 12 C. L. R. 165.—**IND.**

Sect. 4.—What debts are provable and for what amount: Sub-sect. 3, D. (b) i., ii. & iii.]

Annotations :—**Consd.** Amott *v.* Holden (1852), 18 Q. B. 593. **Refd** *Re* Sudell, *Ex p.* Simpson (1834), 3 Deac. & Ch. 792, Ct. of R. ; *Re* Colnaghi, *Ex p.* Marks (1838), 3 Deac. 133. **Mentd.** Tomlin *v.* Tomlin (1841), 1 Hare, 236.

2516. —— ——.]—If a surety for an annuity covenant to pay the annuity in case default is made by the grantor, & the surety become bkpt. before default, the value of the annuity is not provable as a contingent debt.—*Re* WYATT, *Ex p.* THOMPSON (1833), Mont. & B. 219 ; 2 L. J. Bcy. 5, Ct. of R.

Annotations :—**Expld.** *Re* Fox, *Ex p.* Marshall (1834), 3 L. J. Bcy. 37. **Apprvd.** Thompson *v.* Thompson (1835), 2 Bing. N. C. 168. **Expld. & Distd.** *Re* Willis (1849), 4 Exch. 530. **Refd.** *Re* Whitmore & Wells (1833), 3 De G. & Sm. 565 ; *Re* Sudell, *Ex p.* Simpson (1834), 3 Deac. & Ch. 792, Ct. of R.

2517. —— ——.]—A. granted an annuity to C., & B. jointly & severally covenanted with A., as his surety, to pay the annuity, provided that if default should be made in payment of the annuity by A., C. would give notice in writing of so much of the annuity as might be in arrear, twenty-one days' previous to the adoption of any measures against B. to enforce the payment of the arrears. B. became bkpt., before any default was made by A. in payment of the annuity :—*Held :* C. could not prove for the value of the annuity, under 6 Geo. 4, c. 16, s. 54.—*Re* COLNAGHI, *Ex p.* MARKS (1838), 3 Deac. 133 ; 2 Jur. 398, Ct. of R.

Annotation :—**Refd.** Amott *v.* Holden (1852), 18 Q. B. 593.

2518. —— —— **Whether suretyship established.**]—Deft. executed a bond, on the face of which it was stated that he was surety for C., but by which he & C. jointly & severally bound themselves absolutely to pltf., subject to a defeasance making the bond void on payment of an annuity, which it was recited that C. had agreed to grant to pltf. Deft. & C. also jointly & severally covenanted with pltf. to pay the annuity. Deft. having become bkpt. & obtained his certificates :—*Held :* (1) deft. was a surety only ; (2) pltf. could not have proved against his estate as an annuity creditor, & the bkpcy. & certificate were no bar to an action for instalments of the annuity becoming due subsequently.—WHITE *v.* CORBETT (1859), 1 E. & E. 692 ; 28 L. J. Q. B. 228 ; 5 Jur. N. S. 407 ; 7 W. R. 363 ; 120 E. R. 1069, Ex. Ch.

2519. —— **Instalments becoming due after bankruptcy.**]—The instalments of an annuity, for payment of which bkpt. is surety only, & which he covenants to pay in case of default of the grantor, are not, where they become due after his bkpcy., provable under a fiat against the surety.—THOMPSON *v.* THOMPSON (1835), 2 Bing. N. C. 168 ; 1 Hodg. 225 ; 2 Scott, 266 ; 4 L. J. C. P. 311 ; 132 E. R. 66.

Annotations :—**Apld.** *Re* Colnaghi, *Ex p.* Marks (1838), 3 Deac. 133, Ct. of R. ; Lane *v.* Burghart (1841), 3 Man. & G. 597 ; Thompson *v.* Whatley (1850), 16 Q. B. 189 ; Amott *v.* Holden (1852), 18 Q. B. 593 ; Warburg *v.* Tucker (1855), 5 E. & B. 384. **Refd.** *Re* Phibbs, *Ex p.* Vanheythusen (1836), 2 Mont. & A. 519. **Mentd.** *Re* Willis (1849), 4 Exch. 530.

See, further, Sub-sect. 3, G., (a), *post.*

2520. Guarantee of payment of insurance premiums.]—Deft. covenanted for the due payment by A. of a premium upon a policy of insurance affected to secure a debt due from A. to pltf. The premium became due on June 17, & being unpaid by A. or deft., was paid by pltf. On June 20 deft. obtained his certificate under a commission of bkpcy. :—*Held :* his certificate did not discharge him from the amount of the premium. —ATWOOD *v.* PARTRIDGE (1827), 4 Bing. 209 ; 12 Moore, C. P. 431 ; 5 L. J. O. S. C. P. 154 ; 130 E. R. 749.

Annotations :—**Apld.** Toppin *v.* Field (1843), 4 Q. B. 386. **Consd.** *Re* Whitmore, Wells (1843), 3 De G. & Sm. 565 ; *Re* Willis (1849), 4 Exch. 530. **Refd.** *Re* Wyatt, *Ex p.* Thompson (1832), 2 L. J. Bcy. 5.

See, further, Sub-sect. 3, G., (c), *post.*

2521. Guarantee of debenture interest—Company wound up.]—Debtor guaranteed the regular payment of the interest in respect of the debenture of a limited co. until the co. repaid the principal. The co. having been wound up without repaying the principal :—*Held :* the holder of the debenture was entitled to prove in debtor's bkpcy. for the estimated value of the future interest payable under the guarantee.—*Re* FITZGEORGE, *Ex p.* ROBSON, [1905] 1 K. B. 462 ; 74 L. J. K. B. 322 ; 92 L. T. 206 ; 53 W. R. 384 ; 49 Sol. Jo. 204 ; 12 Mans. 14.

Annotations :—**Distd.** *Re* Moss, *Ex p.* Hallet, [1905] 2 K. B. 307, D. C. **Apld.** *Re* Pyke, Davis *v.* Jeffreys (1910), 55 Sol. Jo. 109.

2522. For what amount—Dividend received in bankruptcy of principal debtor.]—A. guaranteed B. & Co. against any loss they might happen to suffer on account of the non-payment of an instalment by certain joint debtors of B. & Co. One of the joint debtors becoming bkpt., B. & Co. under an order for the proof of joint debts under his separate commission proved the amount of the instalment, & received a dividend :—*Held :* the benefit of the future dividends on the proof should be sold, & the produce paid to B. & Co., & the money so received by them, together with the amount of the former dividend, should be deducted from the instalment, & B. & Co. might prove for the difference under A.'s commission.—*Re* RITCHIE, *Ex p.* REID (1818), Buck, 239.

2523. —— **Breach of contract by principal debtor—Amount of damage.**]—By agreement between A. & M. Bank, a Calcutta tea co., & their London agents, the bank granted a letter of credit, permitting the tea co. to draw bills on the bank. The tea co. undertook that the credit should provide for the outlay for the season's tea, that they would ship the whole produce of the season, that they would draw upon the London agents for the value of the produce, & forward to the bank the bills, with bills of lading, policy of insurance, & invoice of tea shipped, & that they would pay any balance which might appear due on the credit on or before a certain date. The London agents guaranteed to the bank that the tea co. would perform its undertaking, "the terms of which we hereby confirm, holding ourselves responsible for same." The tea co. drew, in accordance with the letter of credit, several bills on the A. & M. Bank. which it accepted. Before any of them became due, the A. & M. Bank stopped payment, & was wound up, & its property transferred to the A. Bank. The bills were not paid at maturity, but were afterwards paid either by the A. & M. Bank, or by the A. Bank. The tea co. never performed any part of their undertaking except the drawing the bills above mentioned,

PART VIII. SECT. 4, SUB-SECT. 3. —D. (b) iii.

2524 i. *In general.*]—The law upon the subject of a contest between creditor & surety as to right to rank upon debtor's estate is simple. If the surety be for the whole debt he cannot rank in competition with the other creditors until the whole debt is paid. Where the surety is answerable for part of a debt only—on payment of that part, he, & not the creditor, is entitled to rank in respect of it. Where the surety is surety for the whole debt, but his liability is limited to a certain amount only, in that case the surety cannot rank in competition with the creditor.—*Re* FEARNLEY'S ASSIGNMENT (1915), 8 O. W. N. 223 ; 33 O. L. R. 492 ; 22 D. L. R. 604.—CAN.

& became insolvent. The A. Bank, relying on the guarantee, claimed to be creditors, for the amount of the bills, against the estate of the London agents, who had executed a deed of inspectorship: —*Held:* the fact of the A. & M. Bank stopping payment, & being wound up, did not excuse the tea co. from fulfilling their contract, or release the sureties from their liability, & the A. Bank must be admitted for the amount of such damage as they had sustained by the default of the tea co. to fulfil their contract.—*Re* BARBER & Co., *Ex p.* AGRA BANK, LTD. (1870), L. R. 9 Eq. 725; 39 L. J. Bcy. 39.

ii. *Proof by Creditor against Bankrupt Principal Debtor.*

See Part IX., *post.*

iii. *Proof by Surety against Bankrupt Principal Debtor.*

2524. In general.]—The legislature has provided that the surety, if he pays the debt, may stand in the place of the creditor where the creditor has proved, or may prove the debt himself where the creditor shall not have proved under the commission (TINDAL, C.J.).—BROWNE *v.* CARR (1831), 7 Bing. 508; 5 Moo. & P. 497; 9 L. J. O. S. C. P. 144; 131 E. R. 197.

Annotations:—**Apld.** Ellis *v.* Wilmot (1874), L. R. 10 Exch. 10. **Mentd.** Beckett *v.* Addyman (1882), 9 Q. B. D. 783, C. A.

2525. Whether bail can prove as surety.]—Bail above are not sureties or persons liable for the debt of a bkpt. so as to be able to prove under a commission.—NEWINGTON *v.* KEEYS (1821), 4 B. & Ald. 493; 106 E. R. 1018.

2526. Payment made after act of bankruptcy by principal debtor.]—A., bail for B., cannot prove as a creditor under a commission of bkpcy. against B. until A. has actually paid the debt, & if B.'s act of bkpcy. be prior to A.'s paying the debt, he cannot prove it under the commission at all.—GODDARD *v.* VANDERHEYDEN (1771), 3 Wils. 262; 2 Wm. Bl. 794; 2 Bos. & P. 8, n.; 95 E. R. 1046.

Annotations:—**Folld.** Young *v.* Hockley (1772), 3 Wils. 346. **Apld.** Venderheyden *v.* De Paiba (1774), 3 Wils. 528. **Folld.** Paul *v.* Jones (1787), 1 Term Rep. 599. **Apld.** Bamford *v.* Burrell (1799), 2 Bos. & P. 1. **Refd.** Auriol *v.* Mills (1790), 4 Term Rep. 94; Cowley *v.* Dunlop (1798), 7 Term Rep. 565; St. Martin-in-the-Fields Overseers *v.* Warren (1818), 1 B. & Ald. 491; Woolley *v.* Smith (1846), 3 C. B. 610. **Mentd.** Hoskins *v.* Duperoy (1808), 9 East, 498.

2527. ——.]—A surety having paid the money, for which he was bound, after the bkpcy. of the principal, cannot prove for the debt under the commission.—RUCKER *v.* HAGEN (1773), Dick. 487; 21 E. R. 358.

2528. ——.]—A surety in a bond, who pays the debt after a commission of bkpcy. issued against his principal, is not barred by the certificate, though the penalty of the bond was forfeited before.—TAYLOR *v.* MILLS (1777), 2 Cowp. 525; 98 E. R. 1221.

Annotation:—**Consd.** Cowley *v.* Dunlop (1798), 7 Term Rep. 565.

2529. ——.]—A surety paying a debt after the act of bkpcy., but before the commission taken out against the principal, cannot prove such debt under the commission.—*Ex p.* BADGER (1783), 1 Cox, Eq. Cas. 28; 29 E. R. 1047.

2530. ——.]—A surety, who does not pay the debt of the principal until after his bkpcy., though called upon & liable to pay it before, may hold the principal to bail, notwithstanding his certificate. —PAUL *v.* JONES (1787), 1 Term Rep. 599; 99 E. R. 1273.

2531. ——.]—A surety in a warrant of attorney, in order to discharge himself from his personal liability, paid part of the debt due to the creditor of bkpt., who had proved under the commission, & thereupon satisfaction was entered on the record: —*Held:* this did not fall within 49 Geo. 3, c. 121, s. 8, as being payment of part of a debt in discharge of the whole, & bkpt.'s certificate was no bar to an action by the surety to recover the money so paid by him.—SOUTTEN *v.* SOUTTEN (1822), 5 B. & Ald. 852; 1 Dow. & Ry. K. B. 521; 106 E. R. 1403.

Annotation:—**Folld.** Dally *v.* Wolferstan (1823), 1 L. T. O. S. K. B. 246.

2532. —— **Surety holding counter bond due day before payment.**]—If a surety, bound with his principal for payment of money by instalments, takes a bond from the principal, conditioned for payment of the amount of the instalments before the first of them will be due, & before that time the principal becomes bkpt. & obtains his certificate, & afterwards the instalment bond be discharged by the surety, still he cannot maintain an action against the principal for money paid to his use.—TOUSSAINT *v.* MARTINNANT (1787), 2 Term Rep. 100; 100 E. R. 55.

Annotations:—**Apld.** Martin *v.* Court (1788), 2 Term Rep. 640. **Consd.** Young *v.* Taylor (1818), 8 Taunt. 315. **Refd.** Cowley *v.* Dunlop (1798), 7 Term Rep. 565; *Ex p.* Walker (1798), 4 Ves. 373; Buckler *v.* Buttivant (1802), 3 East, 72; Stirling *v.* Forrester (1821), 3 Bli. 575; Schlencker *v.* Moxsy (1825), 5 Dow. & Ry. K. B. 747; Freeman *v.* Burgess (1827), 1 Moo. & P. 91; Penny *v.* Foy (1828), 8 B. & C. 11; Baber *v.* Harris (1839), 8 Ad. & El. 532.

2533. —— ——.]—If A. be bound with B. as a surety for payment of a sum certain, & take an absolute bond from B. payable the day before the original bond will become due, & B. become bkpt. before the day of payment, A. may prove such debt under the commission, & B.'s certificate will be a bar to an action by A. on the counter-bond, though A. do not pay the original bond till after B. has committed an act of bkpcy.—MARTIN *v.* COURT (1788), 2 Term Rep. 640; 100 E. R. 344.

Annotations:—**Consd.** Young *v.* Taylor (1818), 8 Taunt. 315. **Refd.** Buckler *v.* Buttivant (1802), 3 East, 72.

2534. —— **Surety for faithful discharge of office.**]—A., B., & C. entered into a bond to the King, the condition of which was that A., as sub-distributor of stamps, should well & truly account for all stamped vellum which he should receive, & should pay to the Comrs. the duties payable for such stamped vellum, & also the price of such vellum, together with all money which he should receive on account of the duties on personal legacies & stage coaches. A., as sub-distributor, became indebted to the King in a certain sum, & afterwards became bkpt., & obtained his certificate. A *sci. fa.* having afterwards issued upon the bond, B., one of the sureties, paid a sum of money to compromise the suit, & a certain other sum in defending same. In an action brought by the surety to recover those sums from bkpt.:—*Held:* A. was a person "surety for, or liable for, a debt" of bkpt., within 49 Geo. 3, c. 121, s. 8; & the latter

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2526 i. *Payment made after act of bankruptcy by principal debtor.*]—A cautioner guaranteed payment of all sums for which A. might be liable to a bank, the amount payable under the guarantee not to exceed £15,000, & declared that he should not be entitled to demand from the bank an assignation of the guarantee so long as A. was indebted to the bank in any sums such as aforesaid. A. was sequestrated, being indebted in more than £15,000 to the bank. The cautioner having paid the £15,000, claimed for that amount in the sequestration:—*Held:* the bank were entitled to rank for the full amount of their debt, & the cautioner was not entitled to rank in competition with them.—ALLAN (HARVIE'S TRUSTEES) *v.* GUILD (KETTLE'S TRUSTEE) (1885), 22 Sc. L. R. 758.—**SCOT.**

Sect. 4.—What debts are provable and for what amount: Sub-sect. 3, D. (b) iii.]

was protected by his certificate.—WESTCOTT *v.* HODGES (1821), 5 B. & Ald. 12; 106 E. R. 1098.

2535. —— Debt of counter-surety being principal debtor.]—A. lent B. £750, & B. & C., as his surety, by bond became bound to pay premiums of a policy of assurance deposited with A., & also to pay A. £750, by instalments with interest, provided that if B. or C. should become bkpt. they should at the option of A. give additional security, or pay the principal & interest due. B. & D., his partner, by a separate deed covenanted to indemnify C., in respect of the bond. On Oct. 26, 1847, B. & D. became bkpt., & on Jan. 17, 1848, C. paid principal & interest:—*Held:* a proof against bkpts.' estate for principal was not admissible.—*Re* MEYER, *Ex p.* MEYER (1848), 6 De G. M. & G. 775; 18 L. J. Bcy. 4; 11 L. T. O. S. 248; 12 Jur. 447; 43 E. R. 1434.

Annotation:—**Refd.** *Re* Willis, *Ex p.* Brook (1850), 6 De G. M. & G. 771.

2536. Payment made after bankrupt discharged.]—In *assumpsit* for money paid, deft. pleaded his bkpcy. & certificate, that the money was paid for a debt of deft. due before his bkpcy. for which pltf. was surety, & that pltf. paid the money without any request from deft. except as might legally arise from the premises. Replication, that before the payment deft. had obtained his certificate & that a final dividend had been made of his estate, & that there was not any debt, in respect of the payment of which pltf. could have proved, or for which he could have received any dividend:—*Held:* the certificate was a discharge from the claim, as the principal creditor might have proved, in which case pltf. would have been entitled to the benefit of that proof, or, pltf. might have paid the debt at once to the creditor & have himself proved before any dividend was declared or might have compelled the creditor to prove for pltf.'s benefit.—JACKSON *v.* MAGEE (1842), 3 Q. B. 48; 2 Gal. & Dav. 402; 11 L. J. Q. B. 257; 6 Jur. 1107; 114 E. R. 425.

Annotation:—**Refd.** Earle *v.* Oliver (1848), 2 Exch. 71.

2537. Old surety bond exchanged for new—Whether sufficient payment to admit proof.]—A surety in a bond for bkpts., after bkpts. were certificated, joined with them & a new surety in a new bond to the representatives of the creditor, & the old bond was delivered up to the surety:—*Held:* not payment by the surety, within 49 Geo. 3, c. 121, so as to enable the surety to prove under the commission.—*Re* PARKINSON, *Ex p.* SERGEANT (1825), 2 Gl. & J. 23.

2538. Surety for recurring payments—Payment of instalments accruing after bankruptcy of principal debtor—Rent.]—To a declaration for money paid, deft. pleaded his bkpcy. & certificate, & that pltf., before the issuing the commission, was a surety for a debt of deft., & that the money paid by pltf. for his use was paid by him as such surety, after the issuing the commission, & before a final dividend had been made of deft.'s effects under the same, whereby pltf. became entitled to prove under the commission. Replication, that pltf., before the issuing the commission, was surety to J. for deft., that deft. should perform certain things contained in articles of agreement, by which an annual rent was to be paid by deft., & that after his bkpcy. three years' rent became due from deft., & that the money paid by pltf. for deft. was paid by him as such surety, by reason of the non-payment by deft. of the rent, & for the costs of an action brought against pltf. as such surety by J.:—*Held:* pltf. was entitled to recover, as he could not be deemed liable as a surety, within 49 Geo. 3, c. 121, s. 8, as that sect. related only to debts of bkpt. due at the time of issuing the commission.—M'DOUGAL *v.* PATON (1818), 2 Moore, C. P. 644; 8 Taunt. 584; 129 E. R. 511.

Annotation:—**Distd.** Jackson *v.* Magee (1842), 3 Q. B. 48.

2539. —— —— Annuity.]—Pltf. became surety for defts. in an annuity deed. Defts. became bkpt. & obtained their certificate, & afterwards pltf. was compelled by the annuity creditor to pay several sums for arrears of the annuity due after issuing the commission. Pltf. having sought to recover those sums & held defts. to bail, it was contended that this was a debt which pltf. could have proved under the commission:—*Held:* the surety could not compel the annuity creditor to come in & prove, & it was not a debt *quoad* the surety, until he was in a condition to be damnified by it, & a surety paying arrears in the above circumstances was not within 49 Geo. 3, c. 121, s. 8, & might recover against the principal & hold him to bail.

By s. 17 [of the above Act] the annuity creditor, whether there shall or shall not be arrears due, may prove for the value of the annuity (LE BLANC, J.).—WELSH *v.* WELSH (1815), 4 M. & S. 333; 105 E. R. 857.

Annotations:— **Folld.** M'Dougall *v.* Paton (1818), 2 Moore, C. P. 644. **Refd.** Watkins *v.* Flanagan (1822), 1 Madd. 280; Freeman *v.* Burgess (1827), 4 Bing. 416; Harding *v.* Preece (1832), 9 Q. B. D. 281.

2540. —— —— ——.]—An annuity bond was forfeited before the bkpcy. of the principal, which occurred previous to 6 Geo. 4, c. 16:—*Held:* the surety could only prove for the arrears due before the bkpcy.—*Re* PARTON, *Ex p.* PARTON (1836), 2 Deac. 62.

2541. —— Insurance premium.]—Deft., in 1853, assigned to H. a policy of insurance upon his life, pltf. joining him as surety, & covenanting to pay the premiums which should from time to time become due. In Apr., 1862, deft. became bkpt., & obtained his order of discharge on June 30. In Dec., 1863, pltf. paid the premium due upon the policy, & brought an action, in which deft. pleaded his bkpcy. & certificate:—*Held:* this was a claim or demand provable in the bkpcy.—SAUNDERS *v.* BEST (1864), 17 C. B. N. S. 731; 5 New Rep. 132; 10 Jur. N. S. 1204; 13 W. R. 160; 144 E. R. 293.

2542. —— —— Liability of surety extinguished by valuation of policy.]—A mtgor. assigned to the mtgee. a policy of insurance to secure the repayment of an advance of £500, which the mtgor. covenanted to repay on a certain date, & the mtgor.

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l. *Where surety pays the whole debt.*]—Claimant had given a letter of guarantee to T. & Co. for the account of debtor, subsequently insolvent, to the extent of $450, which he was subsequently obliged to pay:—*Held:* he could not rank on the estate of debtor for the amount paid under the letter of guarantee until after the creditor to whom he had guaranteed had been paid in full.—DUCLOS *v.* THIBODEAU (1877), 7 R. L. O. S. 620. —**CAN.**

m. —— *Bankrupt's assets insufficient to pay claim of creditor.*]—A deceased person, of whom pltf. was exor., gave defts. a guarantee against all loss in respect of goods sold or to be sold, provided he should not be called on in any event to pay a greater sum than $2,500. The principal debtor being indebted to defts. in $5,500, made an assignment under R. S. O. 1887, c. 124, & defts. filed a claim therefore with the assignee. At a later date pltf. paid defts. the $2,500 & filed a claim with the assignee. The dividends from the estate were insufficient to pay the balance of defts.' claim:—*Held:* this was a guarantee of the whole of the debt, limited in amount to $2,500, that is, a guarantee of the ultimate balance, after all other sources were exhausted; & pltf. was not entitled to rank upon the estate in respect of the $2,500, nor to recover any part of any dividend which defts. had received.—MARTIN *v.* MCMULLEN (1890), 18 A. R. 559.—**CAN.**

& another person as surety jointly & severally covenanted with the mtgee. to pay interest so long after the date as any principal money remained due, & to pay all premiums on the policy, &, if the policy should become void, the cost of effecting a new policy. The mtgor. subsequently agreed to indemnify the surety against any sums which he might be called upon to pay under his covenants with the mtgee. No part of the principal money was repaid & the mtgor. became bkpt. The mtgee. proved for the principal money less an amount at which he valued the policy. The surety claimed, under the agreement to indemnify, to prove for the estimated amount of his liability to the mtgee. for future interest & premiums:—*Held:* on the mtgor.'s bkpcy. the principal sum was no longer due within the covenant, &, the policy having been valued, the liability to pay the premiums ceased, & the proof was rightly rejected.—*Re* MOSS, *Ex p.* HALLET, [1905] 2 K. B. 307; 74 L. J. K. B. 764; 92 L. T. 777; 53 W. R. 558; 49 Sol. Jo. 538; 12 Mans. 227, D. C.

Annotation:—**Refd.** *Re* Pyke, Davis *v.* Jeffreys (1910), 55 Sol. Jo. 109; *Re* British Salicylates, [1919] 2 Ch. 155.

2543. Where surety pays part of debt—Claim admitted until ability to pay balance ascertained.]—A surety for a debt due by bkpt. must pay or satisfy the whole debt before he can be allowed to prove, but the administratrix of a deceased surety was allowed to enter a claim for part which had been paid, to stand until it could be ascertained whether the estate of the deceased surety could pay the debt.—*Re* BEAUMONT (1852), Fonbl. 268.

2544. Where surety pays by promissory note before bankruptcy of principal debtor—& receives bond granted by himself & debtor from creditor—Without knowledge of principal debtor.]—In 1855 R., & H. as his surety, gave to G. a bond for £2,000. R. gave to H. by way of indemnity a warrant of attorney. In 1858, G., without the knowledge of R., gave up the bond to H., & received in satisfaction for it the promissory note of H. for the sum remaining due. R. at the same time assigned all his property to H. in satisfaction of the liabilities under which H. had become surety for him. In the following month R. became bkpt., & the warrant of attorney & the assignment became void as against the assignees:—*Held:* the dealings between H. & G. had not taken away the rights of H. against R., & H. having paid the debt was entitled to prove against R.'s estate.—*Re* ROBERTS, *Ex p.* ALLEN & CAZENOVE (1858), 3 De G. & J. 447; 44 E. R. 1341.

2545. Where surety has not paid debt.]—The surety of a bkpt. is entitled to prove against bkpt.'s estate, although he has not paid the debt for which he is liable.—*Re* HEREPATH & DELMAR, *Ex p.* DELMAR (1890), 38 W. R. 752; 6 T. L. R. 280; 7 Morr. 129.

Annotations:—**Apld.** *Re* Blackpool Motor Car Co., Hamilton *v.* Blackpool Motor Car Co., [1901] 1 Ch. 77. **Refd.** *Re* Parrott, *Ex p.* Whittaker (1891), 63 L. T. 777, D. C.

2546. ——.]—A surety for bkpt. is not entitled to prove for the purpose of voting at the first meeting of creditors, unless he has paid the debt for which he is surety.

Qu.: whether a surety for a bkpt. is entitled under 1883 Act, s. 37, to prove against bkpt.'s estate for dividend before he has actually paid the debt, if there is a probability of double proof being made.—*Re* PARROTT, *Ex p.* WHITTAKER (1891), 63 L. T. 777; 39 W. R. 400; 7 T. L. R. 218; 8 Morr. 49, D. C.

Annotation:—**Refd.** *Re* Blackpool Motor Car Co., Hamilton *v.* Blackpool Motor Car Co., [1901] 1 Ch. 77.

2547. For what amount—Interest—Only to date of bankruptcy.]—The exor. of a surety for bkpt. paid the debt, & under 49 Geo. 3, c. 121, s. 8, applied to prove it under the commission, the Comrs. having admitted the proof of the debt, & also of the subsequent interest:—*Held:* all that was meant by the Act was, that the surety should prove as the principal creditor, but nothing subsequent to the bkpcy.—*Ex p.* WILSON (1811), 1 Rose, 137.

2548. —— —— **Where surplus.**] — A surety paying after the bkpcy. to a creditor who has proved can, in case of a surplus, claim no interest which the creditor could not have claimed.—*Re* BOYD, *Ex p.* HOUSTON & BOYD (1825), 2 Gl. & J. 36.

2549. —— —— **On sum paid till date of receiving order.**]—Where a surety pays at maturity a promissory note, upon which he is jointly & severally liable with a bkpt., he is entitled to prove against bkpt.'s estate for the interest on the principal sum he has paid from the date of payment to the date of the receiving order, as well as for the principal sum.—*Re* EVANS, *Ex p.* DAVIES (1897), 66 L. J. Q. B. 499; 76 L. T. 530; 46 W. R. 8; 41 Sol. Jo. 494; 4 Mans. 114.

2550. —— —— **Balance of debt after creditor's proof.**]—Under a deed of arrangement containing

2545 i. *Where the surety has not paid debt.*]—H. guaranteed the payment of a co.'s overdraft at a bank; the co. subsequently went into liquidation, & the bank called upon H. to pay the amount guaranteed by him:—*Held:* without paying to the bank the amount due to it under the guarantee, H. was entitled to prove for the amount of his contingent liability in the liquidation, but only if the bank did not prove for the debt due to it from the co.

The right of proof which a surety has in the bkpcy. of his principal is not limited to that given by Bkpcy. Act, 1908, s. 114. The contingent liability of a surety who has been called upon to pay but has not in fact paid his principal's debt forms a debt provable in the bkpcy. of the principal under s. 98 of that Act; but his right is limited by the rule that there cannot be a double proof against one estate in respect of the same debt.—*Re* YEREX, BARKER & FINLAY, LTD. (1909), 29 N. Z. L. R. 199.—**N.Z.**

2545 ii. ——.]—M. G. became surety for R. G. to T. & A. Co. for £3,000, portion of a debt of a larger amount due by R. F. to the co. on mtge. R. G. afterwards became insolvent & obtained his certificate. T. & A. Co. without the knowledge or consent of M. G. proved their debt against the insolvent's estate at £10,145 12*s.* 3*d.* (for £3,000 of which M. G. had become surety), put a value of £10,000 on their mtge. securities, & received a dividend on the residue:—*Held:* (1) the fact of the co. having proved their debt, valued their securities, & received a dividend on the residue, did not prevent the surety afterwards proving for the amount which he might as surety have to pay; (2) he was not bound by the valuation of the securities made by the principal creditor.—TRUST AND AGENCY CO. OF AUSTRALIA *v.* GREENE (1870), 1 V. L. R. 171.—**AUS.**

2547 i. *For what amount—Covenant of indemnity—Proof for full amount.*]—M. trading as M. & Co., & also as M., with separate banking accounts, obtained an advance from a bank in respect of M. & Co., J. giving the bank a continuing guarantee. M. at the same time gave J. mtges. over his private property, & covenanted to hold J. indemnified. Some time afterwards J. agreed to increase the guaranteed amount. Shortly before the bkpcy. of M., J. advanced him money on his separate account, indorsed promissory notes to cover these second advances, & to secure these, took a mtge. over other land. The mtge. deed provided that the mtge. was to be redeemed, if M. should indemnify J. against his liability on the guarantee. M. & Co. became bkpt., as did M. in respect of his separate estate. The bank proved against the estate of M. & Co., received a dividend, & required J. to pay the full sum covered by the guarantees. J. put in a proof against M.'s separate estate, including in this proof the amount paid to the bank on M. & Co.'s account, & valuing his securities:—*Held:* by virtue of the covenants in the mtges. M. was bound to indemnify J., against all liabilities he might incur under the guarantee & he was entitled to prove not only for the sum covered by the original guarantee, but also for the additional sum covered by the subsequent guarantee.—*Re* MOELLER, *Ex p.* JOSEPH (1884), 3 N. Z. L. R. 164.—**N.Z.**

Sect. 4.—What debts are provable and for what amount: Sub-sect. 3, D. (b) iii., iv. & v. & (c).]

the usual provisions a surety is not entitled to prove for the balance remaining due after the creditor has proved & received a dividend in respect of the debt, but he is entitled to prove for interest on such balance.—*Re* PYKE, DAVIS *v.* JEFFREYS (1910), 55 Sol. Jo. 109.

2551. —— Consequential damage to surety—From failure of bankrupt to pay principal debt.]—By 49 Geo. 3, c. 121, s. 8, the certificate of bkpt. is a bar, not only to any action at the suit of the surety for the recovery of money paid in discharge of the original debt, but to any action for the consequential damage accruing from the non-payment by bkpt. of the original debt, when due.—VAN SANDAU *v.* CORSBIE (1819), 3 B. & Ald. 13; 106 E. R. 568.

Annotations:—**Folld.** Tetley *v.* Wanless (1867), L. R. 2 Exch. 275, Ex. Ch. **Refd.** Berry *v.* Irwin (1849), 8 C. B. 532; Southgate *v.* Saunders (1850), 5 Exch. 565. **Mentd.** Bassett *v.* Dodgin (1833), 9 Bing. 653; Filbey *v.* Lawford (1841), 3 Man. & G. 479, n., Ex. Ch.; Naylor *v.* Mortimore (1864), 17 C. B. N. S. 207.

2552. —— Dividend paid by bankrupt surety's estate.]—C. & J. executed a joint & several bond. C. became bkpt., & his estate paid a great part of the debt. J., who was the principal, afterwards became bkpt., & the bond holders proved the remainder of their debt against his estate:—*Held:* C.'s assignees could prove for what they had paid before J.'s bkpcy.—*Ex p.* WOOD (1791), cited 10 Ves. at p. 415; 32 E. R. 905.

Annotation:—**Consd.** *Ex p.* Rushforth (1805), 10 Ves. 409, L. C.

2553. —— ——.]—A trader made a promissory note, as a surety for a debt due to one of the creditors of a firm. The firm & the trader became bkpt., & the creditor proved against the estate of the trader on the note, & against the separate estate of a partner in the firm on the debt. A dividend was declared & paid on the former proof, but not on the latter:—*Held:* the assignees of the trader were not entitled to an order to prove against the joint estate of the firm, for the amount of the dividend which they had paid on the promissory note.—*Re* CAMPION, *Ex p.* BROWN (1842), 2 Mont. D. & De G. 718; 11 L. J. Bcy. 43; 6 Jur. 1021, Ct. of R.

iv. *Proof by Surety against Bankrupt Co-surety.*

2554. Co-sureties for payment of annuity—One surety paying after bankruptcy of co-surety.]—One of three co-sureties for the payment of an annuity paid money on account of the annuity after the bkpcy. of a co-surety:—*Held:* the latter was liable to an action for contribution, although he had obtained his certificate, as one surety could not prove the value of the annuity under the commission against his co-surety, but he could not at law be compelled to repay more than one-third of the sum paid on account of the annuity, although the third surety had become insolvent at the time of such payment.—BROWNE *v.* LEE (1827), 6 B. & C. 689; 9 Dow. & Ry. K. B. 700; 108 E. R. 604.

Annotations:—**Distd.** Clements v. Langley (1833), 5 B. & Ad. 372. **Apld.** Kemp *v.* Finden (1844), 12 M. & W. 421. **Folld.** Batard *v.* Hawes, Batard *v.* Douglas (1853), 2 E. & B. 287. **Refd.** *Re* Colnaghi, *Ex p.* Marks (1838), 3 Deac. 133; Page *v.* Thomas (1840), 6 M. & W. 733; Amott *v.* Holden (1852), 18 Q. B. 593. **Mentd.** Aston *v.* Hurd, Gwinnell *v.* Askew (1829), 3 Y. & J. 136.

2555. Co-sureties for payment of principal & interest—Forfeiture for non-payment of interest before bankruptcy not insisted on.]—R. borrowed a sum of money, & gave the lenders a bond, by which he & four others bound themselves jointly & severally in a penalty, for the regular payment of interest, & for the discharge of the principal & all interest which might be due at the end of five years, or, if sooner called upon, then at twenty-one days after demand. One of the co-obligors of R. became bkpt., & obtained his certificate. At the time of the bkpcy. a forfeiture had accrued by non-payment of interest, but it was not insisted upon, & the interest was subsequently paid up. After the certificate, R. was called upon for the principal, but did not pay, & payment was enforced from the four co-obligors who had continued solvent. In an action by one of them against the surety who had been bkpt., for contribution:—*Held:* they could not have proved under the commission, & the certificate was no answer to the action.—CLEMENTS *v.* LANGLEY (1833), 5 B. & Ad. 372; 2 Nev. & M. K. B. 269; 110 E. R. 828.

Annotations:—**Distd.** Heigh *v.* Jackson (1838), 1 Horn. & H. 167; Jackson *v.* Magee (1842), 3 Q. B. 48. **Consd.** Wallis *v.* Swinburne (1847), 1 Exch. 203.

2556. Creditor paid in full by solvent co-sureties—Right to prove against bankrupt co-surety.]—A. & B. gave a joint promissory note, upon which money was lent by C. to them, & by them to D. B. became bkpt., & A. was obliged, after the bkpcy. to pay the note:—*Held:* he was not a surety for B., but A. & B. were principal debtors or co-sureties, & A. could not prove for a moiety of the note against B.'s estate.—*Re* DEACON, *Ex p.* PORTER (1835), 4 Deac. & Ch. 774; 4 Mont. & A. 281; 4 L. J. Bcy. 86, Ct. of R.

Annotations:—**Consd.** Wilson *v.* Goodman (1844), 4 Hare, 54; Wallis *v.* Swinburne (1847), 1 Exch. 203. **Distd.** *Re* Wyat & Thompson, *Ex p.* Smith (1850), 16 L. T. O. S. 176.

2557. —— ——.]—One of three co-sureties executed a deed of assignment in favour of his creditors. The principal debtor, a co., went into liquidation, & the creditor claimed against the estate of bkpt. surety. The two other co-sureties paid off the principal creditor, & took an assignment of the whole debt & the benefit of the creditor's claim against bkpt. co-surety:—*Held:* the solvent co-sureties were entitled to prove against the estate of bkpt. co-surety for the whole amount of the debt, but not to receive dividends amounting to more than the proportion of the whole debt for which bkpt. co-surety was liable, namely one-third.—*Re* PARKER, MORGAN *v.* HILL, [1894] 3 Ch. 400; 64 L. J. Ch. 6; 71 L. T. 557; 43 W. R. 1; 38 Sol. Jo. 694; 7 R. 590, C. A.

2558. Creditor paid in full by solvent parties—Right to use creditor's proof against bankrupt co-surety.]—Where one of two or more sureties becomes bkpt. & the creditor has proved his debt, & is afterwards paid in full partly by the principal debtor, & partly by the non-bkpt. surety, the latter has a right to use the proof for the purpose of obtaining from bkpt.'s estate the contribution to which bkpt., but for the bkpcy., would have been liable, so far as proof can furnish means to that end.—*Re* CLARK, *Ex p.* STOKES & GOODMAN (1848), De G. 618; 12 Jur. 891.

Annotation:—**Apprvd.** *Re* Parker, Morgan *v.* Hill, [1894] 3 Ch. 400, C. A.

PART VIII. SECT. 4, SUB-SECT. 3.—D. (b) iv.

2558 i. *Creditor paid in full by solvent parties—Right to prove against bankrupt co-surety.*]—Three parties became bound, conjunctly & severally for a sum, borrowed for the use of one of them. The principal became bkpt. One surety also became insolvent, & the other was obliged to pay the whole debt:—*Held:* the latter was entitled to rank on his co-surety's estate for the one-half of the debt, each of them having been indebted as principal for a moiety thereof; & as surety for the other moiety.—KEITH (TRUSTEE ON MAXWELL'S ESTATE) *v.* FORBES & HUNTER & CO. (1794), 3 Pat. App. 350, H. L.—**SCOT.**

2559. Payment by surety within six months of petition by co-surety.]—In May, 1857, V., & pltf. & deft. as his sureties, gave their joint & several promissory note to H. for timber supplied by H. to V. The note was payable on Jan. 1, 1858. In Nov., 1857, V. executed an assignment for the benefit of his creditors under which pltf. ultimately received a dividend. In Dec., 1857, deft. became bkpt., & obtained his certificate. In Jan., 1858, pltf. paid the note, & afterwards commenced an action against deft., his co-surety, to recover contribution:—*Held:* as the payment by pltf. was within six months from the time of the filing of the petition by deft., pltf. had a right not merely to claim, but to prove against the estate of deft., in respect of his liability to contribution "as a liability to pay money on a contingency," within 1849 Act, s. 178, & the bkpcy. & certificate of deft. were an answer to the action.—ADKINS *v.* FARRINGTON (1860), 5 H. & N. 586; 29 L. J. Ex. 345; 2 L. T. 287; 157 E. R. 1314.

Annotations:—**Consd.** General Discount Co. *v.* Stokes (1864), 17 C. B. N. S. 765. **Mentd.** Betteley *v.* Stainsby (1862), 9 Jur. N. S. 440.

2560. Co-surety's liability to contribution—Whether provable debt under 1883 Act, s. 37.]—The liability of a bkpt. co-surety to contribution, though unascertained at the time of the bkpcy. proceedings, is a debt provable in the bkpcy. under the above sect.—WOLMERSHAUSEN *v.* GULLICK, [1893] 2 Ch. 514; 62 L. J. Ch. 773; 68 L. T. 753; 9 T. L. R. 437; 3 R. 610.

Annotations:—**Folld.** *Re* Blackpool Motor Car Co., Hamilton *v.* Blackpool Motor Car Co., [1901] 1 Ch. 77. **Refd.** Robinson *v.* Harkin, [1896] 2 Ch. 415; Ellis *v.* Pond & Bloomsbury Syndicate, [1898] 1 Q. B. 426, C. A.; Shepheard *v.* Bray, [1906] 2 Ch. 235; Ascherson *v.* Tredegar Dry Dock & Wharf Co., [1909] 2 Ch. 401; *Re* Law Guarantee Trust & Accident Soc., Liverpool Mortgage Insce. Case, [1914] 2 Ch. 617, C. A.

v. *Right of Surety to Benefit of Creditor's Proof against Principal Debtor.*

See GUARANTEE.

(c) *Other Cases.*

2561. Debt payable on happening of contingency—Distinguished from debt payable at all events.]—If a demand be payable at all events though at a future day, it may be proved under a commission of bkpcy. against debtor, but if it rest in contingency, whether it will be paid or not, it cannot be so proved, unless secured by a penalty which is forfeited at law.—HANCOCK *v.* ENTWISLE (1789), 3 Term Rep. 435; 100 E. R. 663.

2562. —— Remote contingency.]—Where the contingency depends upon the separation of husband & wife, & of a widow's not marrying, it is not provable. Only such contingencies as are capable of valuation are provable.—*Re* WENTWORTH, *Ex p.* DAVIS (1831), Mont. 297, L. C.

Annotations:—**Distd.** *Re* Gibbins, *Ex p.* Tindal (1832), 1 Deac. & Ch. 291. **Apld.** Brett *v.* Jackson (1869), L. R. 4 C. P. 259. **Distd.** *Re* Blakemore, *Ex p.* Blakemore (1877), 46 L. J. Bcy. 118, C. A.

2563. Bottomry bond—Bankruptcy before return of ship.]—An obligee on a bottomry bond shall not, before the return of the ship, come in under the commission of bkpcy. of the obligor, but if the contingency happens before bkpt.'s estate be fully distributed, such creditor shall come in.—*Ex p.* CASWELL, *Ex p.* CAZALET, *Ex p.* BATEMAN (1728), 2 P. Wms. 497; 24 E. R. 833; *sub nom. Ex p.* GAZALET, Mos. 28, 79, L. C.

Annotations:—**Mentd.** *Re* Greenaway, *Ex p.* Greenaway (1740), 1 Atk. 113; *Ex p.* Groome (1744), 1 Atk. 115; *Ex p.* Michell (1751), 1 Atk. 120; Goddard *v.* Vanderheyden (1771), 2 Bos. & P. 8, n.; *Ex p.* Barker (1803), 9 Ves. 110; *Re* Gibbins, *Ex p.* Tindal (1832), 1 Deac. & Ch. 291; *Ex p.* Tindal (1832), 8 Bing. 402.

2564. Bond to replace stock—Bankruptcy before forfeiture.]—No proof will be allowed under a bond to replace stock & pay the dividends, unless forfeited, either as to the capital or dividend, before bkpcy.—*Ex p.* KING (1803), 8 Ves. 334; 32 E. R. 383, L. C.

Annotation:—**Apld.** *Re* Biddulph, *Ex p.* Eyre (1841), 6 Jur. 41.

2565. Bond for payment of sum to be recovered in action for debt—Bankruptcy after action but before judgment.]—Debt against one of the principals, on a bond, with sureties, given under Judgments Act, 1838 (c. 110), s. 8, reciting that pltf. had filed & served an affidavit of debt in bkpcy. against deft. & his partners, & conditioned for the payment of such sums as should be recovered in any action which had been, or should be, brought for recovery of the debt, or for the render of themselves by deft. & his partners to the custody of the ct. in which such action had been, or might be, brought, according to the practice of such ct., or within such time, & in such manner, as the ct., or any judge thereof, should direct, after judgment should have been recovered in such action or actions. The declaration further stated a judgment recovered by the pltf. in the Ct. of Exchequer, for the debt in the condition of the bond mentioned:—*Held:* the bkpcy. & certificate of deft. & his partners after the commencement of the action in which the judgment was obtained, but before judgment, furnished no answer to an action upon the bond, the demand arising thereon not being a debt, contingent or otherwise, provable under the fiat, by virtue of any of the provisions of 6 Geo. 4, c. 16.—HINTON *v.* ACRAMAN (1845), 2 C. B. 367; 3 Dow. & L. 426; 15 L. J. C. P. 52; 7 L. T. O. S. 4; 10 Jur. 203; 135 E. R. 987; *subsequent proceedings* (1846), 3 C. B. 737.

Annotation:—**Mentd.** Hayward *v.* Bennett (1846), 3 C. B. 404.

2566. Covenant to be performed within seven years or when requested—Bankruptcy after seven years but before request.]—Covenant within seven years, or when requested, to convey lands of a given value in particular counties. Under a bkpcy. after the expiration of the seven years & no request made:—*Held:* a proof could not be admitted upon the covenant, unless secured by a penalty.—*Ex p.* MARE (1803), 8 Ves. 335; 32 E. R. 384, L. C.

2567. Debt payable on notice—Bankruptcy before notice.]—No proof in bkpcy. was allowed under a written undertaking to pay on one month's notice the debt of another, as notice had not been given before the bkpcy., & the debt was contingent.—*Ex p.* MINET (1807), 14 Ves. 189; 33 E. R. 493, L. C.

Annotations:—**Consd.** *Re* Sudell, *Ex p.* Myers (1833), 2 Deac. & Ch. 251, Ct. of R.; *Re* Willis (1849), 4 Exch. 530. **Mentd.** Boehm *v.* Campbell (1819), 8 Taunt. 679; Jenkins *v.* Reynolds (1821), 6 Moore, C. P. 86; Morley *v.* Boothby (1825), 3 Bing. 107.

PART VIII. SECT. 4, SUB-SECT. 3.—D. (c).

2561 i. *Debt payable on a contingency—Distinguished from contingent liability.*]—Deft. underwrote in favour of pltf. a policy of insurance on a ship, of which pltf. was part owner. The ship was beached in a gale on Oct. 18, 1872. On Oct. 28, 1872, deft. made a voluntary assignment. On Jan. 18, 1873, the adjustment of loss with proof, etc., were furnished to the broker for the underwriters:—*Held:* at the time of deft.'s assignment, the liability to pltf. was not a debt payable upon a contingency, but a mere contingent liability.—ROWAN *v.* HARRISON, ROWAN *v.* TURNER (1875), 2 Pug. 503; 15 N. B. R. 503.—CAN.

Sect. 4.—What debts are provable and for what amount: Sub-sect. 3, D. (c).]

2568. —— ——.]—A bond was conditioned for the payment of a sum of money to exors. of the obligor, & of the interest during his life, payable on certain days, or within twenty days after demand. The obligee became bkpt. & interest was then due, but no demand had been made: —*Held:* there having been no forfeiture, the bond did not constitute a debt provable under the commission.—WINTER *v.* MOUSELEY (1819), 2 B. & Ald. 802; 106 E. R. 558.

Annotations:—**Consd.** Holmes *v.* Love (1824), 5 Dow. & Ry. K. B. 56. **Mentd.** Guy *v.* Newson (1833), 4 Tyr. 31; Marriage *v.* Marriage (1845), 1 C. B. 761; *Re* Nicholson & Stone, *Ex p.* Robinson (1862), 31 L. J. Bcy. 12; *Re* Beardsall & Jackson, *Ex p.* Brett (1867), 15 L. T. 679.

2569. —— ——.]—A., B. & C., being bankers in co-partnership, were appointed treasurers of a corporate body, & executed a joint & several bond, in a penalty of £20,000, conditioned for the due performance by them of various duties as treasurers, &, especially, that they would "when thereunto required by the co.," etc., pay all balances in their hands, etc. A commission of bkpcy. issued against A., B. & C., who had at the time a large balance in their hands, as treasurers, but no demand under the bond had been made by the co. before the bkpcy.:—*Held:* there was not a sufficient breach of the condition to constitute a debt provable against the separate estates of bkpts.—*Re* DILWORTH, *Ex p.* LANCASTER CANAL CO. (1828), Mont. 27.

Annotations:—**Consd.** *Re* Whitmore (1843), 3 De G. & Sm. 565. **Refd.** *Re* Fox, *Ex p.* Marshall (1834), 3 Deac. & Ch. 120.

2570. —— —— **Interest provided for.**]—Upon a loan to bkpt., bearing interest, it was agreed that six months' notice should be given before repayment was required:—*Held:* the debt was provable, though no notice given before the bkpcy.—*Re* DOWMAN, *Ex p.* DOWMAN (1827), 2 Gl. & J. 241, L. C.

Annotation:—**Consd.** *Re* Browne & Wingrove, *Ex p.* Ador, [1891] 2 Q. B. 574, C. A.

2571. Securities deposited to be redelivered on demand—No demand before bankruptcy.]—A customer of a banking firm, whose practice it was to receive deposits at their banking house of boxes of securities belonging to their customers, for safe custody, lent part of the securities contained in his box to the firm, upon an undertaking to replace them in three months or sooner if required. After the expiration of three months from the time of the first loan the firm, with the consent of the customer, deposited other securities in the box in exchange for those first pledged, & afterwards became bkpt.:—*Held:* the value of the securities lent to the firm was not a contingent debt, & as there had been no demand for their replacement before the bkpcy., the customer had no provable debt in respect thereof, either against the joint estate or any of the separate estates.—*Re* BIDDULPH, *Ex p.* EYRE (1843), 3 Mont. D. & De G. 12; *sub nom. Re* WRIGHT, *Ex p.* EYRE, 1 Ph. 227; 12 L. J. Ch. 266; 7 Jur. 162; 41 E. R. 618, L. C.

Annotation:—**Refd.** Hughes *v.* Tursden (1886), 55 L. J. Ch. 481, C. A.

2572. Bond to be void on payment when requested—Bankruptcy before request.]—Members of a brewing firm executed a joint & several bond to the bankers of the firm, conditioned to be void, if the brewers paid the balance due at any time to the bankers when thereunto requested, such request to be in writing & to be sent to the bank. On the bkpcy. of one of the obligors:—*Held:* a request must have been made before the bkpcy. to entitle the bankers to prove.

Part of the amount was due on bills of exchange, which had been dishonoured, & which the bankers had, in writing, required the brewers to pay, without, however, referring to the bond:—*Held:* a sufficient request.—*Re* RODHAM, *Ex p.* FLINTOFF (1844), 3 Mont. D. & De G. 726; 8 Jur. 766, Ct. of R.

2573. Agreement to pay money or admit payee as partner—On payee attaining twenty-one—Bankruptcy before payee twenty-one.]—A father bequeathed his business to his sons, with a declaration that an infant grandson should be admitted into the firm on attaining twenty-one, or in default the sons should pay the grandson £1,000 on his attaining twenty-one. The firm became bkpt. before the grandson attained twenty-one:—*Held:* there was a right to prove for the £1,000 as a contingent debt.—*Re* MEGAREY, *Ex p.* MEGAREY (1845), De G. 167; 5 L. T. O. S. 203; 9 Jur. 517.

2574. Bond for payment of money with interest—On payee attaining twenty-one—Bankruptcy before payee twenty-one—Interest in arrear.]—A. gave to B. a bond conditioned for payment of £1,000 when C. an infant, if living, should attain twenty-one, with interest in the meantime payable half yearly. A. became bkpt. during the minority of C. At the date of the fiat there was an arrear of interest due on the bond:—*Held:* the bond was forfeited, & the debt was not contingent within 1849 Act, s. 177; & B. was entitled to prove against the estate of A. for the whole £1,000 with interest to the date of the fiat.—*Re* CAWOOD, *Ex p.* SHAW (1850), Fonbl. 159; 15 L. T. O. S. 368.

2575. Judgment signed on award—Bankruptcy before end of period within which award might be set aside.]—Where bkpt. has before his bkpcy. contracted a liability to pay money upon a contingency, which has not happened before the filing of the petition, the demand may be proved.

Judgment was signed under an award on July 5, 1850, & costs taxed; on the same day a petition of bkpcy. was adjudicated upon & filed:—*Held:* the contingency of the award not being set aside, etc., was such a contingency as would come within 1849 Act, s. 178, & the claim should be

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o. *Bond to be void on payment of debt—Assignment for creditors before payment—Bond creditor acceding.*]—In 1825 a party borrowed a sum of £1,000 &, being then in England, granted therefore an English penal bond for £2,000, the condition of which was, that if the sum borrowed was paid, with interest, at the stipulated term, the bond should become void. In 1828 & 1835, the debt being unpaid, debtor executed in Scotland trust deeds for behoof of his creditors, to which the creditor in the English bond acceeded. By the arrangement embodied in these trust deeds & deeds of accession, proceedings which had been commenced for the recovery of the sum due by debtor to the creditors in the bond were suspended, & debtor's estate was conveyed to trustees for payment of his whole debts:—*Held:* the original obligation in the bond was superseded by the agreement embodied in the trust deeds & deeds of accession which constituted a new contract under which the creditor was entitled to claim such sum of principal & interest as might be held to effeir to the debt of £1,000 for which the bond had been granted, though amounting to more than £2,000.—SCOTT *v.* SINCLAIR (1865), 3 Macph. (Ct. of Sess.) 918.—**SCOT.**

p. —— —— —— *Amount of proof.*]—*Qu.:* whether, in the circumstances (*see supra*), apart from the supervening contract, the creditor could have claimed more than £2,000.

Though the general rule in the case of such bond was against any claim for more than the penal sum, the circumstances entitled the creditor to a relaxation of that rule (LORD KINLOCH).—SCOTT *v.* SINCLAIR (1865), 3 Macph. (Ct. of Sess.) 918.—**SCOT.**

allowed to be proved.—*Re* DYSON, *Ex p.* FIRBANKE (1850), 15 L. T. O. S. 504.

See, further, Sub-sect. 5, *post*.

2576. Obligation to pay costs in certain event—Event not determined until after bankruptcy.]—Deft., as surety, entered into a bond in a penal sum with the condition that if he should pay to pltf. such costs as he should in due course of law, be liable to pay in case the verdict should pass for then deft. in an action pending, which had been brought by C. in the name of pltf., such costs to be first taxed by one of the masters in the usual manner, the bond was to be void. The action mentioned in the condition was a *sci. fa.* on a judgment obtained by pltf., & which had been assigned to C. by T. since deceased, of whom pltf. was exor. The action was tried at the Spring Assizes in 1848, when a verdict was found for deft. In the following Easter Term a rule *nisi* for a new trial was obtained. On Nov. 14 following a fiat in bkpcy. issued against deft. In Hilary Term, 1849, the rule for the new trial was discharged. On May 29, deft. obtained his certificate, & on Aug. 22 the costs were taxed :—*Held :* at the time the fiat issued, deft.'s liability under the bond was a mere contingent liability, & not a contingent debt, within 6 Geo. 4, c. 16, s. 56, & pltf.'s claim for the costs was not barred by deft.'s certificate.—HANKIN *v.* BENNETT (1852), 8 Exch. 107 ; 21 L. J. Ex. 326 ; 20 L. T. O. S. 47 ; 155 E. R. 1279.

2577. Liability under del credere commission.]—A creditor, at the date of a deed of inspectorship & trust made by a debtor for the benefit of his creditors, had a claim against debtor for an ascertained sum of £1,974, & an unascertained sum on account of acceptances, which he had given to debtor on goods shipped by debtor through the creditor as his factor, on a *del credere* commission, & which had not then been sold, of which acceptances £5,000 had then become due. The creditor, in this state of things, executed the deed generally, without specifying on the deed the amount of his debt or claim. Upon the ultimate account after the goods were sold it appeared that a balance of £5,348 was due to the creditor from debtor :—*Held :* the creditor was entitled to a dividend from debtor's estate for the sum of £5,348, & not merely for the sum of £1,974.—GRAHAM *v.* ACKROYD (1853), 10 Hare, 192 ; 22 L. J. Ch. 1046 ; 17 Jur. 657 ; 1 W. R. 107 ; 68 E. R. 894.

Annotation :—**Mentd.** Teed & Bishop *v.* Johnson (1856), 25 L. J. Ex. 110.

2578. Obligation to pay for timber if burnt—Fire before bankruptcy—Value unascertained at bankruptcy.]—Sawmill proprietors, employed by a timber merchant to saw timber for him, agreed to keep it insured from damage by fire, & to pay him the value of it, if it should be burned. A fire having taken place, the timber was burned, & its quantity & quality were not in dispute, but the price had not been agreed upon before the sawyers became bkpt. :—*Held :* the value of the timber constituted a provable debt.—*Re* ROUTLEDGE, *Ex p.* BATEMAN (1856), 8 De G. M. & G. 263 ; 25 L. J. Bcy. 19 ; 26 L. T. O. S. 317 ; 2 Jur. N. S. 265 ; 4 W. R. 329 ; 44 E. R. 391, L. JJ.

Annotations :—**Consd.** *Re* Lawford, *Ex p.* Harrison (1856), 26 L. J. Bcy. 30. **Apld.** Betteley *v.* Stainsby (1862), 12 C. B. N. S. 477. **Mentd.** *Re* Lacon's Settlmt., [1911] 1 Ch. 351.

2579. Obligation to return securities or to substitute others—Contingent on passing of bill—Bankruptcy before bill passed.]—In Jan., 1866, a co. lent consols to be deposited by the promoters of a bill before Parliament, & pltfs., deft., & three others entered into an undertaking with the co. that, if the bill was thrown out, the consols should be returned, & if it passed, an equal amount of stock should be transferred to the co., & that a sum, in the nature of interest on the value of the consols at the time they were lent, from the end of six months to the date of the transfer, should be paid to the co. In Apr., 1866, deft. was adjudged bkpt., & obtained his order of discharge. In Aug. the bill was passed, but the consols were not transferred to the co. till May, 1867, & pltfs. were compelled to pay under the undertaking £500 as interest. An action having been brought by pltfs. to recover contribution from deft., he pleaded his discharge in bkpcy. :—*Held :* as the liability under the undertaking depended on an uncertain event, viz. the date at which the consols should be transferred, the amount of liability was not capable of being ascertained, & pltf.'s claim was not a debt provable in the bkpcy., & deft. was not discharged.—CARY *v.* DAWSON (1869), L. R. 4 Q. B. 568 ; 10 B. & S. 663 ; 38 L. J. Q. B. 300 ; 21 L. T. 23 ; 17 W. R. 916.

Annotations :—**Folld.** Holmes *v.* Symons (1871), L. R. 13 Eq. 66 ; *Re* Kelson, Tritton, *Ex p.* Wiseman (1871), 7 Ch. App. 35, L. JJ.

2580. Bond to be void on obligor obtaining transfer of security—Bankruptcy of obligor before time for transfer.]—A bond for £1,000, after reciting that the obligor had assigned to the obligee £1,100 consols, to which the obligor's wife was entitled upon the death of her mother E., & that the obligor's wife might survive her husband & might refuse to confirm the assignment, or the obligee might, through the obligor's default or otherwise, never realise the benefit of the assignment, was conditioned for avoidance if, within six months after E.'s death, the obligor should obtain the transfer of the consols, or the trustees thereof should transfer the consols to the obligee. E. died, & more than six months after the obligee sued the obligor on the bond. Deft. pleaded his bkpcy. & discharge under 1861 Act, obtained before any breach of the condition & before six months after E.'s death :—*Held :* the action was not barred by the bkpcy. & discharge, since the obligee could not have proved under the bkpcy., either for "a debt payable on a contingency" within 1849 Act, s. 177, or for "a liability to pay money on a contingency" within s. 178.—KENT *v.* THOMAS (1871), L. R. 6 Exch. 312 ; 40 L. J. Ex. 186 ; 24 L. T. 668 ; 19 W. R. 1148.

2581. Indemnity bond—Condition broken before bankruptcy—Payments made partly before & partly after bankruptcy.]—Where there is a bond of indemnity, the condition of which has been broken, & the penalty absolute at law, & petitioners have paid part before bkpcy., & part after, they may prove the whole.—*Re* RIDEHALGUE, *Ex p.* COCKSHOTT (1792), 3 Bro. C. C. 502 ; 29 E. R. 668.

2582. —— —— Payment made after bankruptcy.]—Y. became bound to X. conditioned for payment of two former bonds, & also to indemnify X. against those two bonds. The money secured by the second bond not having been paid on the day when it became due :—*Held :* the last bond was thereby forfeited, though X. was not called on to pay the money in the second bond until afterwards, & X. might prove it as a debt under the commission of bkpcy., which issued against Y. after the forfeiture & before payment.—HODGSON *v.* BELL (1797), 7 Term Rep. 97 ; 101 E. R. 874.

Annotations :—**Consd.** Collinge *v.* Heywood (1839), 9 Ad. & El. 633. **Reid.** Hankin *v.* Bennett (1852), 8 Exch. 107.

Sect. 4.—What debts are provable and for what amount: Sub-sect. 3, D. (c).]

2583. —— Amount not ascertained at issue of fiat.]—Where bkpt. had given an indemnity bond, & the amount of damage was not ascertained when the fiat issued:—*Held:* there was no provable debt.—*Re* FOX, *Ex p.* MARSHALL (1834), 1 Mont. & A. 145; 3 Deac. & Ch. 120; 3 L. J. Bcy. 37, Ct. of R.

Annotations:—**Consd.** *Re* Whitmore (1843), 3 De G. & Sm. 565; Hinton *v.* Acraman (1845), 2 C. B. 367. **Distd.** Amott *v.* Holden (1852), 18 Q. B. 593. **Refd.** *Re* Sudell, *Ex p.* Simpson (1834), 3 Deac. & Ch. 792; *Re* Rostron, *Ex p.* Raleigh (1838), 3 Mont. & A. 670, Ct. of R.; Abbott *v.* Hicks (1839), 5 Bing. N. C. 578; *Re* Willis (1849), 4 Exch. 530; *Re* Dyson, *Ex p.* Firbanke (1850), 15 L. T. O. S. 504. **Mentd.** South Staffordshire Ry. Co. *v.* Burnside (1851), 6 Ry. & Can. Cas. 611.

2584. Covenant to indemnify—By continuing in favour of retiring partner.]—A partner continuing the business took an assignment of all the stock, etc., & covenanted to indemnify the retiring partner from the debts then owing from the partnership. The continuing partner became bkpt. & obtained his certificate, & subsequently an action was commenced against the retiring partner upon an acceptance of the partnership. Judgment was obtained against him & he paid the debt & costs:—*Held:* no action would lie against bkpt. upon the covenant, since under 48 Geo. 3, c. 121, s. 8, the retiring partner might on his liability have resorted to & proved his debt under the commission, & was bound by his certificate. —WOOD *v.* DODGSON (1813), 2 M. & S. 195; 2 Rose, 47; 105 E. R. 355.

Annotations:—**Folld.** Van Sandau *v.* Corsbie (1819), 3 B. & Ald. 13. **Consd.** Bassett *v.* Dodgin (1833), 9 Bing. 653; Clements *v.* Langley (1833), 5 B. & Ad. 372. **Distd.** Abbott *v.* Hicks (1839), 5 Bing. N. C. 578. **Refd.** Wallis *v.* Swinburne (1847), 1 Exch. 203. **Mentd.** Aflalo *v.* Fourdrinier (1829), 6 Bing. 306; Filbey *v.* Lawford (1842), 4 Scott, N. R. 611.

2585. —— ——.]—A., B., & C. being in partnership as bankers, A. advanced money to the bank by sales of stock, & took bonds for £13,000 from B. & C. separately, conditioned for replacing £9,000 stock each. The stock was not replaced, & A. brought actions on the bonds & recovered judgments. A. withdrew from the bank, being then a creditor for £20,000 stock, which B. & C., by the deed of dissolution, agreed to replace by four instalments, covenanting that if they made default therein, A. might proceed on the judgments, & that he should have a lien on certain securities, both for that debt, & as an indemnity against the partnership debts, which they agreed to pay. B. & C. replaced the first instalment when due, but made default in the second. A written agreement, not under seal, was then made, that the debt should be treated as a loan of money from the first, & that the proceeds of the £15,000 stock then due, being £10,083, should be the debt, & should be repaid at a subsequent time, with legal interest. When that agreement was made, the £15,000 stock was worth only £8,437. Before any part of the £10,083 was paid, B. & C. became bkpts., & at the date of the commission, two out of the three remaining days, named in the deed of dissolution for replacing the stock, were past. After A. left the bank, he paid some of the old partnership debts:—*Held:* A. might prove for such of the old partnership debts as he had paid.—PARKER *v.* RAMSBOTTOM (1824), 3 B. & C. 257; 5 Dow. & Ry. K. B. 138; 3 L. J. O. S. K. B. 16; 107 E. R. 729.

Annotations:—**Distd.** *Re* Badnall, *Ex p.* Ellis (1827), 2 Gl. & J. 312, L. C. **Apld.** *Re* Caton, *Ex p.* Higgins (1842), 11 L. J. Bcy. 34. **Refd.** Sammon *v.* Miller (1829), 9 B. & C. 770; *Re* Naylor, *Ex p.* Grazebrook (1832), 2 Deac. & Ch. 186; *Re* Dunn, *Ex p.* Paynter (1862), 6 L. T. 510. **Mentd.** Powles *v.* Page (1846), 10 Jur. 526.

2586. —— ——.]—In Dec., 1818, A., B., C., & D. dissolved partnership as bankers by deed, by which it was agreed that A. & B. should retire, & the business be carried on by C. & D. C. & D. covenanted to indemnify A. & B. against all outstanding demands. In Oct., 1825, C. died, & a commission issued against D. A. having been obliged to pay certain partnership debts, which C. & D. had undertaken to indemnify

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2584 i. *Covenant to indemnify—Builder executing repairs—Injury to adjoining premises—Scope of indemnity.*]—B., employed by A. to execute some repairs, on being informed that C., the occupier of an adjoining house, had served a notice upon A. that injury was likely to result to his house; & that he would hold A. responsible, undertook in carrying out the work in the estimate, to hold himself responsible for any injury done to the adjoining houses. Some works in addition to those in the estimate were done; the contract was completed; & B. paid in full for all. C. brought an action against A. for injuries caused to his house. B. became bkpt. & A. sought to prove for the damages & costs paid by him, & for his own expenses in the action:—*Held:* the damages which C. might recover against A. were not necessarily identical with those contemplated by the guarantee, & A. could not prove either as for a debt payable upon a contingency, or as for a liability to pay money upon a contingency.—*Re* QUIN (1860), 11 I. Ch. R. 57.—**IR.**

2584 ii. —— *Under charterparty.*]—Defts. entered into a covenant to indemnify pltf., the charterer of a boat, "generally & without exception" against the charterparty. The question arising whether pltf.'s right to be indemnified was a debt provable under defts'. bkpcy.:—*Held:* notwithstanding defts. had assumed the charterparty, the covenant to indemnify was not discharged by defts.' bkpcy. & certificate.—JARVIS *v.* WALKER (1852), 9 U. C. R. 136.—**CAN.**

q. *Covenant to pay money if land sold—Assignment for benefit of creditors not a sale.*]—A. covenanted in writing to give pltf. firewood on certain property, & in the event of his selling or bequeathing it before the wood was cut, to pay $500. A. made an assignment for the benefit of creditors, & subsequently the land was sold by public auction. Pltf. claimed to rank against A.'s estate for the $500:—*Held:* the assignment was not a sale within the covenant, & the $500 was not payable.—RYAN *v.* MALONE (1908), 11 O. W. R. 575.—**CAN.**

r. *Expectancy under will—Insolvent Ordinance 6 of 1843, s. 31.*]—By a mutual will of husband & wife the survivor & children were appointed heirs of the first dying, on condition that the survivor be allowed to keep the whole of the joint estate under his or her sole control, & to remain in free & undisturbed possession thereof for life, & on the death of the survivor the joint estate to be equally divided amongst the children & the descendants of such of them as should die before testators:—*Held:* though the right of the children or their descendants to receive their inheritance would not arise under the will except in the event of one or more of them surviving testators, nevertheless their claim was a contingent one, capable of proof under the above sect. against the estate of the survivor upon his insolvency.—HIDDINGH *v.* ROUBAIX (1878), Buch. 36; 3 R. 11.—**S. AF.**

s. *Contract to pay fixed sum at certain date—Less any sums paid under contract in meantime—Assignments & Preferences Act, R. S. O., 1887, c. 124.*]—Where an estate is being administered under the above Act claims depending upon a contingency cannot rank but only debts strictly so called. An advertising contract gave the advertiser the right to use certain space in a newspaper at any time within twelve months, the advertiser agreeing to pay at the end of each month for the space used in that month, & at the expiration of twelve months, whether the space had been used or not, to pay $1,000 less such sums as might have in the meantime been paid. The advertiser before using any space, & before the expiration of twelve months, made an assignment for the benefit of creditors pursuant to the above Act:—*Held:* the $1,000 would not necessarily become due by effluxion of time, & the newspaper co. could not rank. —MAIL PRINTING CO. *v.* CLARKSON (1898), 25 A. R. 1.—**CAN.**

t. *Contingent liability — Not provable under Insolvent Act, 1869—Not barred by discharge.*]—A contingent liability, which may never become a debt, is not provable against the estate of an insolvent under the above Act, & is not barred by his discharge.—ROWAN *v.* HARRISON ROWAN *v.* TURNER (1875), 2 Pug. 503; 15 N. B. R. 503.—**CAN.**

w. —— *Provable in arrangement.*]—A contingent liability is provable, as such, under an arrangement, as well as in bkpcy.—ANON. (1868), 2 I. L. T. Jo. 337.—**IR.**

him against :—*Held :* he might prove under the commission for the amount so paid, although he knew the firm to have been insolvent at the time of the dissolution in 1818.—*Re* JOHNS, *Ex p.* CARPENTER (1826), 1 Mont. & M. 1.

Annotation :—**Apld.** *Re* Caton, *Ex p.* Higgins (1842), 11 L. J. Bcy. 34.

2587. —— In favour of acceptor of bill—Bill paid after bankruptcy.]—Deft., on certain considerations, undertook to pay the balance due on a bill of exchange, of which pltf. was acceptor, & he afterwards, by a new undertaking, engaged to deliver up the acceptance to pltf. within a month, or to indemnify him against it. Deft. became bkpt., & did not pay or give any indemnity, & pltf. was obliged to take up the bill, bkpt. having then obtained his certificate. On action brought by pltf. for the breach of promise :—*Held :* he could not have proved in respect of it under deft.'s commission, either for a debt not payable at the time of bkpcy., or for a contingent debt, or in the character of a surety, & the bkpcy. was no defence.—YALLOP *v.* EBERS (1831), 1 B. & Ad. 698 ; 9 L. J. O. S. K. B. 105 ; 109 E. R. 946.

Annotations :—**Distd.** Filbey *v.* Lawford (1841), 3 Man. & G. 468. **Refd.** *Re* Fox, *Ex p.* Marshall (1834), 3 Deac. & Ch. 120 ; Heigh *v.* Jackson (1838), 1 Horn & H. 167. **Mentd.** *Re* Whitmore (1843), 3 De G. & Sm. 565.

2588. —— By one of two parties jointly liable for debt—Debt paid after bankruptcy.]—A party, whom bkpt. had agreed to indemnify against certain debts, to which they were jointly liable, is entitled to prove under the indemnity in respect of debts paid by him after the bkpcy.—*Re* CATON, *Ex p.* HIGGINS (1842), 11 L. J. Bcy. 34.

2589. —— By transferor of shares in cost book mining company—Payments made by transferee after bankruptcy of transferor.]—Deft., having transferred into pltf.'s name shares in a mine conducted on the cost-book principle as security for a debt, covenanted with pltf. to indemnify him from all calls which might be made upon such shares, & all charges, liabilities & costs that might attach to the shares. Deft. became bkpt., & pltf. was afterwards compelled to pay in respect of such shares certain debts of the mine, which accrued before the bkpcy. In an action on the covenant for not indemnifying pltf. against such payment :—*Held :* deft.'s liability was not to pay money upon a contingency within 1849 Act, s. 178, nor did pltf. stand in the position of surety for deft. within s. 173 of that Act, & the bkpcy. of deft. was no bar to the action.

The undertaking to indemnify is an additional obligation on the part of debtor that the creditor shall not suffer by the sort of security he is taking, & it is an obligation which does not come within s. 178 (WILLES, J.).—BETTELEY *v.* STAINSBY (1867), L. R. 2 C. P. 568 ; 36 L. J. C. P. 293 ; 16 L. T. 701 ; 15 W. R. 1047.

Annotation :—**Apprvd.** *Re* Kelson, Tritton, *Ex p.* Wiseman (1871), 7 Ch. App. 35, L. JJ.

2590. —— By transferee in favour of transferor of shares not fully paid—Calls made after bankruptcy of transferee.]—A claim by the transferor of shares in a limited co. to be indemnified out of the estate of his bkpt. transferee, against calls made on the transferor after the transfer, is not a debt provable under 1861 Act, ss. 153 & 154, & a plea of the effect of an inspectorship deed under s. 192 of that Act is no defence to a creditor's suit in equity to administer the estate of the transferee.—HOLMES *v.* SYMONS (1871), L. R. 13 Eq. 66 ; 41 L. J. Ch. 59 ; 25 L. T. 628 ; 20 W. R. 175.

2591. —— —— ——.]—Pltf., a holder of shares in a limited co., transferred them to deft., who transferred them to M. The co. was ordered to be wound up, & a call of £40 a share was made on the contributories in Class A. being the existing members, amongst whom M. was placed. They, including M., being unable to pay, pltf. & deft. were placed upon the list of contributories in Class B., as past members, under Cos. Act, 1862 (c. 89), s. 38, & were ordered in Mar., 1869, to pay a call of £40 per share. Deft. had executed a deed of inspectorship under 1861 Act, s. 192, which was duly registered in Dec., 1867. The liquidators of the co. proved for the amount of calls against deft.'s estate, but no part was paid ; & pltf., having paid a sum in compromise of the money remaining due on the shares, sued deft. for the amount :—*Held :* deft. was liable to indemnify pltf. against calls made after deft. had transferred his interest to M., & the claim of pltf. was not provable under 1861 Act, s. 153, & deft.'s deed afforded no defence.—KELLOCK *v.* ENTHOVEN (1874), L. R. 9 Q. B. 241 ; 43 L. J. Q. B. 90 ; 30 L. T. 68 ; 22 W. R. 322, Ex. Ch.

Annotations :—**Refd.** Robinson *v.* Mollett (1875), L. R. 7 H. L. 802, H. L. **Mentd.** Dent *v.* Nickalls (1873), 22 W. R. 218.

2592. —— Stakeholder against adverse claimant—Bankruptcy before claim established.]—K. & Co., having made a claim to bills of exchange, which were in the hands of W. as stakeholder, W. handed them over, on K. & Co. giving him a guarantee to save & keep him harmless & indemnified from & against all claims & demands which might be made against him for the bills, & from & against all costs & damages, which W. might sustain in consequence of handing over the bills, & further, that if proceedings were taken against W. in respect of the bills K. & Co. would save harmless & keep indemnified W. from all costs & damages by reason of such proceedings, & that if W. was ordered in such proceedings to give security, or bring money into ct. K. & Co. would procure such security, or provide W. with the money to be paid into ct., as the case might be. An adverse claimant brought an action against W. for the bills, which action K. & Co. defended by their own attorney, until K. & Co. executed a deed of inspectorship, which was registered under 1861 Act, & under which deed all creditors might prove who could have proved under an adjudication of bkpcy. of the same date. After this, judgment was recovered in the action against W. :—*Held :* (1) W. was not a creditor, who could have proved in bkpcy. under 1861 Act, s. 153, for the contract did not contain any warranty of the title of K. & Co. to the bills, nor any undertaking to pay their amount as soon as a valid claim was made against W. for them, but only an undertaking that W. should not sustain any loss or expense in respect of them, & as K. & Co. had defended the action up to the date of the deed of inspectorship, the contract had not up to that time been broken ; (2) the contract was not a contract to pay money upon a contingency, so as to give a right of proof under 1849 Act, s. 178.—*Re* KELSON, TRITTON & CO., *Ex p.* WISEMAN (1871), 7 Ch. App. 35 ; 25 L. T. 545 ; 20 W. R. 138, L. JJ.

2593. —— Implied from mortgagee agreeing to postpone charge.]—In order to enable a mtgor. to obtain a further advance from the first mtgee. on the security of the mtged. property, the second mtgee. agreed to postpone his charge to a then existing third charge in favour of the first mtgee., & to the fresh advance. The mtgor. became bkpt., &, when the property was sold by the first mtgee., the proceeds of sale were insufficient to pay the whole amount due to him, though they exceeded the amount of the first mtge. :—*Held :* the second

Sect. 4.—What debts are provable and for what amount: Sub-sect. 3, D. (c), E. & F. (a).]

mtgee. was entitled to prove in the bkpcy. for the amount which he would have received out of the proceeds of sale if he had not consented to postpone his charge, on the ground that the ct. was entitled to infer an implied promise by bkpt. to indemnify the second mtgee. against any loss which might result from the postponement of his charge.—*Re* CHAPPELL, *Ex p.* FORD (1885), 16 Q. B. D. 305; 55 L. J. Q. B. 406, C. A.

Annotation:—**Refd.** *Re* Moss, *Ex p.* Hallet, [1905] 2 K. B. 307.

2594. Bail bond—Original debt ascertainable before bankruptcy.]—In an action of debt, an assignment of a bail bond was taken, deft. not having perfected bail. An action being brought on the bond, he became bkpt. between plea & verdict, & obtained his certificate after final judgment:—*Held:* he was discharged from the damages & costs of the latter action, as the debt on the bail bond was provable under the commission.—DINSDALE *v.* EAMES (1820), 2 Brod. & Bing. 8; 4 Moore, C. P. 350; 129 E. R. 859.

Annotations:—**Distd.** Hinton *v.* Acraman (1845), 15 L. J. C. P. 52. **Refd.** *Re* Lloyd, *Ex p.* Lloyd (1864), 11 L. T. 251.

2595. —— Bail bond forfeited after bankruptcy.]—Deft. having been arrested on Mar. 27, on a writ returnable Apr. 16, became bkpt. on Apr. 3, & obtained his certificate on June 26:—*Held:* as the bkpcy. took place before the bail bond was forfeited, the debt was provable under the commission, & the bail were discharged.—LITTLEWOOD *v.* CROWTHER (1823), 3 Dow. & Ry. K. B. 533.

E Sums payable at Future Date or on Happening of Event which must happen.

2596. Debitum in præsenti solvendum in futuro—Amount of proof—Deduction for rebate.]—The amount of a proof, on a *debitum in præsenti solvendum in futuro*, is not subject to any deduction in respect of rebate, which only applies, upon payment of a dividend.—*Re* BROWN, *Ex p.* HILL (1837), 2 Deac. 249; 3 Mont. & A. 175, Ct. of R.

2597. Proof for smaller amount—Sum payable depending on contingency.]—H., owner of a ship then engaged on a voyage, by contract in writing agreed to sell her to G. for £4,000, when she should arrive at her port of discharge in Great Britain, sufficient time being allowed for the discharge of her cargo & for repairs, with power to H., in the event of G. not fulfilling his contract, to resell the ship, & apply the proceeds of sale in part payment of the purchase-money, the deficiency to be paid by G. If the ship should be lost & not arrive in port, the agreement was to become void. Before the arrival of the ship G. became bkpt., & subsequently, on the refusal of his assignees to perform the contract, H. sold the ship for less than £4,000, & claimed to prove for the deficiency against G.'s estate:—*Held:* the breach of the contract did not constitute a debt provable by H. against the estate of G.—*Re* GALES (1845), 1 De G. 100; 10 Jur. 166, L. C.

Annotations:—**Consd.** Betteley *v.* Stainsby (1862), 12 C. B. N. S. 477. **Refd.** *Re* Lawford, *Ex p.* Harrison (1856), 3 Jur. N. S. 228, C. A.; *Re* Dunn, *Ex p.* Paynter (1862), 6 L. T. 510.

2598. What debts included in 7 Geo. 1, c. 31.]—*Held:* though the preamble of the above Act spoke only of bonds given for goods in trade payable at a future date yet the enacting words extended to all sorts of bonds for the payment of money.—SWAINE *v.* DE MATTOS (1744), 2 Stra. 1211; 93 E. R. 1134, N. P.

Annotations:—**Folld.** Pattison *v.* Bankes (1777), 2 Cowp. 540. **Refd.** Goddard *v.* Vanderheyden (undated), cited in 2 Bos. & P. 8, n.; Hoskins *v.* Duperoy (1808), 9 East, 498.

2599. ——.]—*Held:* 7 Geo. 1, c. 31, s. 1, which enabled debts payable at a future date to be proved under the commission was confined to written securities.—PARSLOW *v.* DEARLOVE (1804), 4 East, 438; 1 Smith, K. B. 281; 5 Esp. 78; 102 E. R. 898.

Annotations:—**Refd.** Hoskins *v.* Duperoy (1808), 9 East, 498; *Ex p.* White (1814), 3 Ves. & B. 128, L. C.

2600. Sum due before but payable after bankruptcy.]—A debt was due before, but was only payable at a date subsequent to, debtor's discharge:—*Held:* (1) debtor was discharged from the debt as all other debts, for the question depended when the money became due, & not when it became payable; (2) it was otherwise where the contract was upon a contingency.—ANON (1774), Lofft, 433; 98 E. R. 732.

2601. —— Borough & general district rates.]—The S. corpn. sought to prove in a bkpcy. for a sum due for borough & general district rates. The rates purported to be made for a year from Mar. 31 to Mar. 31. The amount claimed was partly for rates made in June, 1911, & partly for rates made in June, 1912. The receiving order was made on May 3, 1912:—*Held:* under Public Health Act, 1875 (c. 55), s. 210, the rate was only retrospective in the sense that the money obtained by it might be applied in payment of charges & expenses incurred at any time within six months before the making of the rate, & the official receiver was right in rejecting the proof.—*Re* JONES, *Ex p.* SALFORD CORPN. *v.* OFFICIAL RECEIVER (1913), 135 L. T. Jo. 216.

2602. Sum due after accounting—Bankruptcy of overseer before accounting.]—A specific sum of money received by an overseer of the poor is not such a debt as can be proved under a commission of bkpcy. against him, before his accounts are delivered in.—R. *v.* EGGINTON (1786), 1 Term Rep. 369; 99 E. R. 1144.

2603. —— ——.]—A proof under a commission of bkpcy., against an overseer of the poor, will be allowed in respect of money in his hands at the time of his bkpcy. before the period of accounting.—*Ex p.* EXLEIGH (1802), 6 Ves. 811; 31 E. R. 1321.

2604. Sum payable three months after death of survivor of two obligors.]—A debt payable at a future, uncertain, period, as within three months after the decease of two obligors in a bond, or the survivor, is not provable in bkpcy.—*Ex p.* BARKER (1803), 9 Ves. 110; 32 E. R. 543.

Annotations:—**Apld.** Hinton *v.* Acraman (1845), 2 C. B. 367. **Refd.** *Re* Gibbins, *Ex p.* Tindal (1832), 1 Deac. & Ch. 291; South Staffordshire Ry. Co. *v.* Burnside (1850), 5 Exch. 129. **Mentd.** Hardy *v.* Fothergill (1888), 13 App. Cas. 351, H. L.

2605. Sum payable twelve months after death of obligor.]—W., by settlement made on his marriage, covenanted that his exors. should, within twelve months after his decease, pay to his wife's trustees £4,000 with interest from the time of his death, in trust to pay the interest to the wife for her life in case she survived him, &, after her death, the principal to be divided between the children of the marriage, &, if they had no child or children, to the survivor of them, W. & his wife, his or her exors., etc. W. became bkpt., the wife being still alive:—*Held:* the covenant to pay the £4,000 was a debt payable upon a contingency, within 6 Geo. 4, c. 16, s. 56, & the valuation should be, the present worth of £4,000 payable twelve months after the death of bkpt.—*Re*

GIBBONS, *Ex p.* TINDALL (1832), 8 Bing. 402 ; Mont. 462 ; 1 Deac. & Ch. 291 ; 1 Moo. & S. 607 ; 1 L. J. Ch. 193 ; 131 E. R. 449, L. C.

Annotation :—**Consd.** *Re* Whitmore (1843), 3 De G. & Sm. 565.

2606. School fees payable periodically—Bankruptcy before end of period.]—School-money for the education, etc., of deft.'s son, payable half-yearly, is not a debt due till the end of the half-year, so as to be provable under a commission of bkpcy. against the parent who became bkpt. a few days before the end of the half-year, though he had, just before his bkpcy., taken his son home for the holidays, the contract not being thereby put an end to, & bkpt.'s certificate under 5 Geo. 2, c. 30, is no bar to an action against him for the half-year's education, etc.—PARSLOW *v.* DEARLOVE (1804), 4 East, 438 ; 1 Smith, K. B. 281 ; 5 Esp. 78 ; 102 E. R. 898.

Annotations :—**Refd.** Hoskins *v.* Duperoy (1808), 9 East, 498 ; *Ex p.* White (1814), 3 Ves. & B. 128, L. C.

2607. —— ——.]—Bkpcy. during the currency of a quarter, & subsequent certificate, is no bar to an action by a school-master for board & tuition of bkpt.'s son under a quarterly contract, the demand not being a debt "not payable at the time of the bkpcy.," within 1849 Act, s. 172, or "a liability to pay money upon a contingency," within s. 178.—HOPKINS *v.* THOMAS (1860), 7 C. B. N. S. 711 ; 141 E. R. 995 ; *sub nom.* THOMAS *v.* HOPKINS, 29 L. J. C. P. 187 ; 6 Jur. N. S. 301 ; 8 W. R. 262.

2608. Sum payable six months after death of grantor.]—A covenant for the payment of a sum of money out of the estate of the covenantor within six months after his death creates a debt provable in bkpcy., & any action upon such covenant is barred by bkpcy. proceedings in respect of the covenantor's estate.—BARNETT *v.* KING, [1891] 1 Ch. 4 ; 60 L. J. Ch. 148 ; 63 L. T. 501 ; 39 W. R. 39 ; 7 T. L. R. 24 ; 7 Morr. 267, C. A.

Annotation :—**Mentd.** *Re* Browne & Wingrove, *Ex p.* Ador, [1891] 2 Q. B. 574, C. A.

2609. Bond conditioned for payment of money with interest—Power reserved to obligee to allow fund to remain with obligor during life.]—A. on his marriage gave to trustees a bond conditioned for payment of £1,000 with interest. By a settlement of even date it was declared that the trustees should, during his life or until he should become bkpt. or insolvent, allow him to retain in his hands the £1,000 or such parts of it as he should think fit. In 1826 A. became bkpt. The trustees in 1827 proved for the whole £1,000, but the comrs. expunged the proof, & the trustees did not take any steps to have a value set upon the bond as for a sum payable on bkpt.'s death, & to be allowed to prove for the amount of the valuation. In 1860, bkpt. being dead, & fresh assets having come in, the trustees applied again to prove for the whole amount :—*Held :* (1) although the provision for calling in the money on bkpcy. was void, the debt was valid as a debt payable upon the death of bkpt., & proof of it ought to be allowed, not disturbing former dividends ; (2) the decision in 1827 was not a judgment against the claim, the debt not being then payable, & no attempt having been made to prove for it on the footing of its being payable *in futuro*.—*Re* TAYLOR, *Ex p.* BODDAM (1860), 2 De G. F. & J. 625 ; 29 L. J. Bcy. 20 ; 2 L. T. 343 ; 6 Jur. N. S. 570 ; 8 W. R. 457 ; 45 E. R. 763, L. JJ.

Annotation :—**Refd.** *Re* Westby, *Ex p.* Lancaster Banking Corpn. (1879), 10 Ch. D. 776.

2610. Sum payable on death of stranger—With interest—Bankruptcy while interest in arrear.]—By the condition of a *post obit* bond given by way of ante-nuptial settlement, interest was made payable during the life of the obligor, by non-payment thereof the condition had been broken before the obligor's bkpcy. :—*Held :* the obligees were entitled to prove for the principal sum secured by the bond as an immediate debt.—*Re* PATERSON, *Ex p.* GRIFFITHS (1848), De G. 597.

2611. Marriage settlement covenant.]—Where sums are secured by covenant in marriage-settlements, those which are certain, though future, are provable with a rebate of interest, & also of the value of the husband's claims against the trustees. —*Ex p.* MITFORD (1784), 1 Bro. C. C. 398 ; 3 Mer. at p. 105 ; 28 E. R. 1202.

Annotations :—**Consd.** Studdy *v.* Tingcombe (1800), 5 Ves. 695 ; *Ex p.* Barker (1803), 9 Ves. 110 ; *Re* Brown, *Ex p.* Turpin (1832), 1 Deac. & Ch. 120, Ct. of R. ; *Re* Prior, *Ex p.* Young (1835), 4 Deac. & Ch. 645 ; Woodyatt *v.* Gresley (1836), 8 Sim. 180. **Refd.** Mitford *v.* Mitford (1803), 9 Ves. 87 ; Priddy *v.* Rose (1817), 3 Mer. 86 ; Jones *v.* Mossap (1844), 3 Hare 568 ; South Staffordshire Ry. Co. *v.* Burnside (1850), 5 Exch. 129 ; *Re* Good, *Ex p.* Good (1850), 15 L. T. O. S. 50.

2612. —— **Bankrupt settlor having contingent life interest in funds settled.**]—Bkpt. undertook to pay to trustees for his wife, etc., £6,000 at the time therein mentioned, & assigned certain interests in security thereof. The wife's fortune was settled for payment of the income to the survivor of the parties. The husband went bkpt. before payment of the £6,000, & the security was realised at £3,900 : —*Held :* the trustees should sell the contingent life interest of bkpt. in his wife's fortune, & prove for the balance due.—*Re* MARSH, *Ex p.* GONNE (1837), 6 L. J. Bcy. 57 ; 3 Mont. & A. 166, Ct. of R.

—— **Sum payable on contingency.**]—*See* Nos. 2468 *et seq., ante.*

—— **Obligation immediately performable.**]—*See* Nos. 2892 *et seq., post.*

F. *Bills of Exchange and Promissory Notes.*

(*a*) *In regard to what Bills.*

2613. Whether consideration sufficient—Petitioner giving acceptance against bills sought to be proved on.]—M. lent P. his acceptance, in consideration of which, & as security to M., P. & S gave M. their joint & several promissory note. P. & S. both became bkpt. before the acceptance matured :—*Held :* M. could prove under S.'s commission, as the liability to pay money was a good consideration for a bill of exchange, & entitled the party to prove although the payment was to be made in future & depended upon a contingency.—*Ex p.* MAYDWELL (1785), 1 Cooke's Bankrupt Laws, 8th ed. p. 179.

PART VIII. SECT. 4, SUB-SECT. 3.—E.

2611 i. *Marriage settlement covenant.*]—By marriage settlement the husband's bond, & the rents of his house were given to trustees, for his wife & children, in the event of his death ; the proof of the bond was directed to stand, the dividends to be invested in govt. securities, the interest to go to the assignees during the life of bkpt., then to the wife & children.—*Ex p.* OXLEY (1807), 1 Ball & B. 257.—IR.

PART VIII. SECT. 4, SUB-SECT. 3.—F. (a).

y. *Bills discounted but not matured —Contingent debt.*]—The amount of bills discounted by a creditor for an insolvent, but not matured, is only a contingent debt, & cannot be proved as an absolute debt.—*Re* BAYLDON, *Ex p.* BANK OF AUSTRALASIA (1875), 1 V. L. R. 10.—AUS.

a. *Bill drawn & payable in England —By Scottish trader—Partner in English firm—Proof in sequestration.*]—A party resident in Scotland, & carrying on business there on his own account, having been sequestrated, a claim was lodged in the sequestration on a bil drawn & payable in England, & accepted by an English co., of which bkpt. was a partner :—*Held :* the claim must be ranked according to the Scottish, & not according to the English law of bkpcy.—LUSK *v.* ELDER (1843), 15 Sc. Jur. 536.—SCOT.

b. *Notes payable at future dates—By way of composition—Revival of*

Sect. 4.—What debts are provable and for what amount: Sub-sect. 3, F. (a).]

Annotations :—**Distd.** Howis *v.* Wiggins (1792), 4 Term Rep. 714. **Consd.** *Ex p.* Bloxham (1803), 8 Ves. 531.

2614. —— ——.]—Acceptances by bankers, & bills remitted to them in the course of a banking account with bkpt. Their acceptances not due at the bkpcy. are a good consideration, &, taking them up, they may prove upon the bills in their hands, though not due at the bkpcy. The proof must be upon the bills, & not as a cash balance.—*Ex p.* BLOXHAM (1803), 8 Ves. 531 ; 32 E. R. 461.

Annotations :—**Consd.** *Re* Dyer & Swayne, *Ex p.* Solarte (1834), 3 Deac. & Ch. 419. **Folld.** *Re* Bentley, *Ex p.* Vere (1835), 4 Deac. & Ch. 295.

2615. —— **Note given for liquidated damages in compromise of action for seduction.**]—Proof in bkpcy. under promissory notes for liquidated damages by compromise of an action for seduction, *per quod servitium amisit.* Distinction as to a security, *præmium pudoris.*—*Ex p.* MUMFORD (1808), 15 Ves. 289 ; 33 E. R. 763.

Annotation :—**Refd.** *Re* Graham, *Ex p.* Langridge (1871), 19 W. R. 951.

2616. —— **Note given in consideration of wife's fortune.**]—In consideration of his intended wife's fortune, which exceeded £2,000, debtor gave to trustees before his marriage a bond for £2,000, conditioned to pay that sum "in case he should become bkpt.," or in case his wife should survive him. Being pressed by the trustees before his bkpcy. for the payment of the £2,000, he gave them a promissory note for that sum payable on demand :—*Held :* a proof for the £2,000 should be admitted, as independently of the bond, the claim was founded on the promissory note, which was not without consideration & the property being the wife's, placed it out of the reach of those decisions in which similar provisions were declared void, as contrary to the spirit of the bkpcy. laws. —*Re* BRAMHALL, *Ex p.* WRIGHT (1837), 2 Deac. 551 ; 3 Mont. & A. 387 ; 1 Jur. 871, Ct. of R.

2617. —— **Note given for bill of costs—Amount agreed on without taxation.**]—Solrs. delivered their bill of costs in Sept., 1850, &, after a deduction had been agreed upon, the client accepted a bill of exchange for the amount so reduced. On the bill being dishonoured, & the client becoming bkpt. in May, 1851 :—*Held :* the bill of exchange constituted a provable debt without the bill of costs being taxed.—*Re* DOWSON, *Ex p.* WEBB (1851), 4 De G. & Sm. 366 ; 64 E. R. 871.

2618. —— **Note given for new loan & revived debt under previous bankruptcy.**]—Debtor borrowed money from a creditor, & having agreed, in consideration of the fresh loan, to pay a debt proved in his previous bkpcy., gave bills covering the fresh loan & the revived debt :—*Held :* the transaction being for good consideration & not being a sham, the revived debt could be proved in debtor's second bkpcy. which occurred nine months after the agreement had been made.—*Re* AYLMER, *Ex p.* AYLMER (1894), 70 L. T. 244 ; 1 Mans. 391 ; 10 R. 473.

Annotation :—**Folld.** *Re* Bonacina, Le Brasseur *v.* Bonacina, [1912] 2 Ch. 394, C. A.

See, further, Part XVIII., *post.*

2619. —— **Note given for debt provable but not proved under previous composition.**]—A receiving order was made against debtor & the creditors, who had proved their debts under it, were paid a composition under 1890 Act, s. 3, & the order was rescinded. Applts. were creditors, who did not prove their debts & received no composition, & after the rescission debtor gave them a promissory note for the amount of their debt. Subsequently debtor, being again in difficulties, executed a deed for the benefit of his creditors, the other parties to the deed including applts. as creditors. The deed recited that he had requested the creditors to give him time for payment, & that they had agreed to do so, & in consideration thereof debtor assigned to a trustee certain property upon trust to realise it & pay the creditors, including applts. Ultimately the trustee had money in his hands for distribution, & he applied for a declaration that applts. were not entitled to the benefit of the deed :—*Held :* as applts'. debt was a provable debt under the composition & had been discharged & no new consideration had been given for it, & there was no estoppel, applts. were not creditors at all & were not entitled to the benefit of the deed.—*Re* PILET, *Ex p.* TOURSIER & CO. &

whole debt on default in payment.]—A creditor agreed to accept, by way of composition, certain notes of debtor, payable at specified dates ; & it was provided that debtor should also give his note for the whole debt, & that if he were guilty of any default in paying the composition notes, the creditor should rank on his estate for the whole debt :—*Held :* the stipulation as to the whole debt was not illegal, & there having been default, before the insolvency, the creditor was entitled to prove for the whole debt.—*Re* MCRAE (1868), 15 Gr. 408.—**CAN.**

c. *Bills sent by debtor to brokers without indorsement to raise funds—Proof for money paid on behalf of debtor.*]—An arranging trader had sent to his brokers in London four bills of exchange drawn by the brokers & accepted by A. in order that the brokers might raise funds to pay for a cargo of corn purchased by them for him, which was afterwards delivered to him ; he did not put his name on the bills. On a previous occasion a bill similar in all respects had not been honoured at maturity, & he had made arrangements for meeting it himself. A. did not pay any of the four bills at maturity, & the brokers sought to prove for the amount of them against the trader. It having been contended by him that the bills not having his name on them must be regarded as bills sold to the brokers, & that they could neither prove for the bills, nor for the consideration of them :—*Held :* the proof, which was made, not on the bills, but for money paid on account of the trader at his request was properly admitted.—*Re* C. H. (1873), 7 I. L. T. 141.—**IR.**

d. *Notes given to secure loan for payment of composition & bonus for loan—Borrowed from creditor by wife of insolvent—Indorsed by insolvent.*]—An insolvent made a compromise with his creditors, borrowing from his wife the money to pay the composition. She borrowed the money from one of his creditors, agreeing to pay a bonus, & giving to the creditor for his composition payment & the bonus, her promissory notes indorsed by her husband, with other security. The creditor signed the composition agreement, nothing being said about the bonus to the other creditors, who knew, however, that some arrangement had been made with this creditor for the supply of the necessary funds. The insolvent subsequently made an assignment for the benefit of his creditors : —*Held :* the transaction with the wife was not a fraud on the composition, & the creditor was not thereby disentitled to rank upon the notes ; but the notes having been made by the insolvent's wife, payable to the creditor's order, & having been indorsed by the insolvent before they were handed to the creditor, the insolvent was not liable as indorser, & the creditor could not rank on his estate. —SMALL *v.* HENDERSON (1899), 19 C. L. T. Occ. N. 267 ; 27 A. R. 492. —**CAN.**

e. *Illegal bargain by debtor with a creditor—Bills given not provable in second insolvency.*]—Where an insolvent, after the grant of his certificate, gave bills to a creditor under the insolvency, which from their amount & currency were clearly connected with a bargain made by the creditor before the grant to withdraw opposition to the certificate :—*Held :* the creditor could not on a second insolvency prove on such bills.—*Re* CUNNINGHAM (1877), 3 V. L. R. 1.—**AUS.**

f. *Promissory note with forged indorsement—Proof for money paid on.*]—G., the active member of a firm, made a number of promissory notes in the firm name in favour of F., by whom the notes purported to be indorsed, but the indorsements were all of them forged. The notes were presented to the bank & negotiated by G., who received the money on them, & a large part of the proceeds was appropriated to partnership purposes :—*Held :* although the bank could not claim on the notes, it could rank for the amount of them as money paid.—*Re* GRAHAM & MCKAY *v.* BANK OF NOVA SCOTIA (1878), 3 R. & C. 251 ; 12 N. S. R. 251.—**CAN.**

BERKELEY, [1915] 3 K. B. 519; 84 L. J. K. B. 2133; 113 L. T. 926; 31 T. L. R. 558.

2620. Consideration illegal—Bill indorsed to broker in respect of illegal insurance.]—A bill was indorsed to a broker in consideration of money paid by him in effecting insurances, one of which was illegal. The acceptor becoming bkpt., the petition of the indorsee to prove was dismissed as to what arose upon the illegal insurance.—*Ex p.* MATHER (1797), 3 Ves. 373; 30 E. R. 1060, L. C.

Annotations:—**Apld.** Sykes *v.* Bladon (1879), 48 L. J. Ch. 522. **Reld.** Clayton *v.* Dilly (1811), 4 Taunt. 165. **Mentd.** Mosse *v.* Killick (1881), 44 L. T. 149.

2621. —— Stock jobbing transaction.]—Promissory notes were given by a stock broker for the balance of an account of money advanced to him to be employed in stock jobbing transactions, contrary to 7. Geo. 2, c. 8. Part of the consideration consisting of the profits upon those transactions, proof under his bkpcy. was restrained to the residue; *viz.* the money received, which he had applied to his own use.—*Ex p.* BULMER, *Ex p.* ELLIS (1807), 13 Ves. 313; 33 E. R. 311, L. C.

Annotation:—**Mentd.** Clayton *v.* Dilly (1811), 4 Taunt. 165.

2622. Bill drawn in foreign country—Bankruptcy of drawer between drawing & protest.]—Deft. in Jan., 1728, drew bills on Spain, which in Mar. were returned protested for non-acceptance. Between the drawing & return he became a bkpt.: —*Held:* the debt was created immediately upon drawing the bills, the money to be received upon them being *debitum in præsenti*, though *solvendum in futuro*, & the protest not raising any debt, being but notice to the drawer of the drawee's refusal to pay, & the debt was provable in the bkpcy.—MACARTY *v.* BARROW (1733), 2 Stra. 949; 7 East, 437; 2 Barn. K. B. 251, 255; 93 E. R. 961; *sub nom.* MACCARTY *v.* BARROW, 7 Mod. Rep. 163.

Annotations:—**Consd.** Chilton *v.* Whiffin (1768), 3 Wils. 13. **Folld.** Francis *v.* Rucker (1768), Amb. 672. **Dbtd.** Starey *v.* Barns (1806), 7 East, 435. **Mentd.** Whitehead *v.* Walker (1842), 9 M. & W. 506.

2623. Note payable three months after date—Bankruptcy of indorsee before period expired.]—An indorsee of a promissory note payable three months after date, may be discharged under an Insolvent Act, which takes place before the three months are expired: for it is *debitum in præsenti, solvendum in futuro.*—WORKMAN *v.* LEAKE (1774), 1 Cowp. 22; 98 E. R. 946.

Annotations:—**Folld.** Paget *v.* Wheate (1781), 2 Doug. K. B. 669; Kinnaird *v.* Barrow (1798), 8 Term Rep. 49.

2624. Bill refused payment by acceptor after drawer's bankruptcy.]—The drawer of a bill of exchange, which had been accepted, & was not refused payment by the acceptor till after the bkpcy. of the drawer is discharged by his certificate, as such debt is provable under his commission by 7 Geo. 1, c. 31.—STAREY *v.* BARNS (1806), 7 East, 435; 3 Smith, K. B. 441; 103 E. R. 169.

Annotations:—**Folld.** *Ex p.* Douthat (1820), 4 B. & Ald. 67; Alsager *v.* Currie (1844), 12 M. & W. 751. **Consd.** Astley *v.* Gurney (1869), L. R. 4 C. P. 714.

2625. Note payable on demand with interest—Bankruptcy before demand.]—A promissory note, payable with interest twelve months after notice, was expressed to be "for value received." The maker became bkpt. before any notice was given: —*Held:* the payee might prove it under the commission.—CLAYTON *v.* GOSLING (1826), 5 B. & C. 360; 8 Dow. & Ry. K. B. 110; 4 L. J. O. S. K. B. 176; 108 E. R. 134.

Annotations:—**Folld.** *Re* Dowman & Offley, *Ex p.* Dowman (1827), 2 Gl. & J. 241; *Re* West, *Ex p.* Hooper (1834), 3 Deac. & Ch. 655; *Re* Browne & Wingrove, *Ex p.* Ador, [1891] 2 Q. B. 574, C. A.

2626. —— —— Instalments of interest paid up to bankruptcy.]—Money was advanced by petitioner to bkpt., secured by promissory notes, whereby bkpt. promised to pay after three months' notice the money advanced with interest at 5 per cent. Two years' interest had been paid before the commission, but no notice had been given:— *Held:* petitioner was entitled to prove the principal money & interest up to the commission.—*Re* MANTLE, *Ex p.* ELGAR (1826), 2 Gl. & J. 1.

Annotations:—**Folld.** *Re* Dowman & Offley, *Ex p.* Dowman (1827), 2 Gl. & J. 241; *Re* Browne & Wingrove, *Ex p.* Ador, [1891] 2 Q. B. 574, C. A. **Mentd.** *Re* West, *Ex p.* Hooper (1834), 3 Deac. & Ch. 655.

2627. Bill deposited unindorsed as security for advances—Advances repaid before proof.]—H., a moneybroker, was in the habit of depositing bills of exchange with B. & Co. as security for advances, but he did not indorse the bills, nor were they negotiated by B. & Co. nor ever presented for payment. Amongst the bills so deposited was one for £1,000 accepted by C., who became bkpt. on Mar. 5, 1824, which was sometime after the bill fell due. H. also became bkpt. on Dec. 12, 1825, when B. & Co. proved the amount of the balance he owed them, excepting such bill as a security, but made no attempt to prove the bill under C.'s commission until Jan., 1826, when the comrs. rejected the proof:—*Held:* the delivery of the bill by H. to B. & Co. must be taken to have been by way of pledge, to secure the amount of the advances then due from H. to B. & Co., & not with an intention to transfer the property in it, &, the amount of those advances having been since paid, B. & Co. could not in the circumstances prove the bill under C.'s commission.—*Re* CLAUGHTON, *Ex p.* BRITTEN (1833), 3 Deac. & Ch. 35.

2628. Note given for advances — Mortgage subsequently granted for same & additional advances —Whether note merged in mortgage.] — Bkpts. gave a joint & several promissory note for £2,000 to secure advances made by their bankers, & when they were indebted to the bankers in £1,957, one of bkpts. mtged. property to them to secure that sum, & all such further sums as might be advanced, to the extent of £3,000 including the sum of £1,957. At the time of the bkpcy., the amount of the debt due to the bankers was £4,365, of which sum they realised the £3,000 under the mtge.:—*Held:* the mtge. deed did not operate as a merger of the promissory note, & the bankers could prove on the note, for the balance of their debt.—*Re* BISHTON, *Ex p.* BATE (1838), 3 Deac. 358, Ct. of R.

Annotation:—**Folld.** *Re* Keasley, *Ex p.* Pennell (1841), 2 Mont. D. & De G. 273.

2629. Bill accepted to provide funds to retire current bill—Misapplication of proceeds of second bill—Whether second bill provable against acceptor.] —Bkpt., having accepted a bill for £200, which had been negotiated by the drawer, & finding shortly before it fell due that he should be unable to pay it, persuaded the drawer to draw another bill on him for £220, & to get it discounted, in order that he might take up the first mentioned bill. The drawer discounted the bill for £220 with petitioner, but, instead of applying the proceeds to pay off the first bill, appropriated them to his own use, & the holder of the first bill proved the amount of it under the fiat:—*Held:* petitioner, who had no knowledge of the circumstances, in which the second bill was given, or of the breach of trust committed by the drawer, was not prevented from proving the amount of such second bill.—*Re* PHILPOT, *Ex p.* SAMUEL (1841), 2 Mont. D. & De G. 384, Ct. of R.

2630. Bill taken as payment of deposit on purchase price of goods—Security for non-performance of contract.]—An agreement was entered into for

Sect. 4.—What debts are provable and for what amount: Sub-sect. 3, F. (a) & (b) i.]

the purchase of 4,000 tons of iron rails, at £12 12*s.* 6*d.* per ton, according to a section to be delivered by Nov. 1, 1846, & £11,500 was to be paid by the purchaser by way of deposit. According to the custom of the trade, the deposit was to be retained by the seller as a security against any damages from the non-performance of the contract. The deposit was paid in bills of exchange In June, 1846, the purchaser became bkpt. On the bills becoming due they were dishonoured :—*Held :* the vendors were entitled to prove upon two of the bills remaining in their hands.—*Re* MACLEAN, *Ex p.* BOLCKOW (1850), 3 De G. & Sm. 656 ; 64 E. R. 648.

2631. Blank note given to obtain discharge from arrest—Filled in after bankruptcy & certificate.]—In July, 1846, deft., having been arrested under a *ca. sa.*, in order to obtain his discharge gave to the attorney of the execution creditor £5, & a blank promissory note stamp with his name written on it. In May, 1851, deft. obtained a certificate in bkpcy., & in Oct., 1852, the attorney filled up the blank stamped paper, by making it a promissory note for £24 18*s.* 6*d.*, at one month's date, & endorsed it to pltf. for value :—*Held :* there was no claim provable under the fiat, & the certificate was no bar to an action on the note. —TEMPLE *v.* PULLEN (1853), 8 Exch. 389 ; 22 L. J. Ex. 151 ; 20 L. T. O. S. 252 ; 155 E. R. 1399.
Annotation :—**Consd.** Montague *v.* Perkins (1853), 22 L. J. C. P. 187.

2632. Acceptance blank at date of bankruptcy—Blank filled in afterwards.]—Proof by the drawer admitted on an acceptance, which had been in blank at the date of the bkpcy. of the acceptor & had been filled up afterwards.—*Re* HENNETT, *Ex p.* BARTLETT (1858), 3 De G. & J. 378 ; 44 E. R. 1314.

2633. Bill negotiated after bankruptcy of acceptor.]—A. & B. applied to W. & F. to assist them by lending their names to bills to be discounted by S. for the use of A. & B., whose names were not to appear thereon, & three bills were drawn by F. upon W. payable three months after date, two to the order of S., the third to the order of the drawer, which last was indorsed in blank by the drawer. They were all accepted by W. The bills were put into the possession of A. & B. who sent them down to S. at Bristol, who indorsed them & procured them to be discounted & remitted the value of A. & B. in Bristol bank bills. Before the bills became due both A. & W. became bkpt., & S. as indorser was obliged to take up the bills. S. was admitted to prove the bills under W.'s bkpcy., & on a petition to have the proof expunged : *Held :* (1) a bill of exchange negotiated after the bkpcy. of the acceptor might be proved under his commission, although the party was not possessed of it at the time of the bkpcy. for the debt accrued by the acceptance ; (2) as to the consideration, there was a clear consideration paid, though not to W., & S. became the holder of the bills in a fair manner ; (3) the petition should be dismissed.—*Ex p.* BRYMER (1788), Cooke's Bankrupt Laws, 7th ed. p. 178, L. C.
Annotations :—**Consd.** Cowley *v.* Dunlop (1798), 7 Term Rep. 565. **Refd.** *Ex p.* Hale (1797), 3 Ves. 304, L. C.

2634. Accommodation bill.]—A merchant in Bombay bought of a bank bills on their London branch for £25,000, giving for them £5,000 in cash & £20,000 in bills on a firm in London, consisting of himself & another person. The bank bills were all indorsed to the firm in London, & were all accepted. The merchant's bills were sent to the London branch of the bank & were accepted by the London firm. The bank was wound up, & the merchant & his partner each became insolvent, the London firm holding at the time of the winding-up bills to the amount of £19,000, & the bank having parted with the bills for £20,000 :—*Held :* in the circumstances the bills were not accommodation bills, & the trustees of the London firm were entitled to prove for the £19,000 in the winding-up.—*Re* LONDON, BOMBAY & MEDITERRANEAN BANK, *Ex p.* CAMA (1874), 9 Ch. App. 686 ; 43 L. J. Ch. 683 ; 31 L. T. 234 ; 22 W. R. 809, L. JJ.
Annotation :—**Apld.** Lovel *v.* Lovel (1881), 45 L. T. 252.

2635. Note made in violation of statute.]—A., being agent of & also a partner in Leith Banking Co., opened an office at Carlisle, & circulated there promissory notes drawn by the co.'s cashier in Scotland, & made payable to the bearer, on demand, at the co.'s office in Leith :—*Held :* this was in violation of the statutes passed for the protection of the Bank of England, & a debt founded on notes so issued could not be proved under a commission of bkpcy.—*Re* HOBSON, *Ex p.* RANDLESON (1828), Mont. & M. 86.

2636. Note payable in cash or Bank of England notes.]—The holder of promissory notes, payable in cash or Bank of England notes, who did not receive them immediately from the maker :—*Held :* not entitled to prove the amount as for money had & received against the estate of the maker.—*Re* SEATON, *Ex p.* DAVISON (1817), Buck, 31, L. C.

(*b*) *For what Amount.*

i. *In General.*

2637. Bill bought at under value.]—An assignee or indorsee of a bkpt.'s notes at an under value is a creditor for the full sums of the notes, & may sue out a commission as a creditor for such full sums. It is otherwise where the indorsement of the note is subsequent to the bkpcy.—*Ex p.* LEE (1721), 1 P. Wms. 782 ; 2 Eq. Cas. Abr. 97, pl. 3 ; 24 E. R. 614, L. C.

2638. —— Limitation of dividends.]—D. had without consideration given a promissory note for £500 to A. & C., who were then indebted to K. in £300. A. & C. indorsed the note to K. to enable him to raise the amount due. A. & C. went bkpt. :—*Held :* K. could prove for £500, under D.'s commission, his dividends not to exceed £300.—*Ex p.* KING (1786), 1 Cooke's Bankrupt Laws, 7th ed. 168.
Annotation :—**Distd.** *Re* Gomersall, *Ex p.* Gordon (1875), 45 L. J. Bcy. 1, C. A.

2639. —— Limitations of proof—Fraud on

PART VIII. SECT. 4, SUB-SECT. 3.—F. (b) i.

2640 i. *Payments received from other parties to bill or note—Before proof.*]—When proof upon a bill of exchange accepted by bkpt. is made, deductions must be made for all the previous payments on account by other parties to the bill, & the proof can only stand for the amount actually due at the time of the bkpcy.—*Re* DUNNE, *Ex p.* KENNEDY (1857), 30 L. T. O. S. 311 ; 7 I. Ch. R. 285 ; 10 Ir. Jur. 94.—**IR.**

2640 ii. —— ——.]—A. was the holder of promissory notes made by B. in favour of C., & indorsed by C. to A. B. became insolvent. C. having assigned his estate for the benefit of his creditors, his trustee had paid to A. 3*s.* 6*d.* in the pound, on account of the promissory notes :—*Held :* A. might prove for the whole amount of the promissory notes against the estate of B.—*Re* COULTER'S ESTATE, *Ex p* BANK OF NEW SOUTH WALES (1866), 6 N. S. W. S. C. R. 111.—**AUS.**

2640 iii. —— —— *After sequestration.*]—A payment made by one of two obligants posterior to the sequestration of the estates of one, does not preclude the creditor from ranking for his full debt to the effect of receiving full payment.—FARQUHARSON *v.* THOMSON (1832), 10 Sh. (Ct. of Sess.) 526 ; 28 Fac. Coll. 387.—**SCOT.**

creditors—Accommodation bill.]—Traders in the country accepted bills fraudulent against their creditors for £1,727 drawn on them by their London agent. The agent sold the bills for £200. Three days after the sale the traders presented a petition for liquidation, & they were afterwards made bkpts.:—*Held:* in the circumstances, the purchaser of the bills must be taken to have had notice that the bills were fraudulent on the creditors of the traders, & would be allowed to prove in the bkpcy. only for the sum paid by him for the bills. *Qu.:* whether it was still the rule, that the holder of an accommodation bill could prove for the full amount & receive dividends to the amount of the sum advanced by him.—*Re* GOMERSALL (1875), 1 Ch. D. 137; 45 L. J. Bcy. 1; 24 W. R. 257, C. A.; *affd., sub nom.* JONES *v.* GORDON (1877), 2 App. Cas. 616, H. L.

Annotations:—**Distd.** *Re* Aylmer, *Ex p.* Crane (1893), 1 Mans. 391. **Refd.** Tait *v.* MacLeay, [1904] 2 Ch. 631, C. A. **Mentd.** Symons *v.* Mulkern (1882), 46 L. T. 763; *Re* Boyse, Crofton *v.* Crofton (1886), 55 L. T. 391; Oakley *v.* Boulton (1888), 4 T. L. R. 379; Tatam *v.* Haslar (1889), 23 Q. B. D. 345; *Re* Building Estates Brickfields Co., Parbury's Case, [1896] 1 Ch. 100; Rainford *v.* Keith & Blackman Co., [1905] 2 Ch. 147, C. A.; Whitehorn *v.* Davison, [1911] 1 K. B. 463, C. A.

2640. Payments received from other parties to bill or note—Before proof.]—A. gave a promissory note for £200 payable to B. or order, B. indorsed it to C., who indorsed it to D. A., B., & C. became bkpts., & D. received 5*s.* in the pound on a dividend made by the assignees against A.:—*Held:* D. should come in as a creditor for £150 only out of B.'s effects, & if D. paid contribution money for more than £150 it should be returned.—*Ex p.* LEFEBVRE (1727), 2 P. Wms. 407; 24 E. R. 789.

Annotation:—**Folld.** Cooper *v.* Pepys (1741), 1 Atk. 106.

2641. —— ——.]—A., being an indorsee of B., C. & Co.'s acceptances for £1364, sued out a separate commission against B. At the time of suing out the commission, D., the person for whom A. had discounted the acceptances, had, by payments on account, reduced the debt to £420:—*Held:* A. was entitled to prove for the whole amount, & for all that was received above the £420 would be a trustee for D.—*Re* CORSON, *Ex p.* DE TASTET (1810), 1 Rose, 10; 17 Ves. 247; 34 E. R. 95, L. C.

Annotation:—**Refd.** Jones *v.* Broadhurst (1850), 9 C. B. 173.

2642. —— ——.]—Proof in bkpcy. upon a bill reduced by the previous part payment or declaration of dividend from the estate of another party, unless in a special case, as where it was pending a petition against the rejection of the proof for the whole amount, which decision of the comrs. was overruled.—*Ex p.* ROYAL BANK OF SCOTLAND (1815), 19 Ves. 310; 34 E. R. 532; *sub nom. Re* STEIN, *Ex p.* ROYAL BANK OF SCOTLAND, 2 Rose, 197, L. C.

Annotation:—**Mentd.** Geddes *v.* Mowat, *Re* Mowat, *Ex p.* Geddes (1824), 1 Gl. & J. 414, H. L.

2643. —— ——.]—The holder of a bill may at his election sue any or all the parties to it, & if they all become bkpt., he may prove against the estates of all, unless he receive part of the debt from any one (LORD ELDON, C.J.).—ENGLISH *v.* DARLEY (1800), 2 Bos. & P. 61; 126 E. R. 1156.

Annotations:—**Follds.** Clark *v.* Devlin (1803), 3 Bos. & P. 363. **Distd.** Fentum *v.* Pocock (1813), 5 Taunt. 192. **Follds.** Claridge *v.* Dalton (1815), 4 M. & S. 226; Badnall *v.* Samuel (1817), 3 Price, 521; Rowe *v.* Young (1820), 2 Bli. 391, H. L.; Goring *v.* Edmonds (1829), 6 Bing. 94; Combe *v.* Woolf (1832), 8 Bing. 156; Michael *v.* Myers (1843), 1 Dow. & L. 792. **Consd.** Owen *v.* Homan (1850), 13 Beav. 196. **Follds.** Duncan, Fox *v.* North & South Wales Bank (1880), 6 App. Cas. 1, H. L.

2644. —— ——.]—If a creditor applies to prove on a bill of exchange against one of the parties to it, having previously received part of the amount from another party, he can only prove for the remainder.—*Re* THOMPSON & MILDRED, *Ex p.* PRESCOTT, GROTE & Co. (1834), 4 Deac. & Ch. 23, Ct. of R.

2645. —— ——.]—Where the bill-holder has proved against the estates of the drawer & acceptor, the ct. will order a reduction of proof.—*Re* MUNDY, *Re* GLASS, *Ex p.* HOBHOUSE, *Ex p.* GOWER (1837), 3 Mont. & A. 269; 2 Deac. 291; 6 L. J. Bcy. 76, Ct. of R.

Annotation:—**Mentd.** *Re* Geering, *Ex p.* Sparks (1850), 14 L. T. O. S. 548.

See 1914 Act, Sched. I., r. 11.

2646. —— ——.]—The holder of a bill of exchange having, before the proof, received from the drawers several payments in respect thereof, amounting to nearly 15*s.* in the pound, is not entitled to prove as against the estate of the acceptor, who has become a bkpt., for more than the sum actually due at the time the proof was made.—*Re* HOUGHTON, *Ex p.* TAYLER (1857), 1 De G. & J. 302; 26 L. J. Bcy. 58; 29 L. T. O. S. 254; 3 Jur. N. S. 753; 5 W. R. 669; 44 E. R. 740, L. JJ.

2647. —— —— **Payment by way of composition.**]—R. lent his promissory notes to A. without consideration, in order that A. might obtain credit. A. discounted or indorsed them to various persons for valuable consideration without notice. R. & A. both became bkpts. A. by his agents proposed a composition to R.'s assignees, which was accepted by R.'s creditors, & which provided that A.'s estate should be discharged from the notes, in consideration of a payment of 6*s.* in the pound to the holders of the notes, that A.'s bkpcy. should be superseded, & that the holders of the notes should prove for the balance of 14*s.* against R.'s estate:—*Held:* the composition was a fair one, the holders of the notes having their remedy against both R. & A.—COOPER *v.* PEPYS (1741), Barn. Ch. 438; 1 Atk. 107; 27 E. R. 710.

Annotation:—**Distd.** *Ex p.* Wildman (1750), 1 Atk. 109.

2648. —— —— **Limitation of dividend.**]—J., who was indebted to J. & W. for £191 1*s.* 1*d.*, got discounted for J. & W. at the bank a bill for £853 5*s.* 8*d.*, but J. & W. did not endorse the bill. The proceeds of the bill, when discounted, were paid to J. & W. The bill was dishonoured, & G., as indorser, paid the amount to the bank:—*Held:* G. was entitled to prove against the estate of J. & W. for the amount of the bill until he received 20*s.* in the pound on the sum due to him, viz. £342 5*s.* 7*d.*, being the amount of the bill less £319 19*s.*, the dividends received in the acceptor's bkpcy., & £191 1*s.* 1*d.*, G.'s original indebtedness to J. & W., after which he should be a trustee for the estate of J. & W. as regards any further dividends.—*Re* GOODCHILD, *Ex p.* HUSTLER (1821), 1 Gl. & J. 9, L. C.

2649. —— —— **Limits of application of rule.**]—The rule in bkpcy. in connection with bills of exchange & promissory notes by which, if at the time of proving against the estate of bkpt. liable upon such bill or note the creditor so proving has received part of the debt from another person to whom liability also attaches, he will be allowed to prove for the residue only after deducting the amount paid, is a rule which applies to negotiable instruments alone.—*Re* BLACKBURNE, *Ex p.* STROUTS (1892), 36 Sol. Jo. 668; 9 Morr. 249, D. C.

2647 i. —— —— *Payment by way of composition.*]—A claimant in insolvency had received, as holder of a promissory note, a composition on the amount of his claim from an indorser:—*Held:* whatever claimant had received from the indorser must be deducted from his claim against the maker's estate.—*Re* BESSETTE & BANQUE DU PEUPLE & QUEVILLON (1870), 15 L. C. J. 126. —CAN.

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2650. —— After proof — Before dividend received.]—Bkpt. gave petitioner bills of exchange drawn by him on merchants in Holland & accepted by the latter. After proof, but before any dividend received, the merchants in Holland compounded with their creditors, & petitioner received a dividend from their estate:—*Held:* petitioner entitled to prove against bkpt. for the full amount of the bills.—*Ex p.* WILDMAN (1750), 1 Atk. 109; 26 E. R. 72; *sub nom. Ex p.* WYLDMAN, 2 Ves. Sen. 113.

2651. —— After proof partly admitted—Before amended proof.]—A creditor on a bill of exchange made affidavit of a debt of £2500, which proof was admitted for only £1700, & the residue was claimed. It appeared afterwards that the creditor was entitled to prove the whole against bkpt., but in the meantime he had received £500 from some other party to the bill:—*Held:* the former affidavit could not be received as a proof of the remainder of the debt, but new proof must be made, & £500 having been actually paid to the creditor he could only prove the residue after deducting the £500.—*Ex p.* WORRALL (1787), 1 Cox, Eq. Cas. 309; 29 E. R. 1179.

2652. —— Judgment obtained against drawer before bankruptcy—Acceptor paying bill after bankruptcy.]—Where a judgment had been obtained against bkpt. as drawer of a bill of exchange, before the bkpcy., & after the bkpcy. the acceptor of the bill paid the amount of the debt, a proof for the costs alone against bkpt.'s estate was allowed to be made.—*Re* BARWISE, *Ex p.* COCKS (1847), De G. 446; 9 L. T. O. S. 5; 11 Jur. 270, Ct. of R.

2653. Bill discounted—Amount of discount not deducted.]—A person, who takes no more for the discount of notes than at the rate of 5 per cent. *per annum*, shall prove the whole amount of those notes, under a commission of bkpcy. against the drawer, without being obliged to deduct what he has received from the indorser for the discount.—*Ex p.* MARLAR (1746), 1 Atk. 150; 26 E. R. 97, L. C.

Annotations:—**Consd.** Cameron *v.* Smith (1819), 2 B. & Ald. 305. **Refd.** *Re* Burgess, *Ex p.* Greenway (1819), Buck, 412.

2654. Bill protested before bankruptcy—Costs of protest added.]—Costs accrued, by protesting bills before a commission issues, may be proved, but no part of the costs arisen afterwards.—ANON. (1754), 1 Atk. 140; 26 E. R. 91.

2655. —— ——.]—Costs arisen from the protesting of bills shall not be proved, unless antecedent to the act of bkpcy.—*Re* TYLER, *Ex p.* MOORE (1789), 2 Bro. C. C. 597; 29 E. R. 328.

Annotation:—**Refd.** Walker *v.* Hamilton (1860), 1 De G. F. & J. 602.

2656. Bill indorsed after bankruptcy of acceptor—Proof limited to amount indorser could have proved for.]—A bill of exchange having been indorsed after the bkpcy. of the acceptor, the indorsee can only prove such debt, as the indorser could have proved at the time of the bkpcy.—*Ex p.* DEEY (1796), 2 Cox, Eq. Cas. 423; 30 E. R. 196.

2657. Bill indorsed after bankruptcy of drawer—Proof limited to amount indorser could have proved for.]—A., being indebted to B., paid him by indorsing & delivering a bill of exchange drawn by A. on C. & accepted by C. for a larger amount, B. undertaking to give him the change in his own acceptance within a week. B. failed to fulfil his promise, & A. afterwards became bkpt. After the bkpcy. B. indorsed the bill to C. for value:—*Held:* C. stood in the same relation to bkpt. as B., & as B. could not have proved upon the bill against A.'s estate for a larger amount than was due from A. when the bill was transferred, C. could not prove until he had paid to A.'s estate the difference between that sum & the amount of the bill.—*Re* BAPTY, *Ex p.* JOWETT (1856), 27 L. T. O. S. 192.

2658. Bill drawn & discounted abroad—Dishonoured by bankrupt in England—Penalty imposed by foreign law added.]—There was a law in Pennsylvania that bills drawn or indorsed there on persons in England, & protested, should be paid to the holder with 20 per cent. for damage. Bills drawn in Pennsylvania on a merchant in England were accepted by him. He became bkpt. before they were due, & they were protested for non-payment. The drawer having paid the money due on the bills, & the 20 per cent. to the holder, was permitted to prove both under the commission.—FRANCIS *v.* RUCKER (1768), Amb. 672; 27 E. R. 436.

Annotations:—**Folld.** Walker *v.* Hamilton (1860), 1 De G. F. & J. 602, L. C. & L. JJ. **Refd.** Starey *v.* Barnes (1806), 3 Smith, K. B. 441; *Re* General South American Co. (1877), 7 Ch. D. 637; *Re* Commercial Bank of South Australia (1887), 36 Ch. D. 522. **Mentd.** *Re* Gillespie, *Ex p.* Robarts (1886), 18 Q. B. D. 286, C. A.

2659. —— —— ——.]—A drawer in Louisiana of bills of exchange upon acceptors in London:—*Held:* entitled to prove under a deed of arrangement executed by the latter upon their becoming insolvent, to their creditors, not only for the amount of the bills, but also for the £10 per cent. upon that amount in lieu of re-exchange, which, by the law of Louisiana, he had been obliged to pay to the holders of the bills on their return dishonoured & protested for non-payment in Louisiana.—WALKER *v.* HAMILTON (1860), 1 De G. F. & J. 602; 45 E. R. 495, L. C.

Annotations:—**Consd.** *Re* General South American Co. (1877), 7 Ch. D. 637. **Folld.** *Re* Gillespie, *Ex p.* Robarts (1885), 16 Q. B. D. 702. **Refd.** *Re* Gillespie, *Ex p.* Robarts (1886), 18 Q. B. D. 286, C. A.

2660. —— —— ——.]—The drawer of a bill of exchange in a foreign country accepted in England is entitled, upon the bill being dishonoured & protested, to recover from the acceptor not only the amount of the bill with interest, but also all such reasonable expenses as may have been caused by the dishonour, including the expenses of re-exchange.—*Re* GENERAL SOUTH AMERICAN Co. (1877), 7 Ch. D. 637; 47 L. J. Ch. 67; 37 L. T. 599; 26 W. R. 232.

Annotations:—**Folld.** *Re* Gillespie, *Ex p.* Robarts (1885), 16 Q. B. D. 702. **Distd.** Banque Populaire De Bienne *v.* Cave (1895), 1 Com. Cas. 67.

2661. —— —— ——.]—Notwithstanding Bills of Exchange Act, 1882 (c. 61), s. 57, the drawer of a foreign bill of exchange upon an acceptor in England is entitled, upon the bill being dishonoured & protested, to recover from the acceptor damages in the nature of re-exchange, which the drawer is

2662 i. *Dividends declared on bankrupt estates of other parties to bill—Before proof.*]—A claim was made against the estate of an insolvent in respect of bills of exchange on which dividends had been declared on the estates of two other insolvents:—*Held:* the dividends declared on the two other insolvencies, though not paid, must be deducted from the amount of the claim.—*Re* PARKE PITTAR, 8 B. L. R. 118.—**IND.**

2662 ii. —— ——.]—Pltfs. were holders of a note made by C. & Co. & indorsed by M. & Co. M. & Co. became insolvent & effected a composition at fifty cents on the dollar, including their indorsement for C. & Co. C. & Co. also becoming insolvent, pltfs. sought to prove against their estate for the full amount of the note:—*Held:* they could only prove for the balance after deducting the composition received from M. & Co.—BANK OF BRITISH AMERICA *v.* HARVEY (1874), 9 N. S. R. 416.—**CAN.**

by the foreign law liable to pay to the holder of the bill, & the drawer, though he has not paid such damages, can prove in the bkpcy. of the acceptor in respect of his contingent liability to pay them.—*Re* GILLESPIE, *Ex p.* ROBARTS (1886), 18 Q. B. D. 286; 56 L. J. Q. B. 74; 56 L. T. 599; 35 W. R. 128; 3 T. L. R. 132, C. A.

Annotations :—**Apld.** *Re* Commercial Bank of South Australia (1887), 36 Ch. D. 522. **Consd.** *Re* English Bank of the River Plate, *Ex p.* Bank of Brazil, [1893] 2 Ch. 438. **Distd.** Banque Populaire De Bienne *v.* Cave (1895), 1 Com. Cas. 67.

2662. Dividends declared in bankruptcies of other parties to bill or note—Before proof.]—Dividends declared under another commission of bkpcy. upon a bill of exchange, though not received, must be deducted from the proof by the indorsee against a previous indorser.—*Ex p.* LEERS (1802), 6 Ves. 644; 31 E. R. 1237, L. C.

Annotation :—**Refd.** *Re* Houghton, *Ex p.* London Joint Stock Bank Co. (1857), 28 L. T. O. S. 375.

2663. —— ——.]—The holder of a bill or note may prove against all the parties to his security, but if before his proof against the drawer dividends have been declared upon his proof against the acceptors, etc., such dividend must be deducted from his proof against the drawer, & it does not vary this rule, that the creditor, not being then prepared to substantiate his proof against the drawer, had been permitted to enter a claim against his estate before the declaration of the dividend under the commissions, & had also, before such declaration made an affidavit of his debt, to be laid before the drawer's comrs. at their next meeting.—*Re* STEIN, *Ex p.* ROYAL BANK OF SCOTLAND (1815), 2 Rose, 197; 19 Ves. 310; 34 E. R. 532, L. C.

Annotation :—**Refd.** *Re* Mowat, *Ex p.* Geddes (1824), 1 Gl. & J. 414, H. L.

2664. *S. P. Re* WATSON, *Ex p.* TODD (1815), 2 Rose, 202, n., L. C.

Annotation :—**Refd.** *Re* Barrow, *Ex p.* Moult (1832), 1 Deac. & Ch. 44, Ct. of R.

2665. Bill drawn by pledgee's broker on pledgor—Pro formâ sale by pledgee to pledgor.]—A. & B. deposited goods with C. & D. as a security for a debt, with power to sell. C. & D. sold the goods to A. & B., taking as payment bills drawn by their broker on A. & B., who became bkpts. :—*Held :* C. & D. were entitled to prove only their actual debt, & receive dividends *pari passu* with the other creditors, & not the amount, for which they sold the goods to A. & B.—*Re* CARSON & DISTELL, *Ex p.* THOMPSON (1811), 18 Ves. 234; 1 Rose, 165; 34 E. R. 305, L. C.

2666. Proof for aggregate sum of several bills—Each bill separate proof—Limitation of dividend on each bill separately.]—A creditor proved in respect of several bills of exchange drawn by bkpt., & discounted by the creditor. One of those bills was subsequently paid :—*Held :* so much of the proof as related to that bill must be expunged.

The law considers each discount transaction as a distinct isolated transaction; & though the form of proof be upon the loan, the proof is in truth upon each bill separately (LEECH, V.-C.).—*Re* COWELL, *Ex p.* BARRATT (1823), 1 Gl. & J. 327.

Annotations :—**Apld.** *Re* Bentley, *Ex p.* Brunskill (1835), 4 Deac. & Ch. 442, Ct. of R. **Distd.** *Re* Hutchinson, *Ex p.* Dickson (1835), 4 Deac. & Ch. 614, Ct. of R. **Foll.** *Re* Morris, James *v.* London & County Banking Co., [1899] 1 Ch. 485, C. A.

2667. —— —— ——.]—A holder of two bills of exchange, proving in the bkpcy. of the last indorser for the aggregate sum of the two amounts secured by the bills, cannot, where the bills are drawn & accepted by different persons, retain a surplus of over 20*s.* in the pound obtained by proving against the estates of the drawer, acceptor, prior indorsers, & the last indorser of the one bill, & attribute it to a deficiency on the other bill; but the bills for the purposes of proof must be treated as constituting distinct transactions, & the surplus on the one bill must be brought into account without regard to the deficiency on the other bill.

Inasmuch as drawers, acceptors, & prior indorsers are liable to indemnify the subsequent indorser, the dividends paid by their estates are paid out of the assets of the subsequent indorser, & his estate is entitled to have the surplus which has been paid on one of the bills, not exceeding the amount of such surplus paid by his estate, paid to it, & the overpaid bill handed over to his trustee.—*Re* MORRIS, JAMES *v.* LONDON & COUNTY BANKING CO., [1899] 1 Ch. 485; 68 L. J. Ch. 299; 80 L. T. 37; 47 W. R. 324; 43 Sol. Jo. 260; 6 Mans. 178, C. A.

Annotation :—**Mentd.** Pearce *v.* Bullard, King (1908), 98 L. T. 527.

ii. *Bills deposited as Security.*

2668. General rule.]—Creditors right on bkpcy. to prove & avail himself of all collateral securities from third persons to the extent of 20*s.* in the pound.—*Re* LEIGH, *Ex p.* PARR (1811), 18 Ves. 65; 1 Rose, 76; 34 E. R. 242.

Annotations :—**Refd.** *Re* Plummer (1841), 1 Ph. 56. **Mentd.** *Re* Deane, *Ex p.* Goldsmid (1857), 1 De G. & J. 257.

2669. Debt of smaller amount than bill—Proof for full amount—Dividends limited to amount of debt.]—A bill for £200 was drawn by A. on B. payable to C., who endorsed it to D. for a debt of £147 10*s.* due from C. to D. & subsequently reduced to £46 :—*Held :* D. could prove against A. & B. for £200 until £46 received in dividends.—*Ex p.* CROSSLEY (1791), 3 Bro. C. C. 237; 29 E. R. 510; *sub nom. Ex p.* CROSLEY, Cooke's Bankrupt Laws, 7th ed. p. 168.

Annotation :—**Refd.** *Re* Bentley, *Ex p.* Vere (1835), 4 Deac. & Ch. 295.

2670. —— —— ——.]—A creditor having securities of third persons to a greater amount than the debt, may prove & receive dividends upon the full amount of the securities to the extent of 20*s.* in the pound upon the actual debt.—*Ex p.* BLOXHAM (1802), 6 Ves. 600; 31 E. R. 1215.

Annotations :—**Consd.** *Re* Dyer & Swayne, *Ex p.* Solarte (1834), 3 Deac. & Ch. 419. **Refd.** *Re* Bentley, *Ex p.* Vere (1835), 4 Deac. & Ch. 295. **Mentd.** *Re* Bentley, *Ex p.* Brunskill (1835), 4 Deac. & Ch. 442.

2671. —— —— ——.]—Where an accommodation note, & bills of exchange, are deposited with a banker as security for a loan, he may prove for the whole amount of the note, but can only receive dividends in full payment of the balance of the loan, after deducting the other securities.—*Re* BENTLEY, *Ex p.* VERE (1835), 4 Deac. & Ch. 295; 2 Mont. & A. 123; 4 L. J. Bcy. 34, Ct. of R.

2672. —— —— ——.]—A. owed B. £277, &, to secure the amount, deposited with him bills to the amount of £1,518 drawn by A. & accepted by C. A. & C. both became bkpt. :—*Held :* B. might prove the full amount of the bills under the fiat against C., but not to receive dividends beyond the sum of £277.—*Re* BARKER, *Ex p.* PHILIPPS (1840), 1 Mont. D. & De G. 232, Ct. of R.

2673. ——.]—Where a bill of exchange for a larger amount is held as security for a debt, the holder may prove for the full amount against the estate of bkpt. acceptor, though he can only receive dividends up to the amount of his debt.—*Re* MAGNUS, *Ex p.* HODGES & HART (1865), 12 L. T. 241.

2674. ——.]—When a bill of exchange, accepted for the accommodation of the drawer, is

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deposited by him as security for a debt less than the amount of the bill, the holder is entitled to prove in the bkpcy. of the acceptor for the full amount of the bill, though he cannot receive the dividends in excess of the debt due to him by the drawer.—*Re* BUNYARD, *Ex p.* NEWTON, *Ex p.* GRIFFIN (1880), 16 Ch. D. 330; 50 L. J. Ch. 484; 44 L. T. 232; 29 W. R. 407, C. A.

2675. Payments received from drawer's estate—Before bankruptcy of acceptor—Proof for balance due & interest.]—A creditor, with whom a bill of exchange had been deposited as security, first proved his debt against the estate of the drawer, his principal debtor, & thereby, & by other means, reduced his debt to £14. Subsequently, the acceptor became bkpt.:—*Held:* the creditor was entitled to prove under his commission, not only the £14, but all the interest upon his debt at the time of making that proof, to the complete liquidation of the account, in respect of which he held the bill as a security.—*Re* FOWLER, *Ex p.* MARTIN (1814), 2 Rose, 87.

Annotation:—**Apld.** *Re* Penfold, *Ex p.* Ramsbottom (1835), 4 Deac. & Ch. 198.

2676. Bill given to secure payment of goods delivered to third party—Payments by third party—Proof for net sum due.]—A. at request of B., & upon the security of a bill of exchange from him for the amount, delivered goods to C., & such goods were afterwards partly paid for by C., B. became bkpt.:—*Held:* A. could only prove as against the estate of B. the sum remaining due for the goods, & not the full amount of the bill.—*Re* WILLATS, *Ex p.* READER (1819), Buck, 381.

2677. Payments received from other parties on bill—Limitation of dividend.]—C., previous to his bkpcy., agreed with R. & E. to deposit with them bills at long dates which they were to receive when due, or otherwise dispose of in the course of their business as they should think fit, & in consideration thereof they were to accept & pay C.'s bills at three months, charging him with interest on their advances & receiving commission, the surplus, if any, to remain to C.'s account. At the time of C.'s bkpcy. he owed R. & E. £8,007 & they held bills, indorsed by him, for £7,999. They proved the whole of their debts under the commission, & before any dividend received the amount of two bills, amounting to £1,424, which sum they deducted when the first dividend was declared; & after the first dividend they received the amount of three other bills, £1,792, & by dividends from the estate of other parties to the bills, £2,240. C.'s assignees petitioned to reduce the proof to that sum which should appear due after deducting what had been received in respect of the bills deposited:—*Held:* the bills were not to be considered as a deposit, but the indorsees had a right to go against all parties to them & the petition must be dismissed.—*Ex p.* TWOGOOD (1812), 19 Ves. 229; 34 E. R. 503.

Annotation:—**Consd.** *Re* Frith, *Ex p.* Schofield (1879), 48 L. J. Bcy. 122, C. A.

2678. —— ——.]—A creditor, holding a bill of exchange, with bkpt.'s name upon it, proved a debt, upon a deposition, stating, that he held the bill as security, & subsequently received 15*s.* in the pound upon the bill from other parties, & 5*s.* in the pound upon his proof. The creditor was restrained from receiving further dividends on the amount of the bill.—*Re* WOOD, *Ex p.* RUFFORD (1821), 1 Gl. & J. 41.

Annotation:—**Dbtd.** *Re* Peirson & Sammon, *Ex p.* Sammon (1832), 1 Deac. & Ch. 564.

2679. Accommodation bills deposited—Proof against accommodation drawer or indorser—For full amount & interest.]—B. & Co. being largely indebted to R. & Co., indorsed to them various bills, which had been drawn or indorsed by C. & Co. for the accommodation of B. & Co. B. & Co. & C. & Co., respectively became bkpt., & R. & Co. proved the bills under each commission:—*Held:* the estate of C. & Co. was a security to make good the amount of principal & interest due to R. & Co. from B. & Co., & R. & Co. were entitled to receive dividends on their proof under C. & Co.'s commission, until not only the balance of the principal sum due from B. & Co., but all interest thereon, was fully satisfied.—*Re* CALDWELL, *Ex p.* REED (1833), 3 Deac. & Ch. 481, Ct. of R.

2680. —— Proof against accommodation acceptor—For full amount.]—F. & Co. sold cochineal to W., for which a small part of the price was paid in cash & the remainder by two bills at four months, but the cochineal was to remain in the hands of F. & Co. as security for the payment of the bills. The bills not being paid when due, W. sent F. & Co. two other bills drawn by himself on J., for which no consideration was given to J., the acceptor. Before those bills fell due both W. & J. became bkpt. & the price of cochineal had fallen so much in the market that F. & Co. afterwards sold it for not a third of the price at which W. had bought it, & they then proved for the deficiency under W.'s commission:—*Held:* they had also a right to prove the amount of the two bills under J.'s commission, without deducting the proceeds arising from the sale of the cochineal.—*Re* WOOD, *Ex p.* FAIRLIE BONHAM & CO. (1833), 3 Deac. & Ch. 285, Ct. of R.

2681. Accommodation notes deposited—Proof against accommodation maker—Note unindorsed—Right of holder.]—The depositee of a promissory note has no greater right to prove upon the estate of the accommodation maker than the depositor would have had; & where an accommodation note is merely deposited with him, without being indorsed in the usual course of business, he cannot prove against the estate of the maker as a *bonâ fide* holder.—*Re* BENTLEY, *Ex p.* VERE (1835), 4 Deac. & Ch. 295; 2 Mont. & A. 123; 4 L. J. Bcy. 34, Ct. of R.

2682. Some bills paid before & some after declaration of dividend—Reduction of proof—Return of excess dividends.]—Bkpts. kept a banking account, & in the course of their dealings bkpts. indorsed & paid into the bank certain bills of exchange. The bills when paid in were carried to the credit of bkpts., & cheques were drawn by them & payments made on their account from time to time. On the bills arriving at maturity bkpts. were debited with the amount of those dishonoured. The bank proved upon twenty-eights bills of exchange & promissory notes specified in a schedule to the depositions made on the proof, all of which were then in the hands of the bank & unpaid, some of them being overdue & dishonoured. Some of the bills of exchange paid in were paid in full by other parties liable, some before & some after the declaration of dividend:—*Held:* the proof ought to be reduced by the amount of the paid bills, & the dividends refunded, & the bank had no right to receive more than 20*s.* in the pound.—*Re* PRITCHARD, *Ex p.* HORNBY (1844), De G. 69, Ct. of R.

2683. Bill held by indorsee "pending discount."]—Bills of exchange were indorsed by a customer

to his bankers & held by them "pending discount," *i.e.*, pending inquiries as to the solvency of the acceptors, the bankers meanwhile making some advances to the customer on the credit of the bills, but without attributing the advances thus made to any particular bills. The customer became bkpt. :—*Held :* the bills were not securities which the bankers were bound to value, & they were entitled to prove for the full amount due & also to recover what they could from the other parties to the bills, provided they did not receive in the whole more than 20*s.* in the pound.—*Re* FIRTH, *Ex p.* SCHOFIELD (1879), 12 Ch. D. 337 ; 48 L. J. Bcy. 122 ; 40 L. T. 823 ; 27 W. R. 925, C. A.

Annotations :—**Expld. & Distd.** Dawson *v.* Isle, [1906] 1 Ch. 633. **Mentd.** Couldery *v.* Bartrum (1881), 19 Ch. D. 394, C. A.

(*c*) *By whom and against whose Estate.*

2684. By indorser—Against maker—Note taken up after bankruptcy of maker.]—If the payee of a promissory note pay the amount of it to an indorsee after the bkpcy. of the maker, he may recover against the maker, notwithstanding his bkpcy. & certificate.—HOWIS *v.* WIGGINS (1792), 4 Term Rep. 714 ; 100 E. R. 1261.

Annotations :—**Dbtd.** Cowley *v.* Dunlop (1798), 7 Term Rep. 565. Possibly, under a misapprehension of the case of *Howis* v. *Wiggins*, I considered it as a case of indemnity ; I considered the payee of the notes as having indorsed them as surety for deft. with a view to give credit to the notes & without any consideration given to him for so doing ; in any other way of considering that case, I think it is not to be supported (GROSE, J.). **Distd.** Buckler *v.* Buttivant (1802), 3 East, 72. **Consd.** Sarratt *v.* Austin (1811), 4 Taunt. 200. **Expld.** Webster *v.* Kirk (1852), 16 Jur. 247.

2685. —— Against principal of agent drawing—Indorser with knowledge that bill drawn without authority.]—If A. permits B. to draw bills in his name, he is liable as drawer to ignorant indorsees, etc., but he is not liable to the payee having knowledge of the transaction, or his creditors, & money paid by him on such bills is not provable under a commission against A.—CURTIS *v.* BARRS (1797), Peake, Add. Cas. 119.

2686. —— Against acceptor.] — Acceptor becoming bkpt., petitioner having indorsed before the bkpcy. took up the bill :—*Held :* he might prove, but could not set off a debt due from him to the estate.—*Ex p.* HALE (1797), 3 Ves. 304 ; 30 E. R. 1024.

Annotations :—**Distd.** Tempest *v.* Ord (1815), 1 Madd. 89 ; Bolland *v.* Nash (1828), 8 B. & C. 105. **Consd.** Collins *v.* Jones (1830), 10 B. & C. 777.

2687. —— ——.]—If the acceptor of a bill of exchange not due become bkpt., & the indorser be afterwards obliged to take up the bill on account of non-payment by the acceptor, he may prove the amount under the commission, & if the acceptor afterwards obtain his certificate he will be discharged from the debt, & the ct. will enter an *exoneretur* on the bail-piece in an action against him at the suit of the indorser.—JOSEPH *v.* ORME (1806), 2 Bos. & P. N. R. 180 ; 127 E. R. 593.

2688. —— ——.]—A., being indebted to B., accepted a bill, which B. indorsed to C. A. took the benefit of Insolvent Act, & inserted in his schedule C., the indorsee's name, but not B.'s name :—*Held :* B., having paid the amount of the bill to C., could not sue A., who was discharged both as to the debt & the bill.—BOYDELL *v.* CHAMPNEYS (1837), 2 M. & W. 433 ; Murp. & H. 84 ; 6 L. J. Ex. 122 ; 1 Jur. 384 ; 150 E. R. 827.

Annotations :—**Distd.** Booth *v.* Coldman (1859), 7 W. R. 188. **Refd.** Litten *v.* Dalton (1864), 17 C. B. N. S. 178.

2689. —— —— Dividend paid by bankrupt indorser.]—F. & H. drew bills on F., W. & Co. which the latter accepted, & which the drawers indorsed & discounted with S. & Co., bill brokers. S. & Co. rediscounted the bills with their bankers. Before the bills became due the drawers went into liquidation, & S. & Co. suspended payment. Under a composition in the liquidation of S. & Co. the bank received dividends in respect of the bills held by them. The bank afterwards, under a deed of arrangement, received further sums towards discharge of the balance remaining unpaid on the bills from the estate of the drawers, & also from F., W. & Co., the acceptors. On F., W. & Co. going into liquidation the trustee of S. & Co. claimed to prove in the liquidation against the estate of F., W. & Co., for the amount of the dividend paid out of S. & Co.'s estate to the bank, & for interest on that amount of dividend : —*Held :* the proof in respect of the amount of dividend must be admitted, & the proof must also be admitted in respect of the interest.—*Re* FOX, WALKER & Co., *Ex p.* BISHOP (1880), 15 Ch. D. 400 ; 50 L. J. Ch. 18 ; 43 L. T. 165 ; 29 W. R. 144, C. A.

Annotations :—**Distd.** *Re* Bonacino, *Ex p.* Discount Banking Co. (1894), 10 L. 147. **Refd.** Hand *v.* Blow (1900), 44 Sol. Jo. 551. **Mentd.** Edmunds *v.* Wallingford (1885), 14 Q. B. D. 811, C. A.

2690. —— —— ——.]—A. employed B. to get bills, which A. had not indorsed, discounted, & B., in order to do so, endorsed the bills, which were dishonoured :—*Held :* on the subsequent bkpcy. of both A. & B., that B.'s assignees had a right of proof against A.'s assignees in respect of the liability incurred by the indorsement.—*Re* NUNN & BARBER, *Ex p.* ROBINSON (1817), Buck, 113, L. C.

2691. —— —— Accommodation indorsement without knowledge of acceptor.]—Pltf. lent his indorsement upon a bill at the desire of the drawer, but without any privity with deft., the acceptor, who had himself no consideration at the time for such acceptance. The day before the bill became due deft. became bkpt., & it was immediately after taken up by pltf., the indorser, out of the hands of the indorsee :—*Held :* the bill being provable as a debt under deft.'s commission, &

PART VIII. SECT. 4, SUB-SECT. 3.—F. (c).

2684 i. *By indorser—Against maker—Insolvency of indorser—Composition with holder of note.*]—An indorser of a note compounded with his creditors, including the holder of the note who reserved his recourse against the other parties to the note ; the maker also became insolvent :—*Held :* the indorser could not rank on the note against the estate of the maker so long as the holder had not been paid in full.—*Re* BESSETTE & BANQUE DU PEUPLE & QUEVILLON (1870), 15 L. C. J. 126. —**CAN.**

2686 i. —— *Against acceptor—Bills in hands of third parties.*]—Only the actual holder of the bill can prove against a bkpt.'s estate on a bill of exchange accepted by bkpt. for a debt due by him.

A bkpt. accepted bills for L. V. & K., which had been indorsed over by them, & discounted for cash with third parties. Some of the bills, were accepted in payment of goods sold by L. V. & K. to bkpt., the remainder being accommodation acceptances. The bills were not taken up at maturity by L. V. & K. L. V. & K. presented a petition for arrangement, & their trustees claimed to prove for the amount of the bills accepted in paymept of goods :—*Held :* the proof should be rejected.—*Re* WOODS, *Ex p.* JAMES (1875), 9 I. L. T. 65.—**IR.**

2686 ii. —— —— *Bill discharged after bankruptcy of acceptor.*]—Prior to sequestration of P.'s estate, an acceptance of his for £3,000 drawn & indorsed by S. & M. had been dishonoured. After the sequestration S. paid to the holders £2,145 in discharge of the bill :—*Held :* S. was entitled to prove on P.'s estate for the amount paid by him.—*Re* PASCOE, *Ex p.* SAUNDERS (1865), 2 W. W. & A.' B. 17.—**AUS.**

2692 i. —— *Against party accommodated—Accommodation indorsement.*]—A., without value, accepted a bill drawn on him by B., & B., without value, indorsed it to C., who discounted it in bank & drew the proceeds ; both B. & C. became bkpt. before the bill fell due, & A. retired it :—*Semble :* B. was not entitled to be ranked on C.'s estate.—ASHLEY *v.* MUIR (1845), 7 Dunl. (Ct. of Sess.) 524.—**SCOT.**

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there being no privity of contract between those parties collateral to the bill, like the case of the principal & surety, nor any promise of indemnity, pltf. could not recover the amount of the bill paid after the bkpcy. against deft., who had obtained his certificate.—HOULE *v.* BAXTER (1802), 3 East, 177; 102 E. R. 565.

Annotations:—**Distd.** Pownal *v.* Ferrand (1827), 6 B. & C. 439; Pownall *v.* Tenant (1827), 5 L. J. O. S. K. B. 176.

2692. —— Against party accommodated.—Accommodation indorsement.]—An accommodation indorser is a person liable to pay the bill for the party accommodated, against whom, if he become bkpt., such indorser, though not called on to pay the bill till after the bkpcy., may prove the amount under 6 Geo. 4, c. 16, s. 52.—BASSETT *v.* DODGIN (1833), 9 Bing. 653; 2 Moo. & S. 777; 2 L. J. C. P. 84; 131 E. R. 760.

Annotations:—**Apld.** Filbey *v.* Lawford (1841), 4 Scott, N. R. 208.

2693. —— Against indorsee—Accommodation indorsement.]—A sum of money being due from A. to B., C., by B.'s request, & for his accommodation, drew a bill of exchange on A. for the amount, which A. accepted, & C. then indorsed the bill & gave it to B., who indorsed & negotiated it. B. having subsequently become bkpt.:—*Held:* the amount of the bill, which was dishonoured, & paid by C., was provable by him under the fiat, & his right of action against B. was barred by the certificate.—HAIGH *v.* JACKSON (1838), 3 M. & W. 598; 1 Horn & H. 167; 7 L. J. Ex. 200; 2 Jur. 777; 150 E. R. 1283.

2694. By accommodation acceptor — Against drawer.]—Where a bill is accepted for the drawer's accommodation & the drawer become bkpt., acceptor may prove the debt under the fiat.—FILBEY *v.* LAWFORD (1841), 3 Man. & G. 468; 4 Scott, N. R. 208, 611; 11 L. J. C. P. 24; 133 E. R. 1227, Ex. Ch.

2695. —— ——.]—Bills of exchange were drawn by a principal upon & accepted by his factor, upon an agreement that the factor should sell & indemnify himself out of the proceeds of such sale in respect of payments made on account of such bills:—*Held:* the factor had a right to prove under the bkpcy. of the principal for such of the bills as he had paid in full.—*Re* JOHNSON & GILLMAN, *Ex p.* CORNELL (1861), 5 L. T. 695.

2696. —— —— Renewal of bill outstanding at previous bankruptcy.]—Pltf. having accepted a bill payable at a future day for the accommodation of deft., the latter afterwards, & before the bill became due, committed an act of bkpcy., followed by a commission, which was afterwards superseded. Time was given to bkpt. by his creditors, & pltf. thereupon accepted another bill for the same debt, with the addition of interest & stamp. A second effectual commission having afterwards issued upon the same act of bkpcy., before pltf.'s second acceptance became due, which was paid when due:—*Held:* the amount was provable as a debt under such commission by virtue of 49 Geo. 3, c. 121, s. 8, & was barred as a personal demand against bkpt. by his certificate.—STEDMAN *v.* MARTINNANT (1811), 13 East, 427; 104 E. R. 436.

Annotations:—**Consd.** M'Dougal *v.* Paton (1818), 2 Moore, C. P. 644. **Folld.** Vansandau *v.* Corsbie (1818), 2 Moore, C. P. 602. **Refd.** Wallis *v.* Swinburne (1847), 1 Exch. 203; *Re* Bridgland (1848), 12 L. T. O. S. 333.

2697. —— —— Bill taken up after bankruptcy of drawer.]—In consideration that pltf. would accept a bill of exchange drawn on him by defts., they promised to indemnify him. Afterwards defts. became bkpts., & subsequently pltf. was sued upon the bill, & charged in execution:—*Held:* pltf. could not come in as a creditor, under the commission.—CHILTON *v.* WHIFFIN (1768), 3 Wils. 13; 95 E. R. 906.

Annotations:—**Consd.** Goddard *v.* Vanderheyden (1771), 2 Bos. & P. 8, n. **Folld.** Venderheyden *v.* De Paiba (1774), 3 Wils. 528. **Apld.** Heskuyson *v.* Woodbridge (1784), 1 Doug. K. B. 166, n. **Refd.** Cowley *v.* Dunlop (1798), 7 Term Rep. 565; *Re* Fox, *Ex p.* Marshall (1834), 3 Deac. & Ch. 120. **Mentd.** Starey *v.* Barns (1806), 7 East, 435; Hoskins *v.* Duperoy (1808), 9 East, 498.

2698. —— —— ——.]—Deft. drew a bill of exchange upon pltfs., payable to deft.'s own order. Pltfs. at his request, & on promise to indemnify them, accepted the bill, & the bill having become due after deft. had become bkpt., was paid by pltfs. to prevent their being sued:—*Held:* pltfs. could prove that as a debt under the commission, & deft. could not plead his certificate in bar of the action on the promise to indemnify, etc.—YOUNG *v.* HOCKLEY (1772), 3 Wils. 346; 2 Wm. Bl. 839; 95 E. R. 1092.

Annotations:—**Consd.** Paul *v.* Jones (1787), 1 Term Rep. 599. **Refd.** Perkins *v.* Kempland (1776), 2 Wm. Bl. 1106; Cowley *v.* Dunlop (1798), 7 Term Rep. 565; *Re* Fox, *Ex p.* Marshall (1834), 3 Deac. & Ch. 120.

2699. —— —— ——.]—Deft. drew a bill of exchange on pltf., but deft. promised to pay it himself when due. Afterward deft. became a bkpt. & subsequently pltf. was sued & obliged to pay the bill:—*Held:* pltf. could not prove any debt under the commission.—VENDERHEYDEN *v.* DE PAIBA (1774), 3 Wils. 528; 95 E. R. 1194.

Annotations:—**Refd.** Howis *v.* Wiggins (1792), 4 Term Rep. 714; Cowley *v.* Dunlop (1798), 7 Term Rep. 565.

2700. —— —— ——.]—P. accepted bills drawn on him by G. payable to his order for his accommodation. One of them was taken up by P. between the time of G.'s bkpcy. & the issuing of the commission against him, & another was taken up after the issuing of the commission. Shortly before G.'s bkpcy. he purported, by agreement under seal, to assign in consideration of the value of the bills certain cargoes & policies thereon, & gave a receipt. A verdict having been given in an action on the bills by the assignees of P., who had also failed, in their favour, with liberty to deft. to move to set it aside, if the debt were provable under G.'s commission, in consequence of the agreement:—*Held:* neither the assignment nor the receipt were provable, as there was no debt due at law from G. to P. at the time of G.'s bkpcy.—SNAITH *v.* GALE (1797), 7 Term Rep. 364; 101 E. R. 1023.

Annotation:—**Consd.** Buckler *v.* Buttivant (1802), 3 East, 72.

2701. —— —— —— Right to benefit of holder's proof.]—A. accepted four bills for the accommodation of B., which B. indorsed & deposited with

2694 i. *By accommodation acceptor—Against drawer—Effect of proof by bank discounting bills.*]—A cautioner was called on to pay a debt on failure of principal debtor. In an accounting between the estates of the principal debtor & of the creditor who had both become bkpt. the cautioner maintained that debtor's estate was entitled to credit for sums lost through accommodation bills discounted for behoof of the creditor:—*Held:* as the bank discounting the bills had already been ranked on the creditor's estate there could not be a second ranking.—ANDERSON *v.* MACKINNON (1876), 3 R. (Ct. of Sess.) 608.—**SCOT.**

2694 ii. ——*Against drawer & indorsee—Bankruptcy of drawer & indorser before bill due—Retirement by maker.*]—A., without value, accepted a bill drawn on him by B., & B., without value, indorsed it to C., who discounted it in bank & drew the proceeds; both B. & C. became bkpt. before the bill fell due, & A. retired it:—*Held:* A. was entitled to be ranked for the amount of the bill on both sequestrated estates to the effect of drawing full payment.—ASHLEY *v.* MUIR (1845), 7 Dunl. (Ct. of Sess.) 524.—**SCOT.**

the bankers, to secure any floating balance. B. became bkpt., when the bankers proved for a balance greatly exceeding the amount of the bills, excepting in their proof those bills, with others, as securities, & they afterwards received a dividend of 2*s.* in the pound on the amount of their proof. The bills were subsequently paid in full by A.:—*Held:* A. had a right to call on the bankers to refund the amount of the dividend of 2*s.* on the amount of the bills.—*Re* GARNER, *Ex p.* HOLMES (1839), Mont. & Ch. 301; 4 Deac. 82; 9 L. J. Ch. 33; 3 Jur. 1023, L. C.

Annotations:—**Folld.** Hobson *v.* Bass (1871), 6 Ch. App. 792, L. C. **Consd.** Ellis *v.* Emmanuel (1876), 1 Ex. D. 157, C. A. **Mentd.** Bower *v.* Marris (1841), Cr. & Ph. 351, L. C.; *Re* Fernandes, *Ex p.* Hope (1844), 3 Mont. D. & De G. 720, Ct. of R.; *Re* Clark, *Ex p.* Stokes & Goodman (1848), De G. 618; Midland Banking Co. *v.* Chambers (1868), L. R. 7 Eq. 179.

2702. —— —— —— ——.]—G. drew a great number of bills payable to V. & A. upon H., who had no effects of G.'s in his hands, but accepted them for the honour of the drawer. G. became a bkpt., & H. by means of the great sums he paid on account of such acceptance, became bkpt. likewise. The bill-holders proved under both commissions, & received dividends, but not sufficient to pay 20*s.* in the pound:—*Held:* the assignees of H. should stand in the place of the bill-holders for so much as had been paid under H.'s commission to the bill-holders on account of his acceptance of the bills.—*Ex p.* MARSHAL (1752), 1 Atk. 129; 26 E. R. 85, L. C.

Annotations:—**Apld.** *Ex p.* Rusforth (1805), 10 Ves. 409, L. C. **Refd.** Rucker *v.* Hagen (1773), Dick. 487, L. C.

2703. —— —— **Bill paid by drawer in fraud of creditors.**] — Bkpt. received an accommodation acceptance for £20, which he discounted with his bankers. Shortly before the date of the act of bkpcy. he paid into his bankers the sum of £20 to meet the accommodation acceptance:—*Held:* the acceptor of the accommodation bill, although only a surety, was a "creditor" within 1883 Act, s. 37 (3), & would have had a right of proof except for the payment.—*Re* PAINE, *Ex p.* READ, [1897] 1 Q. B. 122; 66 L. J. Q. B. 71; 75 L. T. 316; 45 W. R. 190; 13 T. L. R. 13; 41 Sol. Jo. 30; 3 Mans. 309.

Annotations:—**Distd.** New, Prance & Garrard *v.* Hunting (1897), 76 L. T. 196. **Expld.** *Re* Warren, *Ex p.* Trustee, [1900] 2 Q. B. 138. **Folld.** *Re* Blackpool Motor Car Co., Hamilton *v.* Blackpool Motor Car Co., [1901] 1 Ch. 77. **Refd.** *Re* Pawson, [1917] 2 K. B. 527.

2704. By accommodation maker of promissory note—Against payee.]—Bkpt. being pressed to give security for a debt, prevailed upon a friend to accommodate him with a promissory note for the sum, payable six months after date. The note was not due at the date of the fiat, but had subsequently become due & been paid by the maker:—*Held:* the proof was admissible, the creditor being, in fact, a surety within 6 Geo. 4, c. 16, s. 52.—*Re* BRIDGLAND (1848), 12 L. T. O. S. 333.

2705. —— **Against party accommodated & jointly & severally liable—Note signed under condition not fulfilled.**]—A., as surety to a firm, signed a joint & several promissory note, on the faith that B. would join as co-surety. B. never signed it, but A. was afterwards compelled to pay it, by proceedings at law at the suit of an indorsee. One of the firm died, & the others became bkpt.:—*Held:* (1) the firm were liable to repay the amount & the costs of the proceedings both at law & equity; (2) the claim was of such a nature as not to be provable under the bkpcy., & was not barred by the certificate.—RICE *v.* GORDON (1848), 11 Beav. 265; 50 E. R. 818.

Annotation:—**Consd.** Evans *v.* Bremridge (1855), 2 K. & J. 174.

2706. By transferee—Against transferor—Transfer without indorsement.]—A person giving cash for a bill without the indorsement of the person, from whom he takes it, cannot prove it under his bkpcy.—*Ex p.* SHUTTLEWORTH (1797), 3 Ves. 368; 30 E. R. 1057.

Annotation:—**Expld.** Fairclough *v.* Pavia (1854), 9 Exch. 690. The decision in *Ex p. Shuttleworth* proceeded solely upon the ground that the transaction amounted to a sale of the bill (PARKER, B.).

2707. —— —— ——.]—An agent applied to a banking co. on several occasions to discount bills drawn by his principal, & at the commencement of the transactions informed the co. who the drawer & acceptors were, & inquired whether the co. would discount the bill without requiring the agent to indorse it. They agreed to do so in some instances, but upon some of the bills required & obtained the agent's indorsement. The acceptances turned out to have been forged by the principal, of which fact the agent was wholly ignorant. On the agent becoming bkpt., & there being nothing to show that he had not handed over the proceeds of the bills to the principal, or that those proceeds were in such a position that they could be recalled:—*Held:* the co. could not prove upon the bills, which the agent had not indorsed.—*Re* BOURNE, *Ex p.* BIRD (1851), 4 De G. & Sm. 273; 20 L. J. Bcy. 16; 17 L. T. O. S. 303; 15 Jur. 894; 64 E. R. 829.

2708. —— —— —— **Sale of bill.**]—G. accepted a bill for £493 for the firm of J. & W., & they gave him an unindorsed bill for the same amount drawn by others on another firm. On the bkpcy. of J. & W., G., having paid his acceptance before the bkpcy., claimed to prove, after deducting what he had received on the unindorsed bill:—*Held:* he was not entitled to prove, the transaction amounting to a purchase by G.—*Re* GOODCHILD, *Ex p.* HUSTLER (1821), 1 Gl. & J. 9, L. C.

2709. —— **Against acceptor—Bill transferred after bankruptcy.**]—Where the holder of a bill after the issuing of a fiat against a party liable on the bill transfers the bill, this does not give the transferee a right to prove it, but merely a right to call upon the transferor to prove, as trustee for the transferee.—*Re* GIBSON, *Ex p.* DICKENSON (1832), 2 Deac. & Ch. 520, Ct. of R.

2710. —— **Against maker of note—Indorsement of payee obtained subsequently to tender for proof.**]—A *bonâ fide* holder for value of promissory notes, unindorsed at the date of tender for proof

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2704 i. *By accommodation maker of promissory note—Against accommodation indorser.*]—C. signed some promissory notes as maker, & B. indorsed them. Both affixed their signatures to accommodate M. B. failed after M. had failed. C. filed a claim as B.'s creditor for half the amount which he had paid on the notes:—*Held:* as both maker & indorser had signed for accommodation, they were both sureties for M. & had a recourse one against the other for half the amount they paid for M. Consequently C.'s claim against B. was well founded.—*Re* BOUTIN, CANTIN & ARCAND (1897), Q. R. 12 S. C. 186.—**CAN.**

2706 i. *By transfeeree — Against indorser—Not due until after commission issued.*]—A note indorsed by bkpt. before commission issued though not due until after, may be proved as a debt, & the plea of bkpcy. is a defence to it.—WOOD *v.* HUTT & CLEMENT (1857), 9 U. C. R. 344.—**CAN.**

2711 i. —— *Against drawer—Notice of dishonour required.*]—When the drawer & indorser of a bill of exchange has assigned his estate by a creditors' deed, & the bill is subsequently dishonoured, notice of dishonour should be given to the trustee of the deed, & if not so given, the holder cannot prove on the estate for the bill.

If the holder of a bill of exchange, the drawer of which has assigned his estate to a trustee for creditors, loses his right to resort to that estate, by not giving notice of dishonour, neither the assignor nor trustee can, by waiver of the notice of dishonour, revive the liability as against other creditors.—*Re* LEVY'S TRUST ESTATE, *Ex p.* AARONS (1871), 2 V. R. 33.—**AUS.**

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procured the necessary indorsement before application to register the resolutions :—*Held :* he was entitled to prove for the full amount of his debt, & the time of the indorsement of the notes was immaterial.—*Re* ESLICK, *Ex p.* PIKE (1879), 40 L. T. 529.

2711. —— Against drawer—Bill received from acceptor.]—It is not any objection to the proof on a bill drawn by bkpt. that it comes through the acceptor, if there is not fraud.—*Re* BATES, *Ex p.* GILL (1838), 3 Deac. 288 ; 3 Mont. & A. 590, Ct. of R.

2712. —— —— Bill indorsed over by transferee.]—W. drew bills of exchange on H., who had no effects of W. in his hands, & they were transmitted to R. & Co. & indorsed over by them to several persons :—*Held :* the assignees of R. & Co. must be admitted as creditors under W.'s commission for so much as they had paid to the indorsees of W.'s bills of exchange, under R. & Co.'s commission.—*Re* WINSMORE, *Ex p.* WALTON (1743), 1 Atk. 122 ; 26 E. R. 80.

Annotation :—**Consd.** *Ex p.* Marshall (1752), 1 Atk. 129, L. C.

2713. By indorsee for value—Against drawee—Bankruptcy before acceptance.]—A. sent B., as his agent, to America to purchase cotton, & authorised him to draw bills on A., & to sell & discount same & with the proceeds to pay for the cotton. B. accordingly drew a bill on A. for £3,000 in favour of R., who discounted it for B., & afterwards negotiated it to third parties. B. applied the proceeds of the bill in payment of the cotton, which was shipped off to A. at Liverpool, but before the arrival of the cotton, or the presentation of the bill for acceptance, A. became bkpt., & the cotton was sold by the assignees, & the proceeds applied for the benefit of the estate :—*Held :* these circumstances did not amount to a virtual acceptance of the bill by A., & a subsequent indorsee for value could not prove the amount of it against A.'s estate.—*Re* BENTLEY, *Ex p.* BOLTON (1837), 2 Deac. 537 ; 3 Mont. & A. 367 ; 7 L. J. Bcy. 10, Ct. of R.

2714. —— Against guarantor without indorsement.]—An engagement to warrant the payment of a bill of exchange, otherwise than by indorsement, will not enable the holder to prove it under a commission of bkpcy.—*Re* LEWIS & POTTER, *Ex p.* HARRISON (1789), 2 Bro. C. C. 615 ; 2 Cox Eq. Cas. 172 ; 29 E. R. 339.

2715. —— Against indorser—Bill accepted by partner of indorser on behalf of firm—Indorsee without knowledge of partnership.] — Bills of exchange were accepted by H., a member of, & on account of the firm of M. & Co. & indorsed by O., also a member of the firm, to S. for value. On the bkpcy. of H., S. proved against his estate in respect of these bills :—*Held :* he was not entitled to prove upon the same bills against the estate of O., who was also adjudicated bkpt., notwithstanding he had no notice that O. was a member of the firm until his bkpcy.—*Re* OKELL, *Ex p.* ROYAL BRITISH BANK OF SCOTLAND (1855), 1 Bankr. & Ins. R. 160.

2716. —— —— Absolute exchange of bills for indorsee's acceptances of indorser's drafts—Bills indorsed by bankrupt unpaid.]—Defts. gave pltf. their own bills accepted by third persons in exchange for acceptances of other bills drawn by them on him, the different sets of which tallied in the gross amount, except a few shillings in one instance which was paid at the time, in order, as it was expressed, to finish the transaction, & except that in two instances out of five the acceptances so given by defts. were made payable two days before the counter-acceptances of pltf., but no stress was laid at the time on these trifling differences :—*Held :* the transaction being that of an absolute exchange of securities, each party was confined to his remedy on those securities, & the law would not raise an implied promise in defts., who had become bkpts., to repay to pltf. the amount on the balance of his acceptances paid after such bkpcy.—BUCKLER *v.* BUTTIVANT & WHITE (1802), 3 East, 72 ; 102 E. R. 523.

Annotation :—**Folld.** *Re* Dyer & Swayne, *Ex p.* Solarte (1834), 3 Deac. & Ch. 419.

2717. —— —— —— Indorsee's acceptances dishonoured & proved against indorser by holders.]—B. sent A. bills drawn by him on C. & received from A. his acceptances for the precise amount, which were discounted, but none of which being paid by A., who had become bkpt. before they fell due, they were proved by the holders under B.'s commission, A. having never negotiated these bills :—*Held :* A's assignees could not prove them under B.'s commission.—*Re* KNOWLES, *Ex p.* SOLARTE (1832), 2 Deac. & Ch. 261, Ct. of R.

Annotation :—**Distd.** *Re* Dyer, *Ex p.* Solarte (1834), 3 Deac. & Ch. 419.

2718. —— Against accommodation indorser—Indorsement after bill negotiated.]—Indorsement given without consideration to a bill discounted by the drawer gives the holder no right to prove against a party indorsing the bill for the drawer's accommodation after the bill has been discounted. —*Re* ALFRED (1853), 21 L. T. O. S. 8.

2719. —— Against maker of note—Note payable in money or Bank of England notes—Note received from intermediate person.]—The holder of promissory notes payable in money or Bank of England notes, who had received them from an intermediate person :—*Held :* not entitled to prove them as a debt against the maker.—*Re* SEATON, *Ex p.* IMESON (1815), 2 Rose, 225.

Annotation :—**Folld.** *Re* Seaton, *Ex p.* Davison (1817), Buck, 31.

2720. —— —— Security for same held by indorser.]—A holder of bkpt.'s promissory note, having a security in his hands for the full amount, indorsed the note to B., but still retained the security :—*Qu. :* whether B. could prove the note, without deducting or mentioning the security.

It is new to me to be told that, where a solvent party holds a security for the payment of a note which he has indorsed to a third party, that party is not to be permitted to prove it under a commission against the maker (SIR G. ROSE).—*Re* GREENWAY, *Ex p.* PARAMORE (1835), 1 Deac. 279, Ct. of R.

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k. *By indorsee for value—Against transferor for value without indorsement—Separate written acknowledgment.*]—B. handed over an negotiable note for valuable consideration to G., not indorsing it, but giving a written acknowledgment on a separate paper to be accountable for the note to G. ; G. indorsed the note, which, with the acknowledgment, came into the hands of M. for valuable consideration, & B. & the several parties to the note became bkpt. :—*Held :* (1) M. could not prove the note against the estate of B., the acknowledgment not being assignable ; (2) M. was entitled to have the amount made an item in the account between B. & G. & to stand in the place of the latter.—*Re* BARRINGTON & BURTON (1804), 2 Sch. & Lef. 112. —**IR.**

l. *Payee of note—Against indorser—Maker solvent.*]—A. made a promissory note in favour of B., which was indorsed by C., but not by B. C. surrendered his estate. A. was not insolvent, & had not been excused : —*Held :* B. could prove upon the estate of C.—*Re* SYDSERFF (1866), 5 S. 193.—**S. AF.**

2721. —— Against acceptor—After proof against acceptor by third party holding security.]— A. being a *bonâ fide* holder of two bills accepted by bkpt., for the payment of which he also held a security, transferred the security to B., who proved for the amount under the fiat:—*Held:* such proof did not prevent the right of A. to prove also on the bills, though it might be a question for future consideration, whether he would be entitled to receive dividends on such proof.—*Re* BARHAM, *Ex p.* —— (1840), 1 Mont. D. & De G. 179, Ct. of R.

2722. By payer for indorser's honour—Against acceptor—Blank indorsement filled up by payer.]— A., the payee of a bill of exchange, indorsed it in blank & delivered it to B., who wrote above the blank indorsement, "pay C. or order." B. took up the bill after a commission of bkpcy. had issued against the acceptor:—*Held:* he could not prove it under the commission.—*Re* ASTLEY, *Ex p.* ISBESTER (1810), 1 Rose, 20.

2723. By payer for acceptor's honour—Against acceptor — No protest for non-payment.] — A. accepted a bill of exchange, but became bkpt. before it fell due. On its coming due, B. paid it for the honour of A., but there was no protest of the bill for non-payment, nor did B. make any formal statement that he paid it for the honour of A.:—*Semble:* B. would have been entitled to prove for the amount of the bill (KNIGHT BRUCE, L.J.). —*Re* WYLD, *Ex p.* WYLD (1860), 2 De G. F. & J. 642; 30 L. J. Bcy. 10; 3 L. T. 794; 7 Jur. N. S. 294; 9 W. R. 421; 45 E. R. 770, L.JJ.

2724. By drawer—Against acceptor—Other bill transactions outstanding—Retention of dividends.] —C., on Jan. 10, drew upon G. for £69 payable to S. or order three months after date, & G., on Mar. 24, drew on T. for £200 payable to C. or order two months after date, & T. accepted. On the same day C. & G. settled accounts, & G. charged C. with the £69 & £200, making in all a balance of £515 against C., who drew two drafts on H. & Co. for £300 & £215, payable in six months; to C. or order, who immediately discounted them with S. & Co. On Apr. 17 G. failed, not having paid the £69 bill. T. also failed, & refused to pay the £200 bill. C. took up the £69 bill, & never received any part of the other:—*Held:* C. was entitled to prove against G.'s estate for the £269, but the dividend to be stayed, till the account in respect of the other bills was adjusted.—*Ex p.* CLANRICARDE (LORD) (1787), 1 Cooke's Bankrupt Laws, 8th ed. 182.

Annotations:—**Distd.** Sarratt *v.* Austin (1811), 4 Taunt. 200. **Consd.** *Re* Dyer & Swayne, *Ex p.* Solarte (1834), 3 Deac. & Ch. 419.

2725. —— —— Debt afterwards paid by drawer's debtor—Proof of drawer available for debtor.]— A., to discharge a debt due from him to B., procured his banker, C., to direct his correspondent & partner, D., to accept a bill drawn by B. Before the bill was due, C. & D. became bkpt., C. being indebted to A. more than the amount of the bill. B. proved against the estate of D., but afterwards received the whole from A.:—*Held:* A., not having proved against the estate of C. in respect of the bill, was entitled to stand in the place of B. against the estate of D., whose proof having been expunged was reinstated for the benefit of A.—*Ex p.* MATTHEWS (1801), 6 Ves. 285; 31 E. R. 1054, L. C.

2726. —— Against bank discounting bills—Cash balance in favour of drawer.]—The drawer of bills of exchange accepted for value discounted them with his bankers, who afterwards became bkpt. before the bills arrived at maturity, having a cash balance belonging to the drawer in their hands. The bills were dishonoured:—*Held:* the drawer was not entitled to have the cash balance in his favour applied in discharge of the amount due upon the unpaid bills, &, on payment of the difference, to have those bills delivered up to him, but the bank had a right to obtain payment of such bills from the acceptors & leave the drawer to prove in respect of his cash balance in the usual way. *Semble:* the doctrine in equity of marshalling assets did not apply to the case.—*Re* ROYAL BRITISH BANK, *Ex p.* BANES (1857), 28 L. T. O. S. 296.

(d) Under what Conditions.

2727. Bill drawn by foreigner—One party in England—Payable to agent of foreign government.] —A firm abroad drew bills on one of its own partners, trading on his own account in England, payable to an agent of the foreign govt. The bills were not paid. Process of insolvency issued against the foreign firm, & a commission against the English partner:—*Held:* the agent might prove under the commission, but would be restrained from receiving dividends, unless he elected not to prove under the insolvency abroad.—*Re* VANZELLER, *Ex p.* CHEVALIER (1834), 1 Mont. & A. 345, L. C.

Annotation:—**Apld.** *Re* Deane, *Ex p.* Goldsmid (1857), 1 De G. & J. 257.

2728. —— —— Dividend received in foreign bankruptcy.] — Two firms, one composed of A. & B., the other of A., B. & C., carried on business at Liverpool & Pernambuco respectively. An English adjudication of bkpcy., was made against A. & B., & the holder of a bill drawn by A., B. & C. on A. & B. proved under it & received a dividend. Afterwards A., B. & C. failed in Pernambuco, & the same creditor proved & received dividends on his bill under that liquidation:—*Held:* he ought not to receive any further English dividend without refunding the Brazilian dividends, but could not be ordered to refund the English dividend already received.—*Re* DEANE & YOULE, *Ex p.* MELLOR, *Ex p.* SMITH (1862), 3 De G. F. & J. 760; 31 L. J. Bcy. 60; 6 L. T. 268; 10 W. R. 276; 45 E. R. 1073, L. JJ.

2729. —— —— ——.]—D., who carried on business in England under the firm of D. & Co., & in Brazil under the firm of D., L., & Co., executed a deed of assignment of all his property for the benefit of his creditors. His Brazilian assets were administered under a concordata, a proceeding analogous to bkpcy., under which, by the law of Brazil, the creditors whose debts were contracted in the name of the Brazilian firm had priority. The holders of bills of exchange drawn by D., L., & Co. upon, & accepted by, D. & Co., proved in Brazil, & received a dividend. They then claimed to prove in England:—*Held:* they could not receive a dividend in England, until all the creditors had received a dividend at the same rate as the Brazilian dividend.—*Re* DOUGLAS, *Ex p.* WILSON (1872), 7 Ch. App. 490; 41 L. J. Bcy. 46; 26 L. T. 489; 20 W. R. 564, L. JJ.

Annotations:—**Follid.** *Re* Hooper, *Ex p.* Banco de Portugal (1879), 11 Ch. D. 317, C. A. **Apprvd.** *Re* Hooper, Banco de Portugal *v.* Waddell (1880), 5 App. Cas. 161, H. L. **Consd.** *Re* Somes, *Ex p.* De Lemos (1896), 3 Mans. 131.

Sect. 4.—What debts are provable and for what amount: Sub-sect. 3, F. (d) & (e).]

2730. —— —— ——.]—Two persons carried on business, under one firm, as wine exporters in Portugal, & under another, as wine merchants in London. Bills were drawn by the Portuguese firm on, & accepted by, the English firm. The English firm became bkpt., & before the adjudication proceedings in insolvency were taken in Portugal, under which the property there was administered & divided exclusively among the Portuguese creditors. One of such creditors, who had received a dividend on bills drawn by the Portuguese firm, then sought to prove in the English bkpcy. in respect of the same bills against the English firm as acceptors:—*Held:* he could only do so on condition of bringing into account the dividend received in Portugal.—BANCO DE PORTUGAL *v.* WADDELL, *Re* HOOPER (1880), 5 App. Cas. 161; 49 L. J. Bcy. 33; 42 L. T. 698; 28 W. R. 477, H. L.

Annotation:—**Consd.** *Re* Somes, *Ex p.* De Somos (1896), 3 Mans. 131.

2731. Notes bought up after bankruptcy of maker.]—Petitioner's testator had bought up, after the bkpcy. of the S. Bank, their outstanding notes from various holders. There was no evidence from whence petitioner's testator bought the notes, or that they were the subject of proof in the hands of the former holders. Petitioner prayed to prove the amount of the notes so bought up:—*Held:* (1) there could be no proof in respect to the notes, unless it should be established, that at the time of the bkpcy, they were in the hands of holders who were entitled to prove them under the commission; (2) petitioner should be allowed to go again before the comrs. for the purpose of showing that his testator purchased the notes from *bonâ fide* holders entitled to a proof in respect of the notes they individually held.—*Re* BOWLES, *Ex p.* ROGERS (1820), Buck, 490.

2732. Cheques taken as security for loan without inquiry—Proof subject to equities attaching thereto.]—A. undertook to discount bills for B., & in return for the bills gave cheques to B., upon the understanding that they were not to be presented until there were funds in A.'s bank to meet them. Part of such bills were subsequently handed back to A.'s bankers, & security was given by A. & B. to cover the whole amount of them. B. had meanwhile deposited the cheques with his brother C., as security for money advanced. On A.'s bkpcy., C. sought to prove for the full amount of the cheques. The cheques had been presented & dishonoured:—*Held:* C. having taken the cheques without proper inquiry, took them subject to all the equities attaching to them, & could not prove in respect of them.—*Re* COBB, *Ex p.* HUGHES (1880), 43 L. T. 577.

2733. Whether demand necessary—One joint maker known to join as surety for other.]—The rule that, where a person agrees to pay a debt not his own, demand is necessary to create a right of action against him, does not apply to the case of a joint & several negotiable instrument, *e.g.*, a promissory note, in which one of the makers is known to join only as a surety for the other. In such a case proof can be made without any demand. *Re* MAYOR, *Ex p.* WHITWORTH (1841), 2 Mont. D. & De G. 158, Ct. of R.

2734. Whether notice of dishonour necessary—Proof against drawer.]—The drawer of a bill of exchange became bkpt. & absconded before it was due, & before that time the holder of the bill had notice who were the assignees of bkpt.'s estate. The acceptor also became bkpt. before the bill was due, & when due it was dishonoured. The holder did not give notice of the dishonour to the drawer or leave it at his house, nor did he make any attempt to give such notice to his assignees:—*Held:* the bill was not provable under the commission issued against the drawer, the claim of the holder being barred by his laches.—ROHDE *v.* PROCTOR (1825), 4 B. & C. 517; 6 Dow. & Ry. K. B. 610; 3 L. J. O. S. K. B. 188; 107 E. R. 1152.

Annotations:—**Folld.** *Re* Cohen, *Ex p.* Johnson (1834), 3 Deac. & Ch. 433. **Refd.** *Re* Rains, *Ex p.* Rohde (1829), Mont. & M. 430; *Re* Dyer & Swayne, *Ex p.* Solarte (1834), 3 Deac. & Ch. 419. **Mentd.** *Re* Bellman, *Ex p.* Baker (1877), 4 Ch. D. 795, C. A.

See Bills of Exchange Act, 1882 (c. 61), ss. 41 (d), 48, 49, 50.

2735. *S. P. Re* RAINS, *Ex p.* ROHDE (1829), Mont. & M. 430.

Annotations:—**Consd.** *Re* Cohen, *Ex p.* Johnston (1834), 1 Mont. & A. 622, Ct. of R. **Refd.** Terry *v.* Parker (1837), 6 Ad. & El. 502.

2736. —— ——.]—A. discounted for K. & Co. who afterwards became bkpt., three bills drawn by K. & Co. on D. & S. One of the bills became due before the bkpcy., & two others afterwards; none of them were paid by the acceptors, & A. gave no notice to K. & Co. of their dishonour:—*Held:* A. could not prove the first bill, but might prove the two others.—*Re* KNOWLES, *Ex p.* SOLARTE (1832), 2 Deac. & Ch. 261, Ct. of R.

Annotations:—**Expld.** *Re* Cohen, *Ex p.* Johnson (1834), 3 Deac. & Ch. 433. **Distd.** *Re* Dyer, *Ex p.* Solarte (1834), 3 Deac. & Ch. 419. **Refd.** *Re* Gans, *Ex p.* Chappel (1838), 7 L. J. Bcy. 43.

2737. —— ——.]—The holder of a bill of exchange, falling due & being dishonoured after the bkpcy. of the drawer, is bound to use diligence in giving notice to bkpt. or his assignees of the dishonour of the bill; & when bkpt.'s house continues open in his absence after his bkpcy., the manager being in possession during part of the time, & bkpt.'s wife or clerk during the other period of his absence, the holder is at least bound to leave notice at bkpt.'s house. *Qu.:* whether he is also bound to seek out bkpt.'s assignees for the purpose of giving them notice.

No such notice is necessary, where there are no effects of the drawer in the hands of the acceptors during the currency of the bill.—*Re* COHEN, *Ex p.* JOHNSON (1834), 3 Deac. & Ch. 433; 1 Mont. & A. 622.

2738. —— —— **Whether proof of handwriting necessary.**]—On a petition to prove against the drawer, no evidence is required of his handwriting, or of the notice of dishonour, where no objection was made on either of those grounds before the comr.—*Re* BATES, *Ex p.* GILL (1838), 3 Deac. 288; 3 Mont. & A. 590, Ct. of R.

2739. —— ——.]—A bill of exchange was dishonoured after the drawer had been adjudicated a bkpt., & a trustee had been appointed. The holder, being aware of the bkpcy., but not knowing of the appointment of the trustee, gave notice of dishonour to bkpt. by post. The notice was sent to the only address the holder knew, but bkpt. had left it some months previously:—*Held:* the notice was sufficient, & the holder was entitled to

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2731 i. *Notes brought up after bankruptcy of maker.*]—Application to prove bank notes purchased from various holders, after the issue of the commission, refused, there being no satisfactory evidence of the time or place of purchase, the price paid, or that the sellers were *bonâ fide* holders.—*Re* DELACOUR (1841), 3 I. Eq. R. 573.—IR.

2734 i. *Whether notice of dishonour necessary.*]—A creditor may not prove for bills or notes, if notice of dishonour be not given to bkpt. before the bkpcy., or to the assignee subsequently.—*Re* MULLEN (1841), 3 I. Eq. R. 361.—IR.

prove in respect of the bill.—*Re* BELLMAN, *Ex p.* BAKER (1877), 4 Ch. D. 795; 46 L. J. Bcy. 60; 36 L. T. 339; 25 W. R. 454, C.A.

2740. —— —— Whether necessary to state in proving.]—*Semble:* where a creditor proves under a fiat in bkpcy., for a debt due on bills of exchange, of which the bkpt. is the drawer, it is not necessary for him to aver in his deposition that the bills were duly presented, & that notice of their dishonour was given to bkpt.—FLETCHER *v.* MANNING (1844), 1 Car. & Kir. 350.

Annotation:—**Mentd.** *Re* Grant (1862), 7 L. T. 536.

2741. —— Proof against indorser.] — On a bill falling due after the bkpcy. of the indorser, & before the choice of assignees, notice must be given to bkpt., & after the choice, to the assignees.—*Re* GANS, *Ex p.* CHAPPLE (1838), 3 Deac. 218; 3 Mont. & A. 490; 7 L. J. Bcy. 43, Ct. of R.

2742. —— —— Whether necessary to state in proving.]—A deposition of debt against bkpt. indorser of a bill, not showing notice of dishonour of the bill to have been given to him:—*Held:* not defective, if the comr. be satisfied *aliunde*, or if it be the fact that notice was given.—*Re* MARSTON, *Ex p.* MARSTON; *Re* MARSTON, *Ex p.* BROOME (1839), Mont. & Ch. 576; 4 Deac. 191; 9 L. J. Bcy. 5; 3 Jur. 1079, Ct. of R.

Annotations:—**Mentd.** *Re* Hayne & Shadwell, *Ex p.* Law (1840), 1 Mont. D. & De G. 16, Ct. of R.; *Re* Dobbs, *Ex p.* County of Gloucester Bank (1866), 15 L. T. 53.

2743. Lost bill.]—Proof allowed under a commission of bkpcy. in respect of a bill alleged to be lost, the most extensive indemnity to be given, & to be settled by the comrs.—*Ex p.* GREENWAY (1802), 6 Ves. 812; 31 E. R. 1321.

Annotations:—**Refd.** Champion *v.* Terry (1822), 3 Brod. & Bing. 295; Ramuz *v.* Crowe (1847), 1 Exch. 167. **Mentd.** Wright *v.* Maidstone (1855), 3 Eq. Rep. 946.

2744. ——.]—A bill of exchange having been, in mistake for another bill, sent by the holders to bkpts. before the bkpcy., & retained by them, was lost. Proof was, in the circumstances, allowed, without production of the bill, & without security or indemnity.—*Re* ACRAMAN, *Ex p.* WEBSTER (1847), 8 L. T. O. S. 478; 11 Jur. 136.

See 1915 Rules, rr. 252, 269.

(e) Cross Bills.

2745. General principle.]— The true principle to be applied is, that proof should only be admitted for that sum for which an action could have been maintained by the one party against the other, if the bills had remained in the situation in which they are actually found, & there had been no bkpcy. (LORD SELBORNE, C.).—*Re* CHARLES, *Ex p.* MACREDIE (1873), 8 Ch. App. 535; 42 L. J. Bcy. 90; 28 L. T. 827; 21 W. R. 535, L. C. & L. J.

Annotation:—**Consd.** *Re* London, Bombay & Mediterranean Bank, *Ex p.* Cama (1874), 9 Ch. App. 686, L. JJ.

2746. —— Limits of application of rule.]—The principle as to proving for cross accommodation bills does not apply when the bills are in the hands of third parties.—*Re* LONDON, BOMBAY & MEDITERRANEAN BANK, *Ex p.* CAMA (1874), 9 Ch. App. 686; 43 L. J. Ch. 683; 31 L. T. 234; 22 W. R. 809, L. JJ.

Annotation:—**Apld.** Lovel *v.* Lovel (1881), 45 L. T. 252.

2747. Both parties bankrupt—Bills in hands of third party—Proof for cash balance only.]—Cross paper between two houses, both of which become bkpt. As between the two estates no proof can be made in respect of the bad paper or the excess of damage eventually sustained on that account.—*Ex p.* WALKER (1798), 4 Ves. 373; 31 E. R. 190.

Annotations:—**Consd.** *Ex p.* Earle (1800), 5 Ves. 833; *Ex p.* Rawson (1821), Jac. 274, L. C. **Folld.** *Re* Living, *Ex p.* Laforest, *Ex p.* Wetherell (1833), 2 Deac. & Ch. 199, Ct. of R.; *Re* Dyer & Swayne, *Ex p.* Solarte (1834), 3 Deac. & Ch. 419. **Distd.** *Re* Charles, *Ex p.* Macredie (1873), 8 Ch. App. 535, L. C. & L. J.; *Re* London, Bombay & Mediterranean Bank, *Ex p.* Cama (1874), 9 Ch. App. 686, L. JJ. **Mentd.** *Re* Lynn, *Ex p.* Read (1822), 1 Gl. & J. 224.

2748. —— —— ——.]—Cross-paper, dishonoured on each side, both parties being bkpt. As between the two estates the proof was confined to the cash balance, without regard to the dishonoured bills.—*Ex p.* EARLE (1800), 5 Ves. 833; 31 E. R. 883.

Annotation:—**Mentd.** *Re* Lynn, *Ex p.* Read (1822), 1 Gl. & J. 224.

2749. —— —— —— When surplus after paying holders.] — Where part of the account between two mercantile houses which have become bkpt., consists of bills that may be proved against both estates, there can be no proof in respect of those bills as between the two houses, unless there is a surplus after satisfying the holders of the bills.—*Ex p.* RAWSON, *Ex p.* LLOYD (1821), Jac. 274; 37 E. R. 854, L. C.

Annotation:—**Folld.** *Re* Living, *Ex p.* Laforest, *Ex p.* Wetherell (1833), 2 Deac. & Ch. 199.

2750. *S. P. Re* LIVING, *Ex p.* LAFOREST, *Ex p.* WETHERELL (1833), Mont. & B. 363; 2 Deac. & Ch. 199; 2 L. J. Bcy. 49, Ct. of R.

2751. —— Bills in hand of one party.]—A. gives an accommodation bill to B., which B. gives to C. in exchange for an accommodation bill given by C. to B. A., B. & C. go bkpt. A.'s bill is provable by the assignees of C. against the estate of A., but the dividend reserved.—*Re* DYER & SWAYNE, *Ex p.* SOLARTE (1834), 1 Mont. & A. 270; 3 Deac. & Ch. 419.

2752. —— Distinction between cross bills & bills accepted of each for different consideration.]—Bkpts. at the time of the bkpcy. owed P. a cash balance of £11,000. Bills had, however, been accepted by bkpts. & negotiated by P. in part payment of the balance, & those bills had been proved by the holders against bkpts.' estate. There was evidence that bills had been accepted by P. in favour of bkpts. for an independent consideration which had failed, & those bills also had been discounted. P.'s estate was also in liquidation, & his trustee claimed to prove in the bkpcy. for the whole amount of the cash balance:—*Held:* P.'s trustee could only prove for the difference between the cash balance & the amount of the bills given in part payment thereof.—*Re* CHARLES, *Ex p.* MACREDIE (1873), 8 Ch. App. 535; 42 L. J. Bcy. 90; 28 L. T. 827; 21 W. R. 535, L. C. & L. J.

Annotation:—**Consd.** *Re* London, Bombay, & Mediterranean Bank, *Ex p.* Cama (1874), 9 Ch. App. 686, L. JJ.

PART VIII. SECT. 4, SUB-SECT. 3.—F. (e).

o. *General rule—Sets of bills for approximately same amount—Differing in date, sum & period.*]—N. & Co. granted acceptances to H. & Co., for their accommodation, to the amount of £1,493; & H. & Co. granted acceptances, for the accommodation of N. & Co., to the amount of £1,488. The several bills, however, composing the two sets, did not correspond with each other, in date, sum, or period, & had not been directly exchanged for each other. H. & Co. became bkpt. while these bills were in the circle, & N. & Co. were obliged to pay the set of bills they had accepted, & to retire those granted to them. They were ranked on the estate of H. & Co. for the bills accepted by that co., & drew a small dividend. They further claimed to be ranked, & to draw a dividend on the bills accepted by themselves, to the effect of obtaining full payment of the sum which they had paid in retiring the bills accepted by H. & Co. on the ground that the two sets of bills were mutual accommodations:—*Held:* they were not entitled as the bills were not counterparts.—NEWBIGGING & Co. *v.* HEYWOOD, COLLINS & Co.'s TRUSTEES (1823), 2 Sh. (Ct. of Sess.) 481.—**SCOT.**

Sect. 4.—What debts are provable and for what amount: Sub-sect. 3, F. (e) & (f), & G. (a) i.]

2753. —— Bills accepted by one party paid in full —Dividend paid as drawer on other bills.]—The assignees of P. were obliged to pay a dividend as drawers, on bills accepted by D., who also was a bkpt., as well as to pay bills drawn by D. & accepted by P. The surviving assignee of P. having claimed in respect of those sums, the question being whether the certificate of D. was a bar to pltfs.' claim:—*Held:* (1) (LAWRENCE & ROSE, JJ.) P. might have proved the bills whether negotiated or not, the situation of P. not being worse than it could have been if he had not parted with the bills; (2) (KENYON, C.J., & ASHURST, J.) the right of action only accrued on payment after the bkpcy.—COWLEY *v.* DUNLOP (1798), 7 Term Rep. 565; 101 E. R. 1135.

Annotations:—**Consd.** Buckler *v.* Buttivant (1802), 3 East, 72. **Folld.** Starey *v.* Barns (1806), 7 East, 435; Cardwell *v.* Martin (1808), 9 East, 190. **Distd.** Pownal *v.* Ferrand (1827), 6 B. & C. 439. **Folld.** *Re* Dyer & Swayne, *Ex p.* Solarte (1834), 3 Deac. & Ch. 419. **Mentd.** Burdon *v.* Benton (1847), 9 Q. B. 843.

2754. One party bankrupt—Bills in hands of third party—Condition precedent to proof.]—On a petition to be permitted to prove under a commission of bkpcy., on cross bills of exchange:—*Held:* petitioner not having taken up his own bill, he could not be permitted to prove.—*Ex p.* WARD (1794), 2 Rose, 113, n.

Annotation:—**Mentd.** Sarratt *v.* Austin (1811), 4 Taunt. 200.

2755. —— —— ——.]—A creditor, who is a surety in a bond for the payment of promissory notes, which in turn were given for the payment of debts of a bkpt., must, in order to prove for such notes in a bkpcy., either take up his paper or pay the original debt & exonerate bkpt.'s estate from the original debt.—*Re* BOWNESS & PADMORE (1789), 1 Cooke's Bankrupt Laws, 8th ed. 183.

2756. —— —— ——.]—The assignees of D. petitioned that they might be permitted to prove a debt under the commission of C. & Co., who had accepted the bills for D., who had given them counter-bills which were not paid:—*Held:* they could not prove the debt, till the bills accepted by D. had been taken up.—*Ex p.* EVERETT (1800), 2 Rose, 113, n., L. C.

Annotation:—**Mentd.** Sarratt *v.* Austin (1811), 4 Taunt. 200.

2757. —— —— ——.]—C. & Co., being embarrassed, the Bank of England agreed to advance them £40,000 upon acceptances of the friends of C. & Co. The acceptances were given, & the acceptors, or any substituted acceptors, were secured by C. & Co. assigning to trustees, for that purpose, certain property in America. Two of the acceptances were thus: R. drew a bill on J. & W. for £2,500, which they accepted, & it was indorsed by C. & Co. to the bank. R. accepted another bill to that amount, drawn by J. & W., which was also given to the bank. The bills, when they became due, were renewed. Before the renewed acceptance of J. & W. became due, they stopped payment, & R. the drawer, being called upon, he obtained an acceptance from T. & indorsed it to the bank, & the acceptance of J. & W. was thereupon delivered to him. J. & W. becoming bkpt., R. proved the amount of their acceptances in his possession, & received 18*s.* in the pound:—*Held:* the proof was right, R. being the principal in his acceptances, & J. & W. the sureties in their drawings, J. & W. being the principals in their acceptances, & R. the surety with respect to their acceptances.—*Re* GOODCHILD, *Ex p.* HUNTER, *Ex p.* REYNER (1825), 2 Gl. & J. 7, L. C.

Annotation:—**Consd.** Clements *v.* Langley (1833), 5 B. & Ad. 372.

2758. —— —— **Effect of 49 Geo. 3, c. 121.**]—At the time of L.'s bkpcy. the account between R. & L. stood as follows. There was a cash balance of £3,576 8*s.* 4*d.*, including therein a promissory note for £1,603 17*s.* 5*d.* given by L. to R., who had negotiated it, & it was proved under the commission. R. had accepted, for the accommodation of L. bills drawn by L. to the amount of £6,444 7*s.* 4*d.*, none of which had been paid at the bkpcy., & they were proved under the commission. R. had likewise guaranteed debts of L. to the amount of £773 1*s.* 5*d.*, but had not at the bkpcy. paid any part of those debts, & they were proved under the commission. L. had given three bills for £1,000 each, drawn by him on S. to R., who had negotiated them, & those bills were dishonoured, & two of them were proved. R. subsequently compounded with his creditors & paid the holders of the accommodation bills accepted for L., & the guaranteed creditors, a composition. R. claimed to exclude from both sides of the account the unpaid bills or liabilities, or to debit the account with the amount of the cash balance, & with the difference between the amount of the dividends paid by L.'s estate upon S.'s bills & L.'s promissory note, & the amount of the composition paid by R. to the holders of the accommodation bills & the guaranteed creditors, & to prove for the balance:—*Held:* by reason of the above Act, if the accommodation bills, & that part of the cash balance represented by the promissory note, together with the guaranteed debts, had been paid in full by R., he would have no right to further proof, & could only claim the benefit of the proof already made.—*Re* LYNN, *Ex p.* READ (1822), 1 Gl. & J. 224.

Annotation:—**Mentd.** *Re* Living, *Ex p.* Laforest, *Ex p.* Wetherell (1833), 2 Deac. & Ch. 199, Ct. of R.

2759. —— Bankrupt's acceptances replaced by discounter's draft on drawer.]—A. & B. interchangeably accepted accommodation bills. B.'s bills were discounted with C., who, upon their becoming due, agreed to renew them, but A., having fallen into discredit, C. did not take his name to the bills, but drew for the amount on B. only. Before the new bills became due, A. became bkpt.:—*Semble:* B. might have proved under A.'s commission.—FRANCO *v.* DUBOIS (1804), 2 Smith, K. B. 36.

2760. —— Bills in hand of other party.]—If two persons exchange acceptances for their

2754 i. *One party bankrupt—Other party compounding with creditors—Bills in hands of third parties.*]—In A.'s sequestration a claim was lodged by B. for £6,000, which was admitted to be due to him under certain contracts. B., becoming insolvent, assigned this claim to C. in trust for his creditors, in consideration of their agreeing to accept a composition.

A.'s trustee refused to rank the claim except under deduction of £4,000, the amount of B.'s dishonoured acceptances to A. for value, on which certain banks had ranked on A.'s estate & received a dividend of £1,730. The same banks had also received a composition from B. on these bills. B. had also paid a composition to other banks of £2,441 on A.'s dishonoured acceptances to B., for value, to the amount of £9,000:—*Held:* the rule against double ranking not applying to a case where a debtor had compounded with his creditors without becoming bkpt. or being divested of his estate, A.'s trustee had a good claim against B., to be relieved of payments on account of the £4,000 bills (B. being the true debtor), which he was entitled to deduct from B.'s claim for the £6,000, while B.'s claim against A. to be relieved of payments on account of the £9,000 bills (in which A. was the true debtor) could not be made effectual against A.'s bkpt. estate by reason of the rule against double ranking.—MACKINNON *v.* MONKHOUSE (1881), 9 R. (Ct. of Sess.) 393. —SCOT.

mutual accommodation, & both bills are payable at the same time, have the same dates, & contain the same sums, one is a good consideration for the other, & neither is an indemnity, so that if either party becomes a bkpt., the bill accepted by him may be proved under his commission.—ROLFE *v.* CASLON (1795), 2 Hy. Bl. 570; 126 E. R. 708.

Annotations :—**Follds.** Cowley *v.* Dunlop (1798), 7 Term Rep. 565; Buckler *v.* Buttivant (1802), 3 East, 72. **Consd.** Sarratt *v.* Austin (1811), 4 Taunt. 200. **Follds.** *Re* Dyer & Swayne, *Ex p.* Solarte (1834), 3 Deac. & Ch. 419. **Consd.** *Re* London, Bombay & Mediterranean Bank, Cama's Claim (1874), 31 L. T. 234. **Mentd.** Burdon *v.* Benton (1847), 9 Q. B. 843.

2761. —— ——.]—A. having given two promissory notes for two sums of £400 on behalf of a firm as collateral security to people upon which the firm were accustomed to draw, sought to prove for those sums. It appeared that the notes had not been taken up, although the creditor had given his bond for the payment, till Apr. 14, 1785. The commission in bkpcy. was issued Apr. 13 although not published in the Gazette till Apr. 23. A dividend of 10*s.* in the pound was paid on Apr. 14, enough remaining in the hands of the assignees to pay the £800 if the creditor could establish his right to prove for that sum :—*Held :* the creditor should be at liberty to prove for the latter of the two promissory notes.—*Ex p.* BEAUFOY (1787), Cooke's Bankrupt Laws, 8th ed. 180.

(f) Double Insolvency of Parties liable—The Rule in Waring's Case.

See Part XX., Sect. 5, sub-sect. 3, D.

G. Obligations for Payment of Recurring Sums.

(a) Annuities and Annuity Bonds.

i. What Annuities and Bonds.

See, also, No. 2896, *post.*

2762. Whether consideration sufficient—Debt discharged by testator on condition of payment of annuity—Proof by executrix.]—Debt forgiven by testator, on condition that bkpt. should pay £60 annually to his sister. Upon bkpcy. the extrix. shall prove the debt.—*Re* LAWRENCE, *Ex p.* ENGLISH (1789), 2 Bro. C. C. 610; 29 E. R. 335.

2763. —— **Annuity granted by wife's father—In consideration of contingent annuity granted by husband in favour of wife.**]—A covenant by a husband to secure to his wife an annuity during her life, in case she should survive him, is a sufficient consideration to support a grant of an annuity from the wife's father, & on the bkpcy. of the wife's father a proof for the value of the annuity with the arrears was admitted.—*Re* ARCHER, *Ex p.* DRAYCOTT (1827), 2 Gl. & J. 283.

2764. —— **Whole consideration received by grantor—Part returned in payment of debt.**]—Bkpt. granted an annuity of £42, in consideration of £400, & received the whole of the consideration money, through the medium of the attorney employed by him in the transaction. Half an hour afterwards, at a different place, he repaid £100 of the sum to the attorney, in discharge of a debt : *Held :* this was not a return or retainer of part of the consideration money, & the value of the annuity was provable under the fiat.—*Re* BASUN, *Ex p.* BOGUE (1838), 3 Deac. 314.

2765. —— **Annuity granted in consideration of grantee allowing capital to remain in business.**]—Proof admitted for the value of an annuity agreed to be paid by bkpt. to the creditor, in consideration of the latter allowing his capital to remain in the business in which he had been a dormant partner upon his retirement, as well as for the amount of capital so left in.—*Re* PICKFORD, *Ex p.* PICKFORD (1862), 5 L. T. 775.

2766. —— **Wife's father undertaking to husband to make allowance to daughter—Payment of allowance till bankruptcy of father.**]—Bkpt., prior to the marriage of his daughter, wrote to her intended husband, that he would allow his daughter £150 a year for her own use, but would not immediately pay a gross sum. The annuity was paid for a considerable time after the marriage :—*Held :* the debt was provable.—*Re* MANTON, *Ex p.* SITGER (1828), 1 Mont. 100.

Annotation :—**Refd.** *Re* Curtis, *Ex p.* Annandale (1834), 2 Mont. & A. 19, Ct. of R.

2767. —— **Equivalent to annuity payable during joint lives of father & daughter.**]—An annuity given by a father on his daughter's marriage, by a letter to the intended husband in the following words : I promise you, until it is convenient to me to do something better for you, to allow my daughter £100 a year, which you can have as you may require :—*Held :* to be an annuity during the joint lives of the father & daughter, & though incapable of valuation &, though no other evidence of the genuineness of the letter, to be provable.—*Re* CURTIS, *Ex p.* ANNANDALE (1834), 4 Deac. & Ch. 511; 2 Mont. & A. 19, Ct. of R.

Annotations :—**Apld.** *Re* Pickford, *Ex p.* Pickford (1862), 5 L. T. 775. **Consd.** Mudge *v.* Rowan (1868), L. R. 3 Exch. 85. **Apld.** *Re* Lindrea, Lindrea *v.* Fletcher (1913), 109 L. T. 623.

2768. Annuity set aside—Before bankruptcy.]—Where an annuity has been granted for a sum paid as a consideration for it, *i.e.*, money had & received from the time of the grant, if the annuity is at any subsequent time set aside, & where the grantor became bkpt. after the grant, but subsequent to its being set aside, it is barred by his certificate.—WALKER *v.* LISCARRAY (1807), 6 Esp. 98.

Annotations :—**Dbtd.** Cowper *v.* Godmond (1833), 9 Bing. 748. *Walker* v. *Liscarray* is at variance with all the other cases as cited (TINDAL, C.J.). I cannot assent to the language of Lord Ellenborough in *Walker* v. *Liscarray* ; it is opposed to his own more deliberate judgment in the cases cited at the bar (PARK, J.). **Mentd.** *Re* Blockliss, *Ex p.* Blockliss (1819), Buck, 406; Churchill *v.* Bertrand (1842), 3 Q. B. 568.

2769. Contingent annuity.] — A contingent annuity, granted by bkpt. to A. in case she survived B., may be proved before the happening of the contingency, under 6 Geo. 4, c. 16, s. 54; but if such an annuity is not provable under s. 54 it is not provable under s. 56—*Re* PHIBBS, *Ex p.* VANHEYTHUSEN (1836), 1 Deac. 360; 2 Mont. & A. 519, Ct. of R.

Guaranteed annuity.]—*See* Nos. 2515–2519, *ante.*

2770. Annuity covenanted under deed of separation.]—An annuity covenanted by a husband to be made to his wife, under a deed of separation,

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PART VIII. SECT. 4, SUB-SECT. 3.—G. (a) i.

q. *Allowance pending dissolution of marriage by Act of Parliament—No consideration.*]—A husband, pending an Act of Parliament for dissolving a marriage on the ground of adultery, granted a bond, in the English form, for an allowance to his wife in case of the Act passing. Thereafter the Act passed, & the husband died, & his estates after his death were sequestrated. On the opinion of English counsel that the bond claimed on was granted without onerous consideration & that by the law of England a creditor, under such a bond, could not compete with onerous creditors claiming in England in a case of bkpcy. :—*Held :* as a claimant under the bond could not claim more in the country in which he sought to enforce his right than he would be entitled to *in loco contractus*, he was not entitled to compete with onerous creditors in Scotland.—WILLIAMSON *v.* TAYLOR (1845), 18 Sc. Jur. 99.—**SCOT.**

2770 i. *Annuity covenanted under deed of separation.*]—Weekly payments payable in the future by a husband to his wife for her maintenance, under a separation deed, are provable in bkpcy., under Bkpcy. Act, 1892, s. 98 (3). The value of such a debt or liability may be estimated under s. 109.—*Re* BECK, *Ex p.* BECK (1904), 24 N. Z. L. R. 491.—**N.Z.**

Sect. 4.—What debts are provable and for what amount: Sub-sect. 3, G. (a) i.]

constitutes a debt or liability provable in his bkpcy., & no action can be maintained by the wife, either for arrears or for future payments.—VICTOR *v.* VICTOR, [1912] 1 K. B. 247; 81 L. J. K. B. 354; 105 L. T. 887; 28 T. L. R. 131; 56 Sol. Jo. 204; 19 Mans. 53, C. A.

Annotation:—**Refd.** McQuiban *v.* McQuiban, [1913] P. 208.

2771. ——.]—Where a deed of separation contains a covenant for the payment by the husband of an allowance to his wife, the allowance is provable in bkpcy., & an action cannot, after discharge in bkpcy., be maintained on the covenant.—MCQUIBAN *v.* MCQUIBAN, [1913] P. 208; 83 L. J. P. 19; 109 L. T. 412; 29 T. L. R. 766.

2772. —— **Terminable if cohabitation resumed.**]—By a deed of separation a husband covenanted to pay an annuity to his wife by quarterly instalments, the annuity to cease in the event of future cohabitation by mutual consent:—*Held:* this was not an "annuity" provable under 1849 Act, s. 175, nor a liability to pay money under 1861 Act, s. 154.—MUDGE *v.* ROWAN (1868), L. R. 3 Exch. 85; 37 L. J. Ex. 79; 17 L. T. 576; 16 W. R. 403.

Annotations:—**Consd.** Brett *v.* Jackson (1869), L. R. 4 C. P. 259. **Apld.** Financial Corpn. *v.* Lawrence (1869) L. R. 4 C. P. 731. **Consd.** *Re* Batey, *Ex p.* Neal (1880), 14 Ch. D. 579, C. A. **Expld.** Morgan *v.* Hardy (1887), 18 Q. B. D. 646, C. A. **Refd.** Holmes *v.* Symons (1871), L. R. 13 Eq. 66; *Re* Blakemore, *Ex p.* Blakemore (1877), 46 L. J. Bcy. 118. **Mentd.** Kent *v.* Thomas (1871), 40 L. J. Ex. 186; *Re* Wood, *Ex p.* Naden (1874), 22 W. R. 936, L. JJ.; *Re* Grieves, *Ex p.* Pearce (1879), 13 Ch. D. 262:

See, also, No. 2776, *post.*

2773. Whether annuity capable of valuation—Annuity dependent on conditions.]—A. & B. having a lease of certain salt works for twenty-one years, entered into articles of agreement with bkpt., by which the latter undertook the manufacture of the salt, & it was provided that the contract should subsist for the term granted by the lease, wanting three months, but that if there should be a failure of brine in the pits for ten days successively, bkpt. was to be exonerated from his liability to manufacture the salt to an extent proportioned to the extent of the failure of brine. Bkpt. afterwards granted an annuity to petitioner, charging it on the sums payable to bkpt. from A. & B. for the manufacture of the salt:—*Held:* (1) notwithstanding the possibility of the discontinuance of the salt contract, & of the forfeiture of the lease by non-payment of rent, or non-performance of covenants, the annuity was capable of valuation; (2) it should be ordered that petitioner might prove for the value of the annuity, abandoning all claim of lien as against the assignees, but without prejudice to any claim against other parties.—*Re* BORRON, *Ex p.* PARRATT (1836), 2 Mont. & A. 626; 1 Deac. 696, Ct. of R.

Annotations:—**Consd.** Beardsall & Jackson, *Ex p.* Brett (1867), 15 L. T. 679; Brett *v.* Jackson (1869), L. R. 4 C. P. 259. **Mentd.** Mudge *v.* Rowan (1868), L. R. 3 Exch. 85.

2774. —— **Annuity given for goodwill of business.**]—An annuity granted for a term of years, the consideration for which was the goodwill of a business, may be ordered to be valued, according to 6 Geo. 4, c. 16, s. 54.—*Re* JEMMETT, *Ex p.* SCHOLES (1840), 1 Mont. D. & De G. 384; 4 Jur. 1189, Ct. of R.

Annotation:—**Apld.** *Re* Pickford, *Ex p.* Pickford (1862), 5 L. T. 775.

2775. —— **Annuity payable during life of husband, wife or issue.**] — A trader, upon his daughter's marriage, covenanted to pay, so long as the intended husband & wife, or any issue of the marriage, entitled under the provisions of the settlement, should live, such a sum as with the annual produce of any property, which might be received as therein mentioned, would amount to £150:—*Held:* the payments of the annuity becoming due after the issuing of a fiat against the trader could not be proved.—*Re* FOSTER, *Ex p.* EVANS (1850), 3 De G. & Sm. 561; 13 Jur. 183; 64 E. R. 606.

2776. —— **Annuity payable during joint lives of husband & wife—Terminable if cohabitation resumed.**]—By deed of separation between deft. & his wife, deft. covenanted with pltf. that he would every year during the joint lives of himself & his wife pay to pltf., as a trustee for her, to her separate use, such sum as together with the dividends & interest or other income to arise from £948 6*s.* 4*d.* Bank 3 per cent. annuities, or from other funds settled, or which might be settled to her separate use & which might be received by her, would make one clear annuity or yearly sum of £200, such annuity to commence from Jan. 11, 1854, & to be paid by four even & equal quarterly payments, provided that, if deft. & his wife should at any time thereafter cohabit as man & wife, then & from thenceforth the annuity should cease. On Sept. 29, 1854, & while deft. & his wife continued to live separate, deft. became bkpt:—*Held:* the annual sum, so covenanted to be paid by deft. for the separate use of his wife, was not an "annuity" within 1849 Act, s. 175, nor a "debt payable upon a contingency" within s. 177, or a "liability to pay money upon a contingency" within s. 177, or a "liability to pay money upon a contingency" within s. 178; & the certificate was no bar to an action for the recovery of a quarterly instalment which became due after the bkpcy.—PARKER *v.* INCE (1859), 4 H. & N. 53; 28 L. J. Ex. 189; 32 L. T. O. S. 279; 7 W. R. 201; 157 E. R. 755.

Annotations:—**Consd.** General Discount Co. *v.* Stokes (1864), 17 C. B. N. S. 765; Brett *v.* Jackson (1869), L. R. 4 C. P. 259. **Distd.** *Re* Batey, *Ex p.* Neal (1880), 14 Ch. D. 579, C. A. **Refd.** *Re* Beardsall & Jackson, *Ex p.* Brett (1867), 15 L. T. 679; Mudge *v.* Rowan (1868), L. R. 3 Exch. 85.

See, also, No. 2772, *ante.*

2777. —— —— —— **"Wife" being sister of deceased wife.**]—A man went through the ceremony of marriage with a sister of his deceased wife, & lived with her as his wife. They afterwards separated, & a separation deed in the ordinary form was executed, in which she was described as his wife, & he covenanted with the trustees of the deed to pay her an annuity for their joint lives. There was a proviso that, if the parties should live together again by mutual consent, the deed should become void. The annuity was paid for twelve years, & then the man became bkpt.:—*Held:* (1) the value of the future payments of the annuity was capable of estimation, & was provable in the bkpcy.; (2) as the parties never could legally live together as husband & wife, the proviso, making the deed void in the event of their doing so, must be disregarded.—*Re* WOOD, *Ex p.* NADEN (1874), 9 Ch. App. 670; 43 L. J. Bcy. 121; 30 L. T. 743; 22 W. R. 936, L. JJ.

Annotation:—**Refd.** *Re* Abdy, Rabbeth *v.* Donaldson, [1895] 1 Ch. 455, C. A.

2775 i. *Whether annuity capable of valuation—Annuity payable during life—R. S. O.*, 1897, *c.* 147.]—Insolvent made an assignment for the benefit of creditors, pursuant to the above Act. Previous to the assignment the insolvent had covenanted with pltfs. to pay to J. R. $100 per quarter on the first day of each quarter during her natural life:—*Held:* the growing payments were in the nature of contingent debts; & pltfs. were not entitled under the above Act to rank for the present value of such payments.—CARSWELL *v.* LANGLEY (1902), 22 C. L. T. Occ. N. 97; 3 O. L. R. 261; 1 O. W. R. 107.—**CAN.**

2778. —— —— —— Or on wife ceasing to live chaste life.]—By a separation deed between a husband & wife the husband covenanted with trustees to pay to them an annuity of £350, during the joint lives of himself & his wife, for her benefit. The annuity was made determinable in case the wife should not lead a chaste life, in case the husband & wife should resume cohabitation, & in case the marriage should be dissolved in respect of anything done, committed, or suffered by the other party after the date of the deed. The annuity was to be proportionally diminished in the event of the wife becoming entitled to any income independent of the husband exceeding £350 a year:—*Held:* the value of the annuity was capable of being fairly estimated, & was provable. —*Re* BATEY, *Ex p.* NEAL (1880), 14 Ch. D. 579; 43 L. T. 264; 28 W. R. 875, C. A.

Annotations:—**Consd.** *Re* Mercantile Mutual Marine Insce. Assocn. (1883), 25 Ch. D. 415; Morgan *v.* Hardy (1887) 18 Q. B. D. 646, C. A.; Victor *v.* Victor [1912], 1 K. B. 247, C. A. **Refd.** Chaplin *v.* Hicks (1911), 27 T. L. R. 244. **Mentd.** Hardy *v.* Fothergill (1888), 13 App. Cas. 351, H. L.

2779. —— Annuity terminable on grantee failing or being unable to perform certain stipulations.]—A yearly sum, payable quarterly to B. during his life, "if he shall so long continue to perform, observe, & abide by the stipulation" contained in the deed, but to cease & be no longer payable "if B. should refuse, neglect, fail, or become incapable to perform, observe, or abide by all or any of the stipulations aforesaid," is not provable under 1849 Act, s. 175, as an annuity capable of valuation, as against the estate of the grantors, under an assignment executed by them for the benefit of creditors under 1861 Act, s. 192. Neither is it provable under s. 154 of that Act, as a liability under a contract or promise to pay money.—*Re* BEARDSALL & JACKSON, *Ex p.* BRETT (1867), 15 L. T. 679; 15 W. R. 715.

Annotation:—**Mentd.** *Re* Wilson (1869), 20 L. T. 119.

2780. —— —— To assist grantor & not compete with him in business.]—An annual payment was reserved to pltf. by a deed, by which it was provided that the payment should cease if pltf. should refuse, neglect, or fail or become incapable to perform, observe, or abide by any of the stipulations therein contained. Amongst them were stipulations that pltf. should use his best endeavours to preserve & extend the business of the grantors, & would not by any act, neglect, omission, or default injure the same, or impede the success thereof, that he should perform such services & discharge such duties as the grantors should reasonably require, that he would not, whilst the grantors should continue to carry on the business in question, be engaged or concerned in a similar business within twenty miles of St. Paul's, & that any difference between the parties should be referred to arbn.:—*Held:* this was not an annuity provable under 1849 Act, s. 175, the conditions for its defeasance being so uncertain as to render it incapable of valuation, & it was not barred by a deed executed by the grantors for the benefit of creditors under 1861 Act, s. 192.—BRETT *v.* JACKSON (1869), L. R. 4 C. P. 259; 38 L. J. C. P. 139; 19 L. T. 790; 17 W. R. 532.

Annotations:—**Consd.** Hardy *v.* Fothergill (1888), 13 App. Cas. 351, H. L. **Mentd.** *Re* Wilson (1869), 20 L. T. 119; Financial Corpn. *v.* Lawrence (1869), 38 L. J. C. P. 305; *Re* Wood, *Ex p.* Naden (1874), 22 W. R. 936, L. JJ.

2781. —— —— ——.]—On the dissolution of a partnership it was agreed that one of the partners should continue his business, & he covenanted to pay the retiring partner an annuity of £120, for his life, the retiring partner covenanting on his part not to carry on the business within one hundred miles of his former place of business, & it was agreed that for any breach of that covenant the annuity should cease & determine & the covenant to pay it should become null & void. The continuing partner having filed a petition:—*Held:* the retiring partner's claim in respect of the annuity was provable.—*Re* JACKSON, *Ex p.* JACKSON (1872), 27 L. T. 696; 20 W. R. 1023, L. JJ.

Annotation:—**Mentd.** Hardy *v.* Fothergill (1888), 13 App. Cas. 351, H. L.

2782. —— Annuity terminable on remarriage of grantee.]—A testator bequeathed his business to his two sons, subject to an annuity to be paid to his wife during her widowhood, & directed that the annuity should be further secured by the joint & several bonds of the sons. The sons filed a liquidation petition:—*Held:* the deduction to be made from the value of the life annuity for the contingency of marrying again was capable of being fairly estimated, & proof should be admitted for the value of the life annuity less such deduction, which value the ct. directed to be ascertained by an actuary.—*Re* BLAKEMORE, *Ex p.* BLAKEMORE (1877), 5 Ch. D. 372; 46 L. J. Bcy. 118; 36 L. T. 783; 25 W. R. 488, C. A.

Annotation:—**Apld.** *Re* Batey, *Ex p.* Neal (1880), 14 Ch. D. 579, C. A.

See, also, No. 2767, *ante,* No. 2814, *post.*

2783. Annuity void—Proof for money advanced.]—Where a grant of annuity was void for want of a memorial registered, being charged on an estate of less annual value than the annuity, & the grantor, who was the grantee's attorney, had prepared the security, & deposited the title-deeds, but misrepresented the value of the estate, a proof was admitted under the grantor's bkpcy. only for the money advanced, with liberty to file a bill for an equitable lien upon the fraud & the deposit.—*Ex p.* WRIGHT (1812), 1 Rose, 308; 19 Ves. 255; 34 E. R. 513, L. C.

Annotations:—**Mentd.** Parker *v.* Housefield (1834), 2 My. & K. 419; Collett *v.* Morrison (1851), 9 Hare, 162.

2784. Where there is bond & covenant—General rules governing proof.]—Bkpt., by a marriage settlement, agreed as speedily as might be to settle £40 a year upon his wife, to be paid from his decease, a sum of money to be invested in stock for the purpose of raising that annual sum, the dividends for the husband for life, the capital for the issue, etc. Under the husband's bkpcy.:—*Held:* (1) this was in substance & effect a covenant by the husband to pay on his marriage a sum of money that would produce £40 a year, & if so the moment the marriage took place, & the time elapsed, in which that gross sum could be paid, it was a payment, secured by a covenant to produce a sum to give an annual fruit, but the moment the time was over, it stood upon the same principle as the arrears of an annuity, become due before the bkpcy; (2) a proof should be allowed by the wife & children for £800.

If there is a bond to secure an annuity, & also a covenant, though the bond is forfeited before the bkpcy., & the certificate is a bar as to that, it does not bar the action for breaches of covenant subsequent to the bkpcy. But the arrears of the annuity, actually become due, might be proved. Where there is a bond & a covenant for payment of an annuity, if there is a breach, the penalty is forfeited. The annuitant deals with it, as he may according to law; for it will stand in effect as a security for the payment, by which you may compel the payment of what is due, & to become due. He may prove under the bond, & the certificate will be a bar to the debt upon the bond by breach of the condition, but if he chooses to rest upon the covenant, what is due at the bkpcy. is a debt, &

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may be proved, but the growing payments are not, & cannot be proved (LORD ELDON, C.).—*Ex p.* GRANGER (1805), 10 Ves. 349; 32 E. R. 879.

2785. Bond for payment of annuity—Whether within 7 Geo. 1, c. 31.]—A bond for payment of an annuity for a term of years is within the above Act.—PATTISON *v.* BANKES (1777), 2 Cowp. 540; 98 E. R. 1230.

Annotations:—**Apld.** Cox *v.* Liotard (1784), Doug. K. B. 166. **Consd.** Hoskins *v.* Duperoy (1808), 9 East, 498.

2786. —— Forfeiture before bankruptcy.]—An annuity bond, if forfeited before bkpcy., should be valued & proved under the commission. If not forfeited till after, it cannot be so proved, & the obligor may be taken in execution on a judgment thereon.—PERKINS *v.* KEMPLAND (1776), 2 Wm. Bl. 1106; 96 E. R. 653.

Annotations:—**Consd.** Hodgson *v.* Bell (1797), 7 Term Rep. 97; *Re* Fox, *Ex p.* Marshall (1834), 1 Mont. & A. 145, Ct. of R. **Refd.** Wyllie *v.* Wilkes (1780), 2 Doug. K. B. 519; Sammon *v.* Miller (1832), 3 B. & Ad. 596; *Re* Colnaghi, *Ex p.* Marks (1838), 3 Mont. & A. 521, Ct. of R.; Amott *v.* Holden (1852), 18 Q. B. 593.

2787. —— ——.]—The penalty of a bond for securing an annuity having once been forfeited before bkpcy., the value of the annuity may be proved under the commission, & the certificate is a discharge from future payments, notwithstanding the arrears shall have been paid after the forfeiture & before the bkpcy.—WYLLIE *v.* WILKES (1780), 2 Doug. K. B. 519; 99 E. R. 331.

Annotations:—**Consd.** Butcher *v.* Churchill (1808), 14 Ves. 567. **Refd.** *Re* Colnaghi, *Ex p.* Marks (1838), 2 Mont. & A. 521, Ct. of R. **Mentd.** Murray *v.* Stair (1823), 2 B. & C. 82.

2788. —— ——.]—Bond conditioned to be void upon payment of £3,000 with interest from the death of the obligor, & it the obligor should perform his covenant for the payment of an annuity of £200 contained in an indenture of settlement. The annuity was in arrear at the bkpcy., creating a breach of the condition of the bond, to which the certificate would be a bar:—*Held:* the obligee was entitled to prove under the commission of the obligor.

How that [the proof] is to be ascertained must be the subject of further consideration; in the meantime, let the claim be admitted (LORD ELDON, C.).—*Re* ROWLATT, *Ex p.* ROWLATT (1816), 2 Rose, 416.

Annotations:—**Consd.** Winter *v.* Mouseley (1819), 2 B. & Ald. 802. **Refd.** Holmes *v.* Love (1824), 5 Dow. & Ry. K. B. 56. **Mentd.** *Re* Williams, *Ex p.* Elder (1817), 2 Madd. 282.

2789. —— No forfeiture before bankruptcy—Bill taken for arrears—Bankruptcy before maturity of bill.]—Proof of debt under bonds securing an annuity was rejected, on the ground that a bill accepted for the arrear not being dishonoured till after the bkpcy., the bonds were not forfeited at the bkpcy.—*Ex p.* JAMES (1800), 5 Ves. 708; 31 E. R. 817, L. C.

2790. —— —— Interest on fixed sum payable on fixed days—Or after notice.]—A bond was conditioned for payment of a sum of money to exors. of the obligee, & of the interest during his life, payable on certain days, or within twenty days after demand. The obligor became bkpt. & interest was then due, but no demand had been made:—*Held:* it was not provable as an annuity bond within 49 Geo. 3, c. 121, s. 17.—WINTER *v.* MOUSELEY (1819), 2 B. & Ald. 802; 106 E. R. 558.

Annotations:—**Consd.** Guy *v.* Newson (1833), 4 Tyr. 31; Marriage *v.* Marriage (1845), 1 C. B. 761. **Apld.** *Re* Nicholson & Stone, *Ex p.* Robinson (1862), 31 L. J. Bcy. 12, L. JJ. **Refd.** *Re* Beardsall & Jackson, *Ex p.* Brett (1867), 15 L. T. 679. **Mentd.** Holmes *v.* Love (1824), 5 Dow. & Ry. K. B. 56.

2791. —— Annuity merely in nature of increased interest.]—On a loan transaction between bkpts. & a creditor, it was arranged that the creditor should, in addition to interest, be paid an annuity so long as any money remained owing in respect of the loan. The annuity was secured by a bond in a penal sum & by mtge. The creditor proved against the estate for the money due on the loan, & afterwards tendered a proof in respect of the annuity, or for the penal sum mentioned in the bond:—*Held:* the annuity was merely in the nature of increased interest, & was not a subject of proof.—*Re* NICHOLSON & STONE, *Ex p.* ROBINSON (1862), 31 L. J. Bcy. 12; 6 L. T. 143; 10 W. R. 360, L. JJ.

Annotations:—**Refd.** *Re* Beardsall & Jackson, *Ex p.* Brett (1867), 15 L. T. 679; *Re* Phillips, *Ex p.* Bath (1884), 27 Ch. D. 509, C. A. **Mentd.** *Re* Phillips, *Ex p.* Bath (1882), 22 Ch. D. 450, C. A.

ii. *Valuation of Annuities.*

2792. Necessity for valuation.]—Where a bkpt. is under an agreement to pay an annuity, a value must be put upon it, & proved as a debt under the commission.—*Ex p.* BELTON (1744), 1 Atk. 251; 26 E. R. 161, L. C.

Annotation:—**Refd.** *Re* Colnaghi, *Ex p.* Marks (1838), 3 Deac. 133, Ct. of R.

2793. ——.]—In the case of common personal annuities after a bkpcy., a value is set upon them, & a dividend paid in respect of the sum thus ascertained; but where there has been a decree for payment of the arrears, & for placing out a specific sum to secure the growing payments, the annuitant will still have a right to have the sum placed out; & if the dividends are not sufficient, the remainder must be made good out of the capital, to be raised by sale from time to time.—*Ex p.* ARTIS (1752), 2 Ves. Sen. 489; 28 E. R. 314, L. C.

Annotation:—**Expld.** *Re* Kernot, *Ex p.* Key (1816), 1 Madd. 426.

2794. —— As preliminary to suing surety.]—*Held:* before suing the surety of the grantor of an annuity in respect of arrears of the annuity, where the grantor had become bkpt., the value of the annuity must be ascertained by the comrs., although the annuity was granted, & the grantor became bkpt., previously to Sept. 1825.—BELL *v.* BILTON (1828), 4 Bing. 615; 1 Moo. & P. 574; 6 L. J. O. S. C. P. 141; 130 E. R. 905.

Annotation:—**Refd.** *Re* Russell, *Ex p.* Grundy (1829), Mont. & M. 293, L. C.

2795. —— As preliminary to voting.] — A debtor, who filed a liquidation petition, had, by a separation deed between himself & his wife, covenanted to pay to a trustee an annuity, during the joint lives of himself & his wife, for the maintenance of the wife & a child of the marriage. The annuity was to cease in case the husband & wife should cohabit again:—*Held:* the value of the annuity not having been ascertained, the trustee was not entitled to vote in respect of it at a meeting of creditors under the petition.—*Re* GRIEVES, *Ex p.*

PART VIII. SECT. 4, SUB-SECT. 3.—G. (a) ii.

r. Basis of valuation—Arrears due since adjudication & before proof—Value as at date of adjudication.]—On proof of debt where there are arrears of annuity accrued due since the adjudication & before proof of debt, the value of the annuity is, for purposes of proof, the value it possessed at the time of the adjudication.—*Re* WEST (1894), 28 I. L. T. 129.—IR.

s. Effect of valuation—Final.]—Once the present value of an annuity is found in bkpcy. proceedings, it is found once for all, & for all purposes.—*Re* COLTSMAN (1894), 28 I. L. T. 108.—IR.

PEARCE (1879), 13 Ch. D. 262; 41 L. T. 742; 28 W. R. 404, C. A.

2796. Basis of valuation—Value of annuitant's life—Consideration paid for annuity.] — C. in 1720 gave £300 for an annuity of £30 *per annum* for her life, payable out of a person's estate, who became bkpt. in 1738:—*Held:* the comrs. should settle the value of her life, & C. should be admitted a creditor for such valuation & the arrears of her annuity, & not for the whole £300.—*Ex p.* LE COMPTE (1738), 1 Atk. 251; 26 E. R. 161.

Annotations:—**Consd.** *Ex p.* Thistlewood (1812), 19 Ves. 236, L. C. **Refd.** *Re* Coinaghi, *Ex p.* Marks (1838), 3 Deac. 133, Ct. of R.

2797. —— Where agreement to settle annual sum—& to pay sum of money to provide for same.] —*Ex p.* GRANGER, No. 2784, *ante*.

2798. —— Price paid & time of enjoyment—State of annuitant's health.]—A., aged thirty-two, & of infirm health, gave £8,000 for an annuity of £800. At thirty-four he became convalescent. Under the bkpcy. of the grantor, the comrs. valued the annuity, upon the principle that it having been worth £8,000 at thirty-two, it should be considered as worth ratably less at thirty-four. The grantee contended that it ought to be valued independently of that circumstance, as an annuity for the life of a healthy man of thirty-four:—*Held:* although in ascertaining the value of an annuity, regard ought to be had to the price paid, & to the time of enjoyment, as evidence of value, yet as, in the present case, the probability was that the purchase might have turned out to the disadvantage of the grantee, he ought to be allowed the benefit of its having operated in his favour.—*Re* TEMPLE, *Ex p.* THISTLEWOOD (1812), 1 Rose, 290, L. C.

Annotations:—**Distd.** *Re* Alston, *Ex p.* Whitehead (1815), 1 Mer. 10, L. C. **Refd.** *Re* Burraston, *Ex p.* Webb (1825), 2 Gl. & J. 29; *Re* Bradley, *Ex p.* Fisher (1826), 2 Gl. & J. 102; *Re* Saxe, *Ex p.* Saxe (1832), Mont. & B. 134, Ct. of R.

2799. —— State of annuitant's health.]—*Held:* in taking an annuity for proof under a commission, the comrs., since 6 Geo. 4, c. 16, s. 54, could not enter into the consideration of the altered state of the health of the annuitant.—*Re* BRADLEY, *Ex p.* FISHER (1826), 2 Gl. & J. 102.

Annotation:—**Consd.** *Re* Saxe, *Ex p.* Saxe (1832), Mont. & B. 134, Ct. of R.

2800. —— Price paid & lapse of time since grant.]—The original price given for an annuity, with the variation arising from the lapse of time since the grant, is the value to be proved, where there are no peculiar circumstances in the case.—*Re* ALSTON, *Ex p.* WHITEHEAD (1816), 1 Mer. 10, 127; 2 Rose, 358; 19 Ves. 557; 35 E. R. 581, 623, L. C.

Annotations:—**Refd.** *Re* Kernot, *Ex p.* Key (1816), 1 Madd. 426; *Re* Burraston, *Ex p.* Webb. (1825), 2 Gl. & J. 29; *Re* Saxe, *Ex p.* Saxe (1832), Mont. & B. 134, Ct. of R.

2801. —— —— State of money market.]—B., in consideration of £2,000, granted an annuity to W. in Aug. 1822. A commission issued against B. in Oct., 1823, at which date there was due for arrears of annuity £172 10*s*. W. petitioned for an order for the sale of bkpt.'s interest in the premises, on which the annuity was secured, & for payment to him of the arrears out of the proceeds, & of the balance in discharge of the sum of £3,909 15*s*., the then value of the annuity, according to the state of the money market:—*Held:* the value provable was the original price, with a deduction for the time since elapsed.—*Re* BURRASTON, *Ex p.* WEBB (1825), 2 Gl. & J. 29.

2802. —— Where consideration is life estate & annuity not secured at bankruptcy.]—It was agreed between a mother & a son that she should join in conveying her life interest in an estate to a purchaser, the son undertaking, in consideration thereof, to secure to her an annuity. After the execution of the conveyance, & before the annuity was secured, the son became bkpt.:—*Held:* the mother was not entitled to prove for the value of her life estate, but only for the value of the annuity & the arrears at the date of the bkpcy.—*Re* BROCKLISS, *Ex p.* BROCKLISS (1819), Buck, 406.

2803. —— Where consideration is property—Whether price paid for property conclusive.]—Where the consideration for an annuity is not money, but property, the price paid by the grantee for that property is not the criterion of value, provided such value be altered by accidental circumstances, whether general or local, or by improvement of the property.—*Re* BRADLEY, *Ex p.* FISHER (1826), 2 Gl. & J. 102.

Annotation:—**Refd.** *Re* Saxe, *Ex p.* Saxe (1832), Mont. & B. 134, Ct. of R.

2804. —— Where consideration is transfer of business—Market value without reference to consideration or lapse of time.]—An annuity was granted in consideration of the relinquishment of a business:—*Held:* the creditor was entitled to prove for the market value, without reference to the consideration given, or the lapse of time since the grant.—*Re* SAXE, *Ex p.* SAXE (1832), 2 Deac. & Ch. 172; Mont. & B 134, Ct. of R.

Annotation:—**Folld.** *Re* Curtis, *Ex p.* Annandale (1834), 4 Deac. & Ch. 511, Ct. of R.

2805. —— —— Nature of business.] — The goodwill of a business was sold in consideration of an annuity, which was not expressed to be payable out of the profits of the business. The purchaser became bkpt.:—*Held:* its valuation ought not to be based on arithmetical calculation, but the precarious nature of the business out of which it was to be paid, should be taken into consideration.—*Re* GIEVE, *Ex p.* SHAW (1899), 80 L. T. 359; *revsd.*, on another point, 80 L. T. 737, C. A.

2806. —— Death of annuitant—After receipt of dividend—Instalments accrued to death less than dividend.]—A bkpt. had covenanted to pay a life annuity to trustees for the benefit of his wife. The annuity was valued, & proof was made by the trustees for the amount thus ascertained, & a dividend was paid to them. The wife died, & the dividend which the trustees had received exceeded the amount of the payments of the annuity which bkpt. would have had to make if he had remained solvent:—*Held:* the trustees could not be called upon to refund the excess of the dividend above the payments of the annuity which accrued due during the wife's life.—*Re* PANNELL, *Ex p.* BATES (1879), 11 Ch. D. 914; 48 L. J. Bcy. 113; 41 L. T. 263; 27 W. R. 927, C. A.

Annotations:—**Refd.** Victor *v.* Victor, [1912] 1 K. B. 247, C. A. **Mentd.** *Re* Grieves, *Ex p.* Pearce (1879), 13 Ch. D. 262, C. A.; *Re* Law Car & General Insce. Corpn., [1913] 2 Ch. 103, C. A.

2807. —— —— After proof lodged but before proof admitted or rejected.]—A creditor's proof of debt alleged that debtor was indebted to her in the sum of £7,000, the value of an annuity of £1,440 payable to her by debtor during the residue of her natural life, & further stated the creditor's age, & that the annuity was valued accordingly. The trustee did not within twenty-eight days admit, nor reject, nor require further evidence of the proof. Four months later, & before any dividend had been declared or anything further done, the creditor died. The trustee then called upon her exors. to withdraw the original proof & make an amended proof limited to the amount of the payments of the annuity due to the date of the creditor's death, & on their refusal rejected the proof, on the ground that the annuity had

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been determined by the creditor's death:—*Held:* (1) although the trustee must be taken to have admitted the existence & the amount of the annuity, the omission to deal with the proof in accordance with 1883 Act, Sched. 2 r. 22, & 1886 Rules, r. 228, was not equivalent to an acceptance of the estimate, which by 1883 Act, s. 37, was to be made by the trustee & not by the creditor, & it was open to the trustee to place an estimate on the value of the annuity after the creditor's death; (2) the true value of the annuity was the amount of the payments due & unpaid at the time of the creditor's death.—*Re* DODDS, *Ex p.* PRITCHARD (1890), 59 L. J. Q. B. 403.

2808. —— Determined by court—Valuation of commissioner unsatisfactory.]—If the valuation of an annuity by the comr. is not satisfactory, the ct. may determine the value on affidavits, or direct an issue.—*Re* BURGHART, *Ex p.* VARNISH (1841), 1 Mont. D. & De G. 514; 10 L. J. Bcy. 50; 5 Jur. 489, Ct. of R.

(*b*) *Alimony and Allowances for Bastards.*

2809. Arrears of alimony.]—A wife may not prove against her husband's estate for arrears of alimony, payable to her under an order of the Ct. for Divorce & Matrimonial Causes.—*Re* RICE, *Ex p.* RICE (1864), 10 L. T. 103.

2810. ——.]—Arrears of alimony, payable by debtor to his wife under an order of the Divorce Division of the High Ct. of Justice, which become due after a receiving order has been made against debtor, cannot be proved for by the wife in the bkpcy. of debtor.—*Re* HAWKINS, *Ex p.* HAWKINS, [1894] 1 Q. B. 25; 69 L. T. 769; 42 W. R. 202; 1 Mans. 6; 10 R. 29, D. C.

Annotations:—**Folld.** Kerr *v.* Kerr, [1897] 2 Q. B. 439. **Refd.** Watkins *v.* Watkins, [1896] P. 222, C. A.

2811. ——.]—Arrears of alimony, payable by a debtor to his wife under an order of the Probate & Divorce Division of the High Ct. of Justice, which accrue due before the making of a receiving order against debtor, are not provable by the wife in debtor's bkpcy.—KERR *v.* KERR, [1897] 2 Q. B. 439; 66 L. J. Q. B. 838; 77 L. T. 29; 46 W. R. 46; 13 T. L. R. 534; 41 Sol. Jo. 679; 4 Mans. 207, D. C.

2812. ——.]—Where an order has been made against a husband for judicial separation & for payment of alimony:—*Qu.:* whether his widow may recover against his estate, if insolvent, any arrears of alimony due at his death.—*Re* STILLWELL, BRODRICK *v.* STILLWELL, [1916] 1 Ch. 365; 85 L. J. Ch. 314; 114 L. T. 604; 32 T. L. R. 285; 60 Sol. Jo. 322.

Annotation:—**Mentd.** Maconachie *v.* Maconachie, Maconachie *v.* Maconachie & Blake (1916), 33 T. L. R. 50.

2813. Alimony in respect of which bankrupt attached before discharge.]—Bkpt., who has obtained an order of discharge under 1861 Act, is thereby protected from any proceeding to enforce the payment of alimony, for the non-payment of which he has been attached before the order of discharge, & a sequestration against his estate for such alimony will not be granted.—DICKENS *v.* DICKENS (1862), 2 Sw. & Tr. 645; 31 L. J. P. M. & A. 183; 7 L. T. 395.

2814. Future payments of alimony.]—An order for permanent alimony made until further order:—*Held:* not an annuity which could be valued & proved in bkpcy.—PRESCOTT *v.* PRESCOTT (1868), 20 L. T. 331.

Annotations:—**Apld.** Linton *v.* Linton (1885), 15 Q. B. D. 239, C. A. **Refd.** *Re* Robinson (1884), 27 Ch. D. 160, C. A.; Kerr *v.* Kerr, [1897] 2 Q. B. 439, D. C.

2815. ——.]—Future weekly or monthly payments of alimony, payable by a husband by virtue of an order of the Divorce Ct. are not capable of valuation, & are not a "debt or liability" within 1883 Act, s. 37, & cannot be proved in the bkpcy. of the husband, who is, notwithstanding his bkpcy., liable to continue the payments.—*Re* LINTON, LINTON *v.* LINTON (1885), 15 Q. B. D. 239; 54 L. J. Q. B. 529; 52 L. T. 782; 33 W. R. 714; 49 J. P. 597; 2 Morr. 179, C. A.

Annotations:—**Distd.** *Re* Hinks, *Ex p.* Verdi (1886), 3 Morr. 218; *Re* Tatham, Bensaude *v.* Hastings (1892), 37 Sol. Jo. 27. **Apld.** *Re* Hawkins, *Ex p.* Hawkins, [1894] 1 Q. B. 25. **Consd.** Watkins *v.* Watkins, [1896] P. 222, C. A. **Apld.** Kerr *v.* Kerr, [1897] 2 Q. B. 439, D. C. **Distd.** Victor *v.* Victor, [1912] 1 K. B. 247, C. A. **Refd.** Haddon *v.* Haddon (1887), 18 Q. B. D. 778, D. C.; Morgan *v.* Hardy (1887), 18 Q. B. D. 646, C. A.; *Re* Henderson, *Ex p.* Henderson (1888), 20 Q. B. D. 509, C. A.; *Re* Stillwell, Brodrick *v.* Stillwell, [1916] 1 Ch. 365. **Mentd.** *Re* Fryer, *Ex p.* Fryer (1886), 17 Q. B. D. 718, C. A.; *Re* Otway, *Ex p.* Otway (1888), 4 T. L. R. 489; Buckley *v.* Crawford, [1893] 1 Q. B. 105; Tangye *v.* Tangye, [1914] P. 201, C. A.

See, further, Part XXII., *post.*

2816. ——.]—*Semble:* weekly payments under a separation order do not constitute a debt for bkpcy. purposes.—PAQUINE *v.* SNARY, [1909] 1 K. B. 688; 78 L. J. K. B. 361; 100 L. T. 220; 25 T. L. R. 212, C. A.

2817. Promise of weekly sum for support of bastard.]—Bkpcy. is not a discharge of a promise to allow a weekly sum for the support of an illegitimate child.—MILLEN *v.* WHITTENBURY (1808), 1 Camp. 428, N. P.

2818. Bastardy bond forfeited before bankruptcy.]—The obligor in a bastardy bond, after the bond had been forfeited, became bkpt. & obtained his certificate:—*Held:* the parish officers were not thereby precluded from recovering upon the bond further expenses incurred subsequently to the bkpcy.—ST. MARTIN-IN-THE-FIELDS (OVERSEERS) *v.* WARREN (1818), 1 B. & Ald. 491; 106 E. R. 181.

Annotations:—**Apld.** Davies *v.* Arnott (1825), 3 Bing. 154. **Refd.** *Re* Colnaghi, *Ex p.* Marks (1838), 3 Mont. & A. 521, Ct. of R.

2819. Obligors under bastardy bond discharged under Insolvent Debtors Act—Breaches after discharge.]—Obligors in a bastardy bond discharged under the above Act subsequently to a judgment on the bond:—*Held:* liable for expenses incurred in respect of the bastard subsequently to their discharge.—DAVIES *v.* ARNOTT (1825), 3 Bing. 154; 10 Moore, C. P. 539; 1 Man. & Ry. M. C. 319; 3 L. J. O. S. C. P. 212; 130 E. R. 472.

Annotations:—**Expld. & Distd.** Salmon *v.* Miller (1829), 4 Man. & Ry. K. B. 551. **Refd.** *Re* Colnaghi, *Ex p.* Marks (1838), 3 Deac. 133, Ct. of R.

See 1914 Act, s. 28 (1)(*c*).

(*c*) *Insurance Premiums.*

Guarantee of insurance premium.]—*See* No. 2520, *ante.*

PART VIII. SECT. 4, SUB-SECT. 3.—G. (b).

2809 i. *Arrears of alimony—Insolvency Act, 1915, s. 187.*]—Arrears of alimony *pendente lite* do not constitute a debt provable in insolvency within the above sect.—BURKE *v.* BURKE, [1919] V. L. R. 471.—**AUS.**

2814 i. *Future payments of alimony.*]—Bkpcy. does not release bkpt. from payment of instalments of alimony, awarded in a decree for judicial separation, falling due after the bkpcy. Bkpt.'s wife cannot, therefore, prove on his estate for future instalments of alimony valued as an annuity.—*Re* DAVIDSON, *Ex p.* DAVIDSON (1882), 2 N. Z. L. R. 55.—**N.Z.**

2820. Premiums accruing after bankruptcy.]—A husband, a trader, covenanted in an antenuptial settlement of policies on his life, to keep up the policies & pay the premiums:—*Held:* not a contract of covenant for the future settlement of money or property within 1869 Act, & proof in respect of future premiums allowed.—*Re* PRITCHARD (1871), unreported, cited Robson's Bankruptcy, 7th ed. p. 549.

Annotation:—**Distd.** *Re* Tonnies, *Ex p.* Bishop (1873), 42 L. J. Bcy. 107, n.

2821. ——.]—The declaration was upon an indenture made Aug. 16, 1861, between A., since deceased, & deft. of the one part, & pltf. of the other part, whereby A. & deft. covenanted to pay the premiums upon a policy of insurance upon the life of A., which had been deposited with pltf., until the payment of a certain bond therein mentioned. Pltf. alleged that, although the bond had not been paid, both A. & deft. had neglected to pay any of the premiums upon the policy of assurance, from the date of the indenture. Deft. pleaded a deed, dated June 21, 1869, under 1868 Act, between himself, two inspectors, & the creditors, who would be entitled to prove under an adjudication of bkpcy. against deft., founded on a petition filed upon the day of the date of the presents, upon an act of bkpcy, committed upon the day of the date thereof. The plea merely stated that it was agreed by the deed that the provisions therein contained should operate & have the same force & effect as an order of discharge under Bkpcy. 1861 Act, & might be so pleaded in bar of every action commenced by any creditor of deft., & with the same effect as an order of discharge under 1861 Act, in case deft. had been adjudicated bkpt. The plea then averred the performance of all conditions precedent, & that at the time of the execution of the deed pltf. was a creditor of deft. in respect of the claim therein pleaded to within 1861 Act:—*Held:* the plea was no answer to the action.—SOLOMON *v.* ISAACS (1872), 27 L. T. 624, Ex. Ch.

2822. —— **Election by creditor to take benefit of petition for whole debt—Whether presumed from proof of part.**]—Action on a covenant by debtor to pay the premiums on a policy of insurance on the life of debtor, which was assigned to pltf. as a security for his debt. Plea, bkpcy. & certificate of deft. New assignment that the action was for non-payment of a premium due after the certificate. Plea to the new assignment, on equitable grounds, that pltf. proved part of the debt under the bkpcy., & elected to take the benefit of the petition in respect of the debt. Demurrer & issue. On the trial it appeared that pltf. proved the balance of the debt, & expressly reserved the sum secured by the policy:—*Held:* (1) the election to take the benefit of the petition for the whole debt was not an inference of law from proof of part; (2) the averment in the plea must be understood as of an election in fact, & the plea was good, but not proved; (3) deft. should have judgment on the demurrer, & pltf. should have the verdict.—ELDER *v.* BEAUMONT (1857), 8 E. & B. 353; 27 L. J. Q. B. 25; 4 Jur. N. S. 23; 6 W. R. 57; 120 E. R. 131.

Annotations:—**Refd.** Wright *v.* Jelley (1868), L. R. 4 Exch. 9. **Mentd.** Warburg *v.* Tucker (1858), E. B. & E. 914; Kingsford *v.* Swinford (1859), 28 L. J. Ch. 413; Murphy *v.* Glass (1869), 17 W. R. 592, P. C.

2823. —— **Obligation to pay money on contingency.**]—A. borrowed money of B., & executed a deed of assignment, by way of mtge., to B., of a policy of assurance on his own life, with a covenant to keep up the annual payments for premiums. A. became bkpt.:—*Held:* there was not a liability to pay money upon a contingency provable under 1849 Act, s. 178.—MITCALFE *v.* HANSON (1866), L. R. 1 H. L. 242; 35 L. J. Q. B. 225, H. L.

Annotations:—**Apld.** *Re* Kelson, Tritton, *Ex p.* Wiseman (1871), 7 Ch. App. 35, L. JJ. **Refd.** Betteley *v.* Stainsby (1867), L. R. 2 C. P. 568; Deering *v.* Bank of Ireland (1886), 12 App. Cas. 20, H. L. **Mentd.** Robinson *v.* Ommanney (1882), 21 Ch. D. 780.

2824. —— ——.]—A party who covenanted to pay the premiums on a policy of insurance & to keep same on foot:—*Held:* not relieved from such covenant by obtaining his discharge under Judgments Act, 1838 (c. 110).—FLETCHER *v.* TURK (1843), 13 L. J. Q. B. 43; 2 L. T. O. S. 168; 8 Jur. 186.

Annotation:—**Folld.** Stephens *v.* Jervis (1848), 11 L. T. O. S. 245.

2825. Covenant valued & proved for—Death of assured after declaration but before payment of dividend—Limitation of dividends.]—By a marriage settlement a fund was impressed with a trust to pay such premiums upon policies of assurance on the husband's life, assigned by the husband to the trustees, as he should fail to pay, & the husband covenanted with the trustees to pay the premiums. In 1871 the husband filed a liquidation petition, after which the trustees paid the premiums out of the wife's life estate. The husband's covenant was valued at £2,052 8*s.* & a claim for that amount was admitted as a proof. A dividend of 10*s.* was declared, but before the amount reached the hands of the trustees the husband died. At that time the sums which had been disbursed by the trustees amounted to £766 5*s.*:—*Held:* the trustees were not entitled to receive the whole dividend which had been declared, but only the amount of their payments for premiums with such interest as the dividend had been actually making.—*Re* MILLER, *Ex p.* WARDLEY (1877), 6 Ch. D. 790; 37 L. T. 38; 25 W. R. 881.

Annotation:—**Distd.** *Re* Pannell, *Ex p.* Bates (1879), 11 Ch. D. 914, C.A.

2826. Obligation to refund premiums advanced by creditor.]—Deft. assigned a policy of insurance by way of security for the repayment of a sum of money, advanced to him by pltf., with covenants to pay the premiums, & to repay pltf., if he should pay any premium on deft.'s default:—*Held:* the bkpcy. of deft. was no answer to an action on

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PART VIII. SECT. 4, SUB-SECT. 3.—G. (c).

t. *Policy valued—Proof for value of covenant to pay premiums in addition.*]—A holder of a policy of insurance on his own life mortgaged it to a bank as security for advances, & covenanted to pay the premiums. Upon the mtgor. being adjudicated a bkpt., the bank valued the policy, & afterwards sought to prove for the value of the covenant to pay premiums:—*Held:* the bank was not entitled to prove in addition for the value of the covenant under Irish 1872 Act.—DEERING *v.* BANK OF IRELAND (1886), 12 App. Cas. 20; 56 L. J. P. C. 47; 56 L. T. 66; 35 W. R. 634, H. L.—IR.

2825 i. *Covenant valued & proved for—At valuation made by public notary.*]—A motion was granted, that a creditor of an arranging debtor should be entitled to prove on the estate, under Irish 1872 Act, s. 47, for the money-value of a contract by debtor to pay the premiums on policies of insurance mortgaged by debtor to the creditor, such value having been ascertained by a valuation made, at the creditor's instance, by a public notary.—*Re* L. (1874), 8 I. L. T. 92.—IR.

2825 ii. —— *At amount required by insurance co. by way of commutation of premiums.*]—Where, in an arrangement matter, a creditor held policies of insurance which the arranging debtor had covenanted to keep up:—*Held:* the value of the creditor's interest in the covenant was the sum which the insurance co. would accept as a present payment, by way of commutation of the annual premiums, to keep the policies subsisting.—*Re* S., *Ex p.* BANK OF IRELAND (GOVERNOR & CO.) (1886), 17 L. R. Ir. 507.—IR.

Sect. 4.—What debts are provable and for what amount: Sub-sect. 3, G. (c), (d) & (e) & H.]

the covenants.—TOPPIN *v.* FIELD (1843), 4 Q. B. 386; 3 Gal. & Dav. 340; 12 L. J. Q. B. 148; 7 Jur. 257; 114 E. R. 944.

Annotations:—**Apprvd.** Fussell *v.* Dunn (1858), 31 L. T. O. S. 199. **Refd.** Warburg *v.* Tucker (1855), 5 E. & B. 384.

2827. ——.]—A trader covenanted by an antenuptial settlement to pay the premiums on certain assigned policies of insurance on his life, or, if he failed to do so, to repay to the trustees the amount which they should pay in respect of the premiums. On his becoming bkpt.:—*Held:* the trustees could not prove for the amount required by the offices to be paid to keep up the policies during the remainder of bkpt.'s life.—*Re* WHITMORE (1843), 3 De G. & Sm. 565; 13 Jur. 185, n.; 64 E. R. 608.

2828. ——.]—On a covenant by a debtor to pay the premiums on a policy of insurance assigned to the creditor as a security, & if he should make default & the creditor should pay them, to repay him the sums so paid:—*Held:* the covenant was divisible, & though the creditor's claim under the second part of it, for repayment of premiums paid by him upon default of debtor, was barred by debtor's certificate in bkpcy., the cause of action upon breach of the first part of the covenant, by mere default in payment of the premiums to the office, was not of a nature to be so barred, as it was not a "debt payable on a contingency" within 1849 Act, s. 177, nor "a liability to pay money upon a contingency," within s. 178, it not being a liability to pay money to pltf., nor a claim or "demand" made provable under the bkpcy.—YOUNG *v.* WINTER (1855), 16 C. B. 401; 24 L. J. C. P. 214; 25 L. T. O. S. 163; 1 Jur. N. S. 960; 3 C. L. R. 1268; 139 E. R. 815.

Annotations:—**Consd.** *Re* Strahan, *Ex p.* Barwis (1855), 6 De G. M. & G. 762. **Folld.** Maples *v.* Pepper (1856), 18 C. B. 177. **Consd.** Parker *v.* Ince (1859), 4 H. & N. 53. **Refd.** Boyd *v.* Robins (1858), 4 C. B. N. S. 749; Browne *v.* Price (1858), 4 C. B. N. S. 598; Warburg *v.* Tucker (1858), E. B. & E. 914; Betteley *v.* Stainsby (1867), L. R. 2 C. P. 568.

2829. ——.]—Deft. assigned life policies to pltf. as security for a debt, & covenanted with pltf. to pay the premiums, & also, if he failed to do so, that it should be lawful for pltf. to pay thereon such sum as might be necessary for keeping on foot the policies or effecting any new policies, & that deft. would repay pltf. all such sums paid by him. Deft. afterwards became bkpt.:—*Held:* the certificate of discharge in bkpcy. was no bar to an action by pltf. on the covenant to pay the premiums which had become due after the bkpcy.:—*Semble:* the certificate was no bar to an action on the second covenant to repay pltf. the amounts he had paid to keep the policies alive on deft.'s default in paying the premiums.—WARBURG *v.* TUCKER (1858), E. B. & E. 914; 28 L. J. Q. B. 56; 31 L. T. O. S. 316; 4 Jur. N. S. 1142; 6 W. R. 755; 120 E. R. 750, Ex. Ch.

Annotations:—**Apld.** Maples *v.* Pepper (1856), 18 C. B. 177. **Apprvd.** Fussell *v.* Dunn (1858), 31 L. T. O. S. 199. **Consd.** Parker *v.* Ince (1859), 4 H. & N. 53. **Distd.** Adkins *v.* Farrington (1860), 5 H. & N. 586. **Apld.** Greet *v.* Webb (1860), 1 L. T. 381. **Apprvd.** Mitcalfe *v.* Hanson (1866), L. R. 1 H. L. 242, H. L. **Apld.** Betteley *v.* Stainsby (1867), L. R. 2 C. P. 568; Cary *v.* Dawson (1869), L. R. 4 Q. B. 568; *Re* Kelson, Tritton, *Ex p.* Wiseman (1871), 7 Ch. App. 35, L. JJ. **Refd.** Elder *v.* Beaumont (1857), 8 E. & B. 353; Boyd *v.* Robins (1858), 4 C. B. N. S. 749; Browne *v.* Price (1858), 4 C. B. N. S. 598; White *v.* Corbett (1859), 1 E. & E. 692; Kent *v.* Thomas (1871), L. R. 6 Exch. 312; Deering *v.* Bank of Ireland (1886), 12 App. Cas. 20, H. L. **Mentd.** *Re* Strahan, *Ex p.* Barwis (1855), 6 De G. M. & G. 762; General Discount Co. *v.* Stokes (1864), 13 W. R. 138; Martin's Anchor Co. *v.* Morton, Martin's Anchor Co. *v.* Hewett (1868), L. R. 3 Q. B. 306.

2830. ——.]—Deft. being indebted to his bankers for advances, assigned to them a policy of assurance upon his life, & covenanted that if he neglected to pay the annual premium, the bankers might pay it, & he would repay them with interest, with a proviso that the total amount of money intended to be secured should not exceed £500. Deft. subsequently took the benefit of Insolvent Debtors Act, & inserted in his schedule the debt then due to the bankers, amounting to £659 4*s.* 10*d.*, & he also became bkpt. He obtained his discharge as insolvent & bkpt. From that time he discontinued to pay the premiums, but the bankers paid them, & afterwards sued him for the amount:—*Held:* (1) the insolvency & bkpcy. were no answer to the claim; (2) the proviso did not in such case affect the demand.—FUSSELL *v.* DUNN (1858), 31 L. T. O. S. 199.

(d) Rent.

See Sub-sect. 3, C., *ante*.

(e) Guarantees of Recurring Payments.

See Sub-sect. 3, D. (*b*), *ante*.

H. Calls on Shares.

2831. Calls due before bankruptcy.] — The amount of a call made upon a contributory under Joint Stock Cos. Winding-up Act, 1848 (c. 45), before his bkpcy. may be proved against his separate estate by the official manager, although all the debts of the co. are not paid for which the contributory is liable.—*Re* FENWICK, *Ex p.* BROWN (1849), 3 De G. & Sm. 590; 19 L. J. Bcy. 4; 13 L. T. O. S. 468; 13 Jur. 978; 64 E. R. 619.

2832. —— **Joint stock bank.**]—Money due for calls in respect of shares in a joint stock bank does not constitute such an ascertained debt as to allow the co. to prove against a bkpt. shareholder, without an account first taken.—*Re* RANSFORD, *Ex p.* SNAPE (1839), Mont. & Ch. 607, Ct. of R.

2833. Whether future calls provable—6 Geo. 4, c. 16.]—Debt for railway calls. Plea bkpcy. of deft. Deft., being the holder of shares in a railway co., became bkpt.:—*Held:* the debt was not barred by the certificate, as it was not provable under the fiat as a debt due *in futuro*, within s. 51 of the above Act, or as a debt due on a contingency within s. 56.—SOUTH STAFFORDSHIRE RY. CO. *v.* BURNSIDE (1851), 5 Exch. 129; 6 Ry. & Can. Cas. 611; 20 L. J. Ex. 120; 16 L. T. O. S. 415; 155 E. R. 56.

Annotations:—**Distd.** *Re* Liverpool Marine Assce., Greenshield's Case (1852), 5 De G. & Sm. 599. **Consd.** *Re* General Estates Co., Hastie's Case (1869), 4 Ch. App. 274, L. JJ. **Mentd.** Cork & Bandon Ry. Co. *v.* Goode (1853), 1 W. R. 410; Wylam's Steam Fuel Co. *v.* Street (1855), 10 Exch. 849; Graham *v.* Van Diemen's Land Co. (1856), 1 H. & N. 541; Hopkins *v.* Thomas (1860), 7 C. B. N. S. 711; Thomas *v.* Hopkins (1860), 29 L. J. C. P. 187.

PART VIII. SECT. 4, SUB-SECT. 3.—H.

2833 i. *Whether future calls provable —Insolvency Act,* 1890.]—A liability to a co. by a shareholder in respect of the amount uncalled upon his shares is a "debt due" under s. 154 of the above Act & is therefore provable against a debtor's estate.—*Re* MELBOURNE LOCOMOTIVE & ENGINEERING WORKS, LTD. (IN LIQUIDATION), NEAVE'S CASE (1895), 21 V. L. R. 442.—**AUS.**

2833 ii. ——.]—Calls upon shares in a joint stock co. made after the filing of a petition for arrangement do not constitute a contingent liability provable in the arrangement.—*Re* J. H. (1869), 3 I. R. Eq. 245.—**IR.**

w. *Trustee as contributory—Call equivalent to judgment—Insolvent Ordinance 6 of* 1843.]—The liquidators of a co. wound up under Winding-up Act of 1868 may place upon the list of contributories the name of the trustee of an insolvent shareholder, & a call duly ordered upon such contributory amounts to a judgment which may be proved against the insolvent estate.—UNION BANK (IN LIQUIDATION) *v.* KING'S TRUSTEE (1893), 10 S. C. 101; 3 C. T. R. 89.—**S. AF.**

2834. —— **Joint Stock Companies Winding-up Amendment Act, 1849 (c. 108).**]—A shareholder in a joint stock banking co. became bkpt. Afterwards an order for the winding up of the affairs of the banking co. was made. Subsequently bkpt. obtained his certificate & his name was afterwards included in the list of contributories. On a call being afterwards made, the official manager, by the master's direction, applied to prove for the balance due from bkpt. after debiting him with the call:—*Held:* the proof ought to have been admitted.—*Re* NICHOLAS, *Re* MONMOUTHSHIRE & GLAMORGANSHIRE BANKING CO., *Ex p.* NICHOLAS' ASSIGNEES (1852), 2 De G. M. & G. 271; 21 L. J. Bcy. 64; 19 L. T. O. S. 291; 17 Jur. 6; 42 E. R. 876, L. JJ.

Annotations:—**Consd.** *Re* Warwick & Worcester Ry. Co., *Ex p.* Parbury (1860), 3 L. T. 117; *Re* General Estates Co., Hastie's Case (1869), 4 Ch. App. 274, L. JJ.

2835. —— **1849 Act.**]—The liability of a shareholder of a joint stock co. to pay future calls is not a liability to pay money on a contingency within s. 178 of the above Act, & such shareholder's bkpcy. is no bar to an action for a call made subsequently to such bkpcy.—GENERAL DISCOUNT CO., LTD. *v.* STOKES (1864), 17 C. B. N. S. 765; 5 New Rep. 134; 34 L. J. C. P. 25; 11 L. T. 423; 10 Jur. N. S. 1205; 13 W. R. 138; 144 E. R. 306.

Annotations:—**Consd.** *Re* General Estates Co., Hastie's Case (1868), L. R. 7 Eq. 3; City Discount Co. *v.* Lloyd (1871), 24 L. T. 512. **Mentd.** *Re* Clarke, *Ex p.* Gibbons (1865), 11 L. T. 752.

2836. —— **1861 Act.**]—Future calls in respect of shares in a co. cannot be proved under a deed of arrangement containing no *cessio bonorum* in the same way as under a bkpcy.—*Re* RICHMOND HILL HOTEL CO., LTD., *Ex p.* KING (1867), 3 Ch. App. 10; 38 L. J. Ch. 541; 17 L. T. 188; 16 W. R. 57, L. J.

Annotations:—**Consd.** *Re* Bank of Hindustan, China & Japan, Mitchell's Case (1870), 5 Ch. App. 400, L. J. **Mentd.** Bailey *v.* Bowen (1868), 8 B. & S. 734; *Re* Universal Banking Corpn., Mackreth's & Strang's Case (1870), 22 L. T. 85.

2837. ——— ———.]—The holder of shares in a co. executed an inspectorship deed under the above Act. After the execution of the deed, a call was made on the shares. Subsequently, but before the property included in the deed had been distributed among the creditors, the winding up of the co. commenced:—*Held:* the call was not barred by the deed, on the ground that Cos. Act, 1862 (c. 89), s. 75, only applied to cos. being wound up, & the liability to future calls by a going co. were not provable in bkpcy.—FINANCIAL CORPN., LTD. *v.* LAWRENCE (1869), L. R. 4 C. P. 731; 38 L. J. C. P. 305; 17 W. R. 854.

Annotations:—**Consd.** *Re* Bank of Hindustan, China & Japan, Mitchell's Case (1870), 5 Ch. App. 401, n.; City Discount Co. *v.* Lloyd (1871), 24 L. T. 512; *Re* West of England & South Wales District Bank, *Ex p.* Branwhite (1879), 40 L. T. 652. **Mentd.** *Re* West of England & South Wales District Bank, *Ex p.* Hatcher (1879), 41 L. T. 181.

2838. —— ——.]—Two shareholders in a co., ordered to be wound up voluntarily, executed as debtors a deed of inspectorship, to which debtors, the inspectors, & all creditors who would have been entitled to prove against debtors under an adjudication of bkpcy., were expressed to be parties. The deed contained no actual assignment of debtors' estate, but contained provisions for converting their estate into money, & applying it in payment of the debts due to the creditors, & also contained provisions for a release being given to them in certain events. The deed was duly registered in bkpcy.:—*Held:* the Ct. of Ch. ought not to make an order in the winding up upon debtors for payment of calls, though the calls were made since the deed was executed, but the calls were debts provable under the deed of inspectorship.—*Re* BANK OF HINDUSTAN, CHINA & JAPAN, MITCHELL'S CASE (1870), 5 Ch. App. 400; 39 L. J. Ch. 530; 22 L. T. 188; 18 W. R. 502, L. J.

2839. —— —— **Shares retained.**]—A person, who had taken shares in a co. incorporated & registered under Cos. Act, 1862 (c. 89), became bkpt. under 1861 Act. He, however, retained his shares, the assignees not having taken them, & the co. was subsequently wound up:—*Held:* he was not discharged from liability to calls made after his bkpcy.—MARTIN'S PATENT ANCHOR CO., LTD. *v.* MORTON, MARTIN'S PATENT ANCHOR CO., LTD. *v.* HEWETT (1868), L. R. 3 Q. B. 306; 9 B. & S. 183; 37 L. J. Q. B. 98.

Annotations:—**Folld.** *Re* General Estates Co., Hastie's Case (1868), L. R. 7 Eq. 3; Financial Corpn. *v.* Lawrence (1869), L. R. 4 C. P. 731. **Consd.** *Re* General Estates Co., Hastie's Case (1869), 4 Ch. App. 274, L. JJ. **Folld.** Holmes *v.* Symons (1871), L. R. 13 Eq. 66. **Mentd.** *Re* Pickering (1868), 38 L. J. Bcy. 1.

2840. ——— ——— ———.]—A shareholder in a co. became bkpt., & obtained his discharge. Afterwards the co. was wound up voluntarily. The assignees repudiated the shares, & they remained in the name of bkpt. At the time of the bkpcy. no calls were due, & no future calls were proved in the bkpcy., nor was there anything to show that they were capable of valuation at the date of the bkpcy.:—*Held:* bkpt. remained liable to the future calls & must be put on the list of contributories.—*Re* GENERAL ESTATES CO., HASTIE'S CASE (1869), 4 Ch. App. 274; 38 L. J. Ch. 233; 20 L. T. 93; 17 W. R. 302, L. JJ.

Annotations:—**Folld.** Cary *v.* Dawson (1869), 10 B. & S. 663; Financial Corpn. *v.* Lawrence (1869), L. R. 4 C. P. 731; *Re* Bank of Hindustan, China & Japan, Mitchell & Aspinall's Case (1870), 39 L. J. Ch. 530; City Discount Co. *v.* Lloyd (1871), 24 L. T. 512; *Re* Land Credit Co. of Ireland, McEwen's Case (1871), 24 L. T. 252. **Mentd.** *Re* Wilson (1869), 20 L. T. 119; *Re* Muggeridge, Muggeridge *v.* Sharp, *Ex p.* Bank of London & National Provincial Insce. Assocn. (1870), L. R. 10 Eq. 443; Morgan *v.* Hardy & Fothergill (1887), 56 L. J. Q. B. 363, C. A.

2841. —— —— **Companies Act, 1862 (c. 89), s. 75.**]—After bkpt. has been settled upon the list of contributories the liquidators may, in pursuance of the above sect., prove against his estate for the estimated value of future calls in respect of the shares held by him in the co. which is being wound up, but the ct. will reserve liberty to the assignees to institute an inquiry & call upon the liquidators to show in what way the estimate was arrived at.—*Re* CLARKE, *Ex p.* GIBBONS (1865), 11 L. T. 752.

2842. —— —— ——.]—A contributory of a co. in course of winding-up executed a deed of arrangement with his creditors, & entered the co. as creditors only for a call of £5 per share which had been made. He was liable to be called on for £35 per share more, & calls to that amount were afterwards made:—*Held:* the co. ought to have been entered as creditors for the estimated amount of the future calls, as well as the call already made, being the amount provable in bkpcy. according to the above Act.—*Re* PICKERING, *Ex p.* PICKERING (1868), 4 Ch. App. 58; 19 L. T. 369; 17 W. R. 38, L. JJ.

Annotations:—**Consd.** *Re* China S.S. Co., *Ex p.* Mackenzie (1869), L. R. 7 Eq. 240; Financial Corpn. *v.* Lawrence (1869), L. R. 4 C. P. 731; *Re* Land Credit Co. of Ireland, McEwen's Case (1871), 6 Ch. App. 582, L. JJ.

2843. —— —— ——.]—A shareholder in a co. under Cos. Act. 1862 (c. 89), was adjudicated a bkpt. After the adjudication a call was made upon him which subsequently became due. After the call became due, but before deft. obtained his

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order of discharge in bkpcy., the co. went into liquidation. An action having been brought by the co. against the shareholder for the call, before the commencement of the proceedings in liquidation, & judgment having been obtained in default of appearance:—*Held:* the call was not a debt provable under the bkpcy., & the judgment ought not to be set aside.—CITY DISCOUNT CO., LTD. *v.* LLOYD (1871), 24 L. T. 512; 20 W. R. 22.

2844. ——— ——— ———.]—Whenever any shareholder, who is liable to be put on the list as a contributory in Class B., becomes bkpt. after the commencement of the winding-up, the liquidator is entitled to prove the amount of his liability against his estate, & the assignees or trustees of the estate are to be placed on the list of contributories in lieu of bkpt., notwithstanding the shareholder has obtained his order of discharge before the B. list is made out.

M. being liable to be made a contributory to a co. as a past member was adjudged bkpt. under a Scottish sequestration, which was assumed to be equivalent to an English bkpcy., after the co. had been ordered to be wound up, & he received his discharge before the winding up was complete. After his discharge a large claim was established against the co., & then, for the first time, contribution was required from the past members:—*Held:* M.'s name must not be put on the list of contributories, but the name of his trustee in the sequestration must be substituted for it.—*Re* LAND CREDIT CO. OF IRELAND, MCEWEN'S CASE (1871), 6 Ch. App. 582; 40 L. J. Ch. 341; 24 L. T. 645; 19 W. R. 738, L. JJ.

Annotation:—**Folld.** *Re* Waddington, *Ex p.* Marshall (1872), 7 Ch. App. 324, L. JJ.

2845. ——— **1869 Act.**]—A contributory in a mining co. became bkpt., & obtained his order of discharge. Nearly two years afterwards a call was made under the winding up:—*Held:* the contributory was released by the order of discharge from all liability to the call.—*Re* WADDINGTON, *Ex p.* MARSHALL (1872), 7 Ch. App. 324; 26 L. T. 337; 20 W. R. 432, L. JJ.

2846. ——— ———.]—A., a member of a mutual marine insurance assocn. limited by guarantee, was liable to contribute, in the winding up, the amount he had guaranteed, & certain additional sums in respect of contracts he had entered into under the rules & regulations of the co. A. became bkpt., &, while the bkpcy. proceedings were still open, the co. went into voluntary liquidation. Neither the co. nor the liquidator took any steps to prove in the bkpcy. for A.'s liability in respect of future contributions:—*Held:* the liability in respect of calls of a liquidating member of a co., where the liquidation began before the winding up of the co., & were pending at the time of the winding up, was a debt or liability capable of being fairly estimated, & provable, & where there had been no proof for such calls, & the liquidating member obtained his discharge, he could not be placed on the list of contributories.—*Re* MERCANTILE MUTUAL MARINE INSURANCE ASSOCN. (1883), 25 Ch. D. 415; 53 L. J. Ch. 593; 50 L. T. 150; 32 W. R. 360.

2847. ——— **1883 Act.**]—On appeal from the rejection of a proof of debt carried in by the liquidator of a mutual insurance co. for the sum of £85, the amount due from bkpts. as contributors in respect of calls, & also for the estimated sum of £100 for further calls which had accrued before the date of the receiving order but had not been then ascertained, the county ct. judge allowed the proof as to the £85 & directed the proof as to the £100 to stand over. On July 30, 1886, proof for the ascertained sum of £74 in substitution for the £100 was tendered & was rejected by the trustee, on the grounds (1) the claim was made too late by reason of the fact that on July 9, 1886, notice to declare a dividend had been inserted in the *Gazette*, by which July 28 was specified as the last day for claims to be sent in, & (2) the alleged claim had already been adjudicated upon by the ct.:—*Held:* the notice in question did not prevent the creditor from making the claim, & the proof in respect of the further calls was not *res judicata* & must be allowed.—*Re* SHEPHERD & LEECH, *Ex p.* WHITEHAVEN MUTUAL INSURANCE SOCIETY (1887), 4 Morr. 130.

2848. ——— ———.]—An intestate, whose estate proved to be insolvent, was entitled at the time of his death to a number of £5 shares in a co., on which 30*s.* had been paid up & three calls of 5*s.* each had since become due & payable. The co. set up a proof in an administration action for the unpaid calls & also for the estimated future liability:—*Held:* having regard to Jud. Act, 1875 (c. 77), s. 10, & to 1883 Act, s. 37 (3), (4), (6), (8), it was the intention of the Legislature that a bkpt. should be enabled to get a release from such debts, & the claim ought to be admitted, & no distinction drawn between the three unpaid calls & those which might be made.—*Re* MCMAHON, FULLER *v.* MCMAHON, [1900] 1 Ch. 173; 69 L. J. Ch. 142; 81 L. T. 715; 16 T. L. R. 73; 7 Mans. 38.

2849. ——— **Shareholders ceasing to be such on bankruptcy.**]—By the deed of settlement of a registered joint-stock co., the shareholders covenanted to pay, in manner thereinafter mentioned, the calls on their shares, & by a subsequent clause it was stipulated that no assignees of bkpts. should be entitled to become shareholders in respect of the shares held by such bkpt. shareholders in the capital of the co., but that such assignees should be entitled to sell same upon proof of the bkpcy. & of their title as assignees, & by the next clause a general power was given to the directors to make calls on the holders of shares other than bkpt. shareholders:—*Held:* the bkpcy. of a shareholder was an answer to an action for calls made & due after his certificate, although the assignees had not availed themselves of the power of sale, & bkpt. still remained the nominal holder of the shares.—WYLAM'S STEAM FUEL CO. *v.* STREET (1855), 10 Exch. 849; 24 L. J. Ex. 208; 25 L. T. O. S. 22; 3 C. L. R. 880; 156 E. R. 685.

2850. ——— **Indian Act.**]—Shares in an English co. were taken by a resident at Bombay, who became insolvent. Afterwards the co. was ordered to be wound up. Debtor subsequently obtained an order of discharge under an Indian Act:—*Held:* the liability of the insolvent in respect of the shares was not a debt provable in the insolvency proceedings, & it was not barred by the order of discharge, & the name of the late insolvent must be placed on the list of contributories.—*Re* EAST INDIA COTTON AGENCY, FURDOONJEE'S CASE (1876), 3 Ch. D. 264; 35 L. T. 53.

Annotation:—**Distd.** *Re* Mercantile Mutual Marine Insce. Assocn. (1883), 25 Ch. D. 415.

2851. Disclaimer by trustee—1883 Act—Proof for damages.]—The trustee in bkpcy. of a debtor, who was the holder of shares in a co. which were not fully paid, disclaimed the shares. The liquidator of the co. put in a proof against debtor's estate for the damage sustained by the operation

of the disclaimer, & assessed that damage at the amount unpaid on the shares. The trustee rejected the proof:—*Held:* the proof must be admitted for the amount claimed, subject to a deduction for the value, if any, of any shares received back by the co., & any other advantage the co. had gained by reason of the disclaimer.—*Re* HALLETT, *Ex p.* NATIONAL INSURANCE CO. (1894), 71 L. T. 408; 42 W. R. 651; 1 Mans. 380; 10 R. 441.

See, further, Part XX., Sect. 16, sub-sect. 5, *post*.

K. Interest.

2852. General rule.]—There is a general rule in bkpcy., whether a right & a reasonable rule or not, that there is to be no proof in bkpcy. for interest subsequent to the bkpcy. (JAMES, L.J.).—*Re* SAVIN (1872), 7 Ch. App. 760; 42 L. J. Bcy. 14; 27 L. T. 466; 20 W. R. 1027, L. JJ.

Annotations:—**Distd.** *Re* Browne & Wingrove, *Ex p.* Ador, [1891] 2 Q. B. 574, C. A. **Folld.** *Re* London, Windsor & Greenwich Hotels Co., Quartermaine's Case, [1892] 1 Ch. 639. **Distd.** *Re* Pearce, [1909] 2 Ch. 492, C. A. **Mentd.** *Re* Hofmann, *Ex p.* Carr (1879), 11 Ch. D. 62, C. A.

2853. History of law as to proof of interest—Contract for future payment with interest in meantime.]—The effect of 1883 Act, s. 37, is that when a debt is by contract payable at a future date, with interest in the meantime, & debtor becomes bkpt. before the time of payment has arrived, the creditor may prove for interest accruing after the date of the receiving order. In such a case the proper course is to prove for the principal sum as a present debt; then under r. 21 to deduct a rebate of interest at 5 per cent. from the dividends upon it, & then to value the liability to pay interest & prove for that value, the dividend on which is to be paid without any rebate. When the rate of interest contracted for is 5 per cent. the proper course is simply to prove for the principal sum as a present debt, without any rebate. History of the law as to proof for interest in bkpcy. considered.—*Re* BROWNE & WINGROVE, *Ex p.* ADOR, [1891] 2 Q. B. 574; 61 L. J. Q. B. 15; 65 L. T. 485; 40 W. R. 71; 7 T. L. R. 747; 8 MORR. 264, C. A.

Annotations:—**Refd.** *Re* Moss, *Ex p.* Hallett (1905), 92 L. T. 777. **Mentd.** Wallace *v.* Universal Automatic Machine Co., [1894] 2 Ch. 547, C. A.

2854. Not provable unless express contract—Bill of exchange.]—The rule established by the comrs., that note creditors cannot prove interest upon them, unless expressed in the body thereof, is a reasonable one, & the ct. will not break through it.—*Ex p.* MARLAR (1746), 1 Atk. 150; 26 E. R. 97, L. C.

Annotations:—**Consd.** *Re* Burgess, *Ex p.* Greenway (1819), Buck, 412, L. C. **Folld.** Cameron *v.* Smith (1819), 2 B. & Ad. 305.

2855. —— ——.]—A debt for interest is not provable under a commission of bkpcy. on a bill of exchange, unless such interest be expressed in the body of the bill.—*Re* BURGESS, *Ex p.* GREENWAY (1819), Buck, 412, L. C.

2856. —— ——.]—Interest accruing before the act of bkpcy. cannot be added to the principal sum due on a bill of exchange, unless interest be specially made payable on the face of the bill.—CAMERON *v.* SMITH (1819), 2 B. & Ald. 305; 106 E. R. 378.

Annotations:—**Mentd.** Laing *v.* Stone (1828), 2 Man. & Ry. K. B. 561; Montgomery *v.* Bridge (1831), 2 Dow & Cl. 297; Cook *v.* Fowler (1874), L. R. 7 H. L. 27, H. L.; Webster *v.* British Empire Mutual Life Assce. (1880), 15 Ch. D. 169, C. A.; *Re* Dixon, Heynes *v.* Dixon, [1900] 2 Ch. 561, C. A.; Stearns *v.* Village Main Reef Gold Mining Co. (1904), 48 Sol. Jo. 700.

See, now, 1914 Act, Sched. II., r. 21.

2857. —— **Stated account.**]—No interest on the balance of a stated account is provable under a commission, unless by express contract.—*Ex p.* FURNEAUX (1790), 2 Cox, Eq. Cas. 219; 30 E. R. 101, L. C.

2858. —— **Wife's settlement fund lent to husband.**] — The trustees of a marriage settlement, in which the wife had a life interest for her separate use, lent money to the husband with the consent of the wife. The wife had been supported by the husband since the marriage:—*Held:* (1) the proof must be reduced by expunging the interest; (2) if the trustees had lent the money without the wife's consent & been responsible to her for the interest, they would have had a right to prove for it.—*Re* ELLIS, *Ex p.* GREEN (1832), 2 Deac. & Ch. 113; 2 L. J. Bcy. 2, Ct. of R.

2859. —— **Debt secured by bond.**]—Where proof is in respect of a debt secured by bond, the general rule in bkpcy. is that a specialty creditor cannot have interest beyond the penalty contained in his security, but up to the penalty of the bond he will be entitled to interest at the rate secured by the bond.—*Re* SPARKE & BRIDGES, *Ex p.* DAY (1863), 9 L. T. 350.

2860. Interest subsequent to bankruptcy.]—Interest subsequent to the commission cannot be charged upon the estate directly or indirectly, except in case of surplus.—*Re* DUNSMORE, *Ex p.* PATON (1823), 1 Gl. & J. 332.

Annotation:—**Refd.** *Re* Collie, *Ex p.* Findlay (1881), 17 Ch. D. 334, C. A.

2861. —— **Interest included in instalments in repayment of loan.**]—A loan society advanced £250 to A. upon terms of his paying £550 in respect of the loan & interest by monthly instalments. A. having filed his petition, the society claimed to prove for the balance due to them:—*Held:* the society was entitled to prove for the full amount claimed, on the ground that the original debt was a certain sum of £550, & did not come within the rule, by which interest was made to cease at the date of the bkpcy.—*Re* LUNDY, *Ex p.* COCKBURN (1878), 39 L. T. 362.

2862. —— ——.]—A mtge. provided that the loan, with a premium & interest on the advance, should be paid in equal monthly instalments during a term of years, & that each monthly instalment, when paid, should be applied in payment

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PART VIII. SECT. 4, SUB-SECT. 3.—K.

2854 i. *Not provable unless express contract—Agreement of commission.*]—By a document styled an "agreement of commission" the executant acknowledged the receipt of a loan & bound himself to pay commission thereon at the rate of 10 per cent. per month. The so-called commission was in the nature of interest:—*Held:* the creditor was not entitled to a dividend in respect of commission claimed to have accrued due after the date of the petition.—SUBBARAYALU *v.* ROWLANDSON (1890), I. L. R. 14 Mad. 133.—**IND.**

a. *On calls made prior to petition.*]—Interest upon calls upon shares in a joint stock co. previously made ceases on the filing of the petition.—*Re* J. H. (1869), 3 I. R. Eq. 245.—**IR.**

2863 i. *Where there is a surplus—Debts carrying interest.*]—Where a surplus remains, interest must be allowed on all debts proved, which, by express contract or by stat., bear interest, or where a contract to pay it is implied, but on no other debts.—*Re* LANGSTAFF (1851), 2 Gr. 165.—**CAN.**

2863 ii. —— *Insolvency—Interest after filing of petition—Bankruptcy & Insolvency Act, 1857, s. 304.*]—The old rule in insolvency cases, of not allowing interest on debts after the filing of a petition in insolvency, is now set aside by the above sect.; &, where there is a surplus, interest will be allowed in insolvency as well as in bkpcy.—*Re* SLEATOR (1869), 3 I. R. Eq. 240.—**IR.**

b. *Whether rule applies to assignments for creditors.*]—The rule in bkpcy. that interest should not be allowed after the date of the commission does not apply in the case of voluntary assignments for the benefit of creditors.—STEWART *v.* GAGE (1887), 13 O. R. 458.—**CAN.**

Sect. 4.—What debts are provable and for what amount: Sub-sect. 3, K. & L.]

of (1) the interest due at the time of payment, (2) the premium till the whole should be discharged, & (3) the principal. The mtgor. became bkpt., & the mtgees. claimed to prove for the total amount of the monthly instalments, which remained due under the deed, less the amount at which they valued their security :—*Held :* as to so much of the sum claimed as represented interest payable subsequently to the filing of the petition, the proof must be rejected.—*Re* PHILLIPS, *Ex p.* BATH (1882), 22 Ch. D. 450 ; 48 L. T. 293 ; 31 W. R. 281, C. A.

Annotations :—**Consd.** *Re* Brown & Wingrove, *Ex p.* Ador, [1891] 2 Q. B. 574, C. A. **Refd.** *Re* London, Windsor & Greenwich Hotels Co., Quartermaine's Case, [1892] 1 Ch. 639 ; *Re* Moss, *Ex p.* Hallett (1905), 92 L. T. 777.

2863. Where there is surplus—Debts carrying interest—Limitation as regards bonds.]—Where a bkpt.'s estate is sufficient to pay all, with a large surplus, creditors, whose debts carried interest, shall be allowed interest for their respective debts from the time the computation of it was stopped by the comrs., but such as are creditors by bond, not beyond their penalties.—BROMLEY *v.* GOODERE (1743), 1 Atk. 75 ; 26 E. R. 49, L. C.

Annotations :—**Folld.** Gibson *v.* Egerton (1769), Dick. 408. **Distd.** *Ex p.* Morris (1790), 1 Ves. 132. **Consd.** *Ex p.* Mills (1793), 2 Ves. 295 ; *Re* Boyd, *Ex p.* Boyd (1824), 1 Gl. & J. 285 ; Bower *v.* Marris (1841), Cr. & Ph. 351. **Refd.** *Ex p.* Bevan (1804), 10 Ves. 107 ; *Ex p.* Barfit (1806), 12 Ves. 15 ; Butcher *v.* Churchill (1808), 14 Ves. 567 ; *Re* Agoins (1851), 18 L. T. O. S. 159. **Mentd.** *Ex p.* Hill (1804), 11 Ves. 646 ; Saxton *v.* Davis (1811), 18 Ves. 72 ; Thompson *v.* Derham, Thompson *v.* Goodman (1842), 1 Hare, 358.

2864. —— Debt with interest to date of flat paid in full—Compound interest.]—Upon a bkpcy., there being a surplus after dividing to the amount of the whole principal with interest to the suing out the commission :—*Held :* subsequent interest should be ordered on petition of bond creditors, saving just allowances, & comrs. might give it without order, & need stop at nothing but want of assets, but no compound interest should be allowed.—*Ex p.* MORRIS (1790), 1 Ves. 132 ; 3 Bro. C. C. 79 ; 30 E. R. 266, L. C.

Annotations :—**Refd.** *Ex p.* Mills (1793), 2 Ves. 295 ; Bower *v.* Marris (1841), Cr. & Ph. 351 ; *Re* Grant, *Ex p.* Begbie (1864), 10 L. T. 276.

2865. —— Course of trading—Interest allowed after certain credit.]—There being a surplus of bkpt.'s estate, interest was allowed to creditors, where, by the course of actual trading between the parties & settled accounts, interest was allowed after a certain credit.—*Re* MILLS, *Ex p.* CHAMPION (1792), 3 Bro. C. C. 436 ; 29 E. R. 629, L. C.

Annotation :—**Mentd.** Blackburn *v.* Warwick (1836), 2 Y. & C. Ex. 92.

2866. —— Contract bearing interest on face—Or by evidence.]—In case of a surplus coming to bkpt., creditors have a right to interest, wherever there is a contract for it, appearing either on the face of the security or by evidence.—*Ex p.* MILLS (1793), 2 Ves. 295 ; 30 E. R. 640, L. C.

Annotations :—**Consd.** Bower *v.* Marris (1841), Cr. & Ph. 351. **Refd.** *Ex p.* Morris (1790), 1 Ves. 132.

See, also, No. 2882, *post.*

2867. —— —— Notes payable on demand.]—Interest out of the surplus of bkpt. banker's estate, refused upon his promissory notes payable on demand, as not being debts carrying interest, either by contract, or on the face of them.—*Re* WILCOX, *Ex p.* COCKS (1813), 1 Rose, 317, L. C.

2868. —— —— Or by implication.]—Where there is a surplus of bkpt.'s estate, creditors are not entitled to interest upon debts, unless it has been provided for by contract, either express or implied, & upon bonds, not beyond the penalty. An implied contract to pay interest may be raised from the dealings between the parties, as where debtor has been in the habit of paying interest upon such or similar securities.—*Re* WILCOCKS, *Ex p.* WILLIAMS (1813), 1 Rose, 399, L. C.

See, now, 1914 Act, s. 33 (8), Sched. II., r. 21.

2869. —— —— ——.]—Creditors under a commission entitled to interest out of a surplus, only where interest accrues due upon contract express or implied.—*Re* BOYD, *Ex p.* BOYD (1824), 1 Gl. & J. 285, L. C.

2870. —— Judgment debt—Receipt given in full before surplus ascertained.]—Judgment creditors delivered up to the assignees of bkpt. their securities, on payment of the principal sums. Under the impression that there would be no surplus, they gave the assignees receipts in full :—*Held :* interest out of the surplus should be paid from the date of the commission to the payment of the principal.—*Ex p.* DEEY (1812), 2 Rose, 148 ; 2 Ball & B. 77, L. C.

Annotation :—**Consd.** Bower *v.* Marris (1841), Cr. & Ph. 351.

See, further, Sub-sect. 5, *post.*

2871. —— Calculation of interest.]—Since 6 Geo. 4, where there is a surplus, interest should be calculated upon the whole debt from the date of the commission up to the time of the first dividend, then the amount of the dividend to be subtracted from the whole, & interest to be calculated upon the reduced principal up to the payment of the next dividend, & so on.—*Re* HIGGINBOTTOM (1826), 2 Gl. & J. 123 ; 5 L. J. O. S. Ch. 84.

2872. Proof for interest at five per cent.—Covenant to pay interest at five per cent.—Judgment on covenant—Effect of.]—A mtgee. recovered judgment against his mtgor. on his covenant to repay the principal together with interest at 5 per cent. : —*Held :* the covenant was merged in the judgment, & from the date thereof the mtgee. could only prove for interest at the rate of 4 per cent.—*Re* SNEYD, *Ex p.* FEWINGS (1883), 25 Ch. D. 338 ; 53 L. J. Ch. 545 ; 50 L. T. 109 ; 32 W. R. 352, C. A.

Annotations :—**Mentd.** Arbuthnot *v.* Bunsilall (1890), 62 L. T. 234 ; Faber *v.* Lathom (1897), 77 L. T. 168 ; Economic Life Assce. Soc. *v.* Osborne, [1902] A. C. 147, H. L. ; Wales *v.* Carr, [1902] 1 Ch. 860.

2873. —— Promissory note for principal & interest—Appropriation of payments.]—A creditor had advanced £600 to bkpt. upon two promissory notes for £400, & £600, at 3 & 6 months respectively. The first had been paid before the date of the receiving order. The payment had not been appropriated by bkpt. either to interest or principal :—*Held :* the amount of the two notes must be considered as a lumped sum of principal & interest, & the £400 note represented four-tenths interest, & six-tenths principal, leaving due for principal £360, for which sum proof should be admitted, with interest at 5 per cent. from the date the £600 note became due to the date of the receiving order. —*Re* HOLLAND, *Ex p.* PARKER *v.* YOUNG (1894), 71 L. T. 435 ; 43 W. R. 16 ; 38 Sol. Jo. 709 ; 1 Mans. 509 ; 15 R. 47.

2874. Proof for interest exceeding five per cent.—Limitation of dividend.]—A creditor proved for interest at a rate exceeding 5 per cent. The principal had been repaid :—*Held :* the proof must be admitted, but, for the purpose of dividend, the amount of the interest could not exceed 5 per cent.—*Re* HERBERT, *Ex p.* JONES (1892), 8 T. L. R. 685 ; 9 Morr. 253, D. C.

2875. —— Whether 1890 Act, s. 23, retrospective.] —*Held :* the above sect. was not retrospective, & did not apply to a debt, including interest above

5 per cent., proved under a scheme adopted by the ct. before the date of the passing of the Act.—*Re* ATHLUMNEY, *Ex p.* WILSON (1898), 2 Q. B. 547; 67 L. J. Q. B. 935; 79 L. T. 303; 47 W. R. 144; 42 Sol. Jo. 740; 5 Mans. 322.

Annotation:—**Refd.** *Re* Nepean, *Ex p.* Ramchund, [1903] 1 K. B. 794.

See, also, Nos. 2882, 2888, *post.*

Interest on sums payable by sureties.]—*See* Nos. 2547 *et seq.*, *ante.*

Application of proceeds of security towards interest.]—*See* Part IX., Sect. 4, sub-sect. 5, B., *post.*

See, further, COMPANIES.

L. Other Claims arising out of Contract.

2876. Agency—Proof for money paid to agent—Placed to credit of principal's account.]—H. purchased an annuity from M. through the agency of bkpts., to whom M. was indebted. The consideration money was received by bkpts. as agents for M., & placed by them to M.'s account:—*Held:* H. could not prove for the consideration money, as money had & received for his use, unless the grant of the annuity was a mere colourable transaction contrived to obtain H.'s money in payment of the debt due by M. to bkpts.—*Re* HOWARD & GIBBS, *Ex p.* SHAW (1826), 2 Gl. & J. 106.

2877. —— Proof for differences—Bankrupt stock-broker.]—Share-brokers, by direction of a customer, purchased shares in a projected railway co., the consideration for which purchase, it was agreed, should be paid on the delivery of the scrip. After the purchase, the brokers, by the direction of the customer, sold the same shares at a higher price, to be paid on the delivery of the scrip. The share-brokers then became bkpt. The co. was amalgamated with another co., & the scrip in the amalgamated co. was delivered. The customer was not allowed to prove against the estate of bkpts. for the difference of the bought & sold prices.—*Re* ROBINSON, *Ex p.* NORTON (1847), 9 L. T. O. S. 374; 11 Jur. 699, Ct. of R.

2878. —— Proof for secret profit.]—Under a secret agreement between the vendors of a mine & G., who was promoting & afterwards formed a co. for its purchase, G. received from the vendors part of the purchase-money without the knowledge of the co. In an action by the co. to make G. liable for the amount of the secret profit he had so made, a specific sum was found due from him to the co. upon that footing. G. then presented a petition for liquidation, & his creditors passed a resolution for liquidation of his affairs by arrangement, & a trustee was appointed of his estate, & he obtained his certificate of discharge:—*Held:* the co. were at liberty to prove against G.'s estate as creditors for the sum found due from him in the action, it not being a "demand in the nature of unliquidated damages arising otherwise than by reason of a contract," & the debt so due was incurred by "fraud" & was also a "breach of trust," & G. was not released from such debt by his discharge, & must pay the debt to the co., or so much thereof as should not be received by the co. under the liquidation.—EMMA SILVER MINING CO. *v.* GRANT (1880), 17 Ch. D. 122; 50 L. J. Ch. 449; 29 W. R. 481.

Annotations:—**Consd.** Hale *v.* Boustead (1881), 8 Q. B. D. 453. **Mentd.** Ross *v.* Gutteridge (1882), 52 L. J. Ch. 280; *Re* Parkes, *Ex p.* Sheppard (1887), 19 Q. B. D. 84; Capel *v.* Sim's Ships Compositions Co. (1888), 57 L. J. Ch. 713; *Re* British Gold Fields of West Africa, [1899] 2 Ch. 7, C. A.; *Re* Macfadyen, *Ex p.* Vizianagaram Mining Co., [1908] 2 K. B. 817, C. A.

See, further, Sub-sect. 4, *post.*

2879. —— Proof for commission.] — Debtor instructed an estate agent to find a purchaser for property. The agent introduced a prospective purchaser, but before the terms were agreed debtor became bkpt. The trustee sold the property to the person so introduced:—*Held:* the agent could prove for his commission, the sale resulting from the introduction.—*Re* BEALE, *Ex p.* DURRANT (1888), 5 Morr. 37, D. C.

2880. —— Proof for loss of profit on stock-broker's account—Bankrupt stockbroker.]—A broker on the Stock Exchange was officially declared a defaulter. The same day the official assignee, under the Rules of the Stock Exchange, closed all accounts of the broker then open, & received & paid all amounts owing by or to him on the Stock Exchange, &, after payment of all the Stock Exchange liabilities of the broker, there remained a surplus in the hands of the official assignee. Shortly afterwards the broker was adjudicated bkpt., with large outside liabilities. Part of the surplus above mentioned comprised a sum of money which represented differences, being profits, due on contracts made with jobbers on the Stock Exchange by the broker as agent for an outside customer, who was running a speculative account on the Stock Exchange through him, & which the broker, had he been solvent, would have received for such customer on the day he became a defaulter. Both the customer & the trustee in bkpcy. of the broker having claimed the sum of money, the official assignee paid it into ct. under an inter-pleader summons:—*Held:* the remedy of the customer was to prove in the bkpcy. for the amount.—KING *v.* HUTTON, [1900] 2 Q. B. 504; 69 L. J. Q. B. 786; 83 L. T. 68; 7 Mans. 393, C. A.

Annotation:—**Mentd.** *Re* Woodd, *Ex p.* King (1900), 82 L. T. 504.

2881. —— Proof in regard to goods in agent's hands for sale—Passing to trustee as being in order & disposition of agent.]—At the date of the bkpcy. of debtor, an art dealer, there were in his possession goods, which had been entrusted to him by a customer to sell for the customer at the best prices he could get for them, & by an order made in bkpcy. it was adjudged that those goods passed to the trustee as being in the order & disposition of bkpt. within 1883 Act, s. 44 (2) (iii):—*Held:* the customer was entitled to prove in the bkpcy. for the value of the goods.—*Re* BUTTON, *Ex p.* HAVISIDE, [1907] 2 K. B. 180; 76 L. J. K. B. 833; 97 L. T. 71; 23 T. L. R. 422; 51 Sol. Jo. 373; 14 Mans. 180, C. A.

See, further, Part XX., Sect. 9, sub-sect. 3, *post.*

2882. Bailment—Navy bills bearing interest.]—A., entitled to navy bills, in 1711, deposited them with B., who gave a note to be accountable for them, & in six months after became bkpt. The representative of A. petitioned to be admitted to prove both principal & interest to the time of the decree, as navy bills in their nature carried interest:—*Held:* as this was a special deposit, a calculation should be made of the value of the whole entire thing deposited, both principal & interest at the time of the deposit, & interest should not be allowed to run on as in a simple

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PART VIII. SECT. 4, SUB-SECT. 3.—L.

c. *Bailment—Wheat to be ground.*]—Insolvent, a miller, agreed to grind wheat for claimants, & to deliver to them a barrel of flour for so many bushels of wheat:—*Held:* this was a bailment of the wheat, but such bailment was determined by conversion of the wheat, so that claimants might waive the tort & sue for the value of the goods when they should have been delivered; & the claim therefore was provable as being a debt within Insolvent Act, not a claim for unliquidated damages.—*Re* WILLIAMS (1871), 31 U. C. R. 143.—**CAN.**

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debt.—BROMLEY *v.* CHILD (1744), 1 Atk. 259; 26 E. R. 165.

Annotation :—**Apprvd.** *Ex p.* Mills (1793), 2 Ves. 295.

See, also, Sub-sect. 3, K., *ante.*

2883. —— Obligation to insure logs to be sawed —Loss by fire before bankruptcy.]—Proprietors of sawmills contracted to saw timber for a merchant, & to insure him against loss as to any timber that might be destroyed by fire. A fire took place, & the timber at that time at the mills was destroyed. The parties to the contract agreed as to the quantity & quality of the timber destroyed, & the merchant brought an action for the alleged value. The sawmill proprietors soon afterwards were adjudicated bkpt., but the merchant proceeded with the action, notwithstanding the adjudication, & recovered a verdict for the sum alleged to be the value, & tendered a proof for that sum :—*Held :* the amount of the loss was capable of being ascertained, & the merchant was entitled to prove.—*Re* ROUTLEDGE, *Ex p.* BATEMAN (1856), 8 De G. M. & G. 263; 25 L. J. Bcy. 19; 26 L. T. O. S. 317; 2 Jur. N. S. 265; 4 W. R. 329; 44 E. R. 391, L. JJ.

Annotations :—**Consd.** *Re* Lawford, *Ex p.* Harrison (1856), 26 L. J. Bcy. 30, L. JJ.; Betteley *v.* Stainsby (1862), 12 C. B. N. S. 477. **Mentd.** *Re* Lacon's Settlmt., Lacon *v.* Lacon, [1911] 1 Ch. 351.

See, also, No. 2941, *post.*

2884. —— Dock warrants obtained by fraud—Proof by pledgee of warrants against warehousemen.]—A wharfinger was induced by the consignees of goods to sign & give them delivery warrants for goods which were stopped *in transitu* before they came into his possession. The consignees deposited the warrants with a bank as security for an advance. The wharfinger afterwards compounded with his creditors :—*Held :* the bank was not entitled to prove against the wharfinger's estate for the value of the goods described in the warrants, but only for the sum actually advanced.—*Re* MOORE, *Ex p.* MOORE (1874), 31 L. T. 812; 23 W. R. 154, L. J.

2885. —— —— Proof by warehouseman against bailor—For sum paid to pledgee of warrants.]—*Re* SEAGER, *Ex p.* SEAWARD BROTHERS, No. 2391, *ante.*

2886. —— Proof for damages for breach of contract—After action for damages for detinue & conversion stayed.]—S. stored goods with H. under a verbal contract, in breach of which H. sold the goods. S. brought an action against H., & in the statement of claim set out the contract & its breach, but made no claim for damages for breach of contract, but only for detinue & conversion. Before judgment a receiving order was made against H., of which S. had notice :—*Held :* on S. undertaking to abandon the judgment & stay all further proceedings under it, she should be permitted to carry in a proof in the bkpcy. for damages for breach of contract.—*Re* HOPKINS, *Ex p.* DE STEDINGK (1902), 86 L. T. 676, C. A.

See, further, Part XXI., *post.*

2887. Building contract—Liquidated damages for delay in completion.]—A builder contracted to build & complete a school house by the end of the year. The contract contained stipulations, providing *inter alia*, that the builder should pay £10 for every week after the end of the year during which the works should remain unfinished, & that, in case the contract was not in all things duly performed by the contractor, he should pay £1,000 as & for liquidated damages. The contractor failed before the end of the year, & his trustee in bkpcy. abandoned the contract :—*Held :* the sum of £1,000 was really a penalty, & proof could only be made for the damages actually occasioned by breach of the contract.—*Re* NEWMAN, *Ex p.* CAPPER (1876), 4 Ch. D. 724; 46 L. J. Bcy. 57; 35 L. T. 718; 25 W. R. 244, C. A.

Annotations :—**Distd.** Watson *v.* Holliday (1882), 30 W. R. 747. **Refd.** Wallis *v.* Smith (1882), 21 Ch. D. 243, C. A.; Catton *v.* Bennett (1884), 51 L. T. 70. **Mentd.** Elphinstone *v.* Monkland Iron & Coal Co. (1886), 11 App. Cas. 332, H. L.; Willson *v.* Love, [1896] 1 Q. B. 626, C. A.

2888. Building society loan—Repayable by instalments of principal, premium, & interest—Proof for premium.]—A member of a building society borrowed from the society, on the security of a mtge., £1,200, for which he was to pay £144 premium, & interest at 5 per cent. *per annum.* The principal, premium, & interest were made payable by the borrower to the society in a fixed number of monthly instalments, each of which consisted of principal, premium, & interest. The borrower having filed a liquidation petition, & the mtge. being insufficient :—*Held :* the premium was not in the nature of interest, & the society were entitled to prove for it in the liquidation.—*Re* PHILLIPS, *Ex p.* BATH (1884), 27 Ch. D. 509, C. A.

See, also, Sub-sect. 3, K., *ante.*

2889. Contract to deliver shares—Damages for breach of.]—The discharge of insolvent under Judgments Act, 1838 (c. 110), does not operate to release him from a claim for unliquidated damages for not redelivering mining shares, pursuant to a contract for that purpose.—OWEN *v.* ROUTH (1854), 14 C. B. 327; 23 L. J. C. P. 105; 22 L. T. O. S. 260; 18 Jur. 356; 2 W. R. 222; 2 C. L. R. 365; 139 E. R. 134.

Annotations :—**Consd.** *Re* Dunn, *Ex p.* Paynter (1862), 6 L. T. 510. **Refd.** Betteley *v.* Stainsby (1862), 12 C. B. N. S. 477.

2891 i. *Covenant to settle funds on spouse—Ante-nuptial contract—Fund not paid over—Proof of bona fides.*]—Where money which a spouse purports to give by an antenuptial contract is not paid over & the giver becomes insolvent the person who relies upon the antenuptial contract must produce *primâ facie* proof that the gift was made *bonâ fide* in order that it shall not lose its effect under Insolvency Law, s. 59.—LINDE *v.* COHEN (1914), T. P. D. 369.—**S. AF.**

d. *Contract for hire—Fixed sum payable by instalments—Liquidated damages.*]—Debtor agreed to keep for seven years certain apparatus to be installed in her shop & to pay therefore the sum of £35 in annual instalments of £5. Only one instalment had been paid prior to her arrangement, & the owners of the apparatus sought to prove for £30 :—*Held :* the sum payable upon breach of the agreement was liquidated damages & not a penalty, & the proof should be allowed.—*Re* O'B. (A DEBTOR), [1917] 2 I. R. 626. —**IR.**

e. *Liquidated damages — Annual penalty agreed as—How far provable.*]—On the insolvency of a trader who has undertaken for a given period to purchase his stock from particular merchants only, subject to an annual penalty as liquidated damages, the creditor cannot claim the penalty for a period longer than from the date of the breach to the date of the abandonment by the trader of his estate.—GERVAIS *v.* PAQUETTE & TURGEON (1909), Q. R. 37 S. C. 501.—**CAN.**

f. *Unliquidated damages — For breach of contract.*]—A person claiming damages against the assignor for breach of contract is not a creditor within Assignments & Preferences Act, R. S. O. 1887, c. 124, & cannot, after the assignment, bring an action to ascertain the damages & rank for the amount against the estate.—GRANT *v.* WEST (1896), 23 A. R. 533. —**CAN.**

g. ——.]—A claim for unliquidated damages arising out of a breach of contract was allowed to be proved in the Insolvent Ct. under Insolvency Act, s. 40 :—*Semble :* the provisions of the English 1869 Act with regard to such claims applied to India.—*Re* OMERTOLOLL DAW (1874), 13 B. L. R. App. 2.—**IND.**

h. *Bond in penal sum—Conditioned for payment of a sum by instalments—First instalment not due at date of discharge.*]—A bond, in a penal sum, conditioned for payment of a sum by instalments was provable under 1 & 2 Geo. 4, c. 59, although the first instalment had not become due at the time of the insolvent's discharge.—MITCHELL *v.* READE (1835), 3 Ir. L. Rec. N. S. 289.—**IR.**

2890. Covenant not secured by penalty—Unliquidated damages for breach of.]—A right of action on a breach of covenant, not secured by a penalty & where the damages to be recovered are uncertain, is not barred by the certificate of deft., who became bkpt. after the covenant was broken.—BANISTER *v.* SCOTT (1795), 6 Term Rep. 489; 101 E. R. 663.

2891. Covenant to settle funds on wife—Obligor never possessed of funds—Proof by widow.]—Proof allowed by the widow of bkpt. under an engagement by the marriage settlement to settle money, which he falsely represented himself to possess.—*Ex p.* GARDNER (1805), 11 Ves. 40; 32 E. R. 1002.

Annotation:—**Refd.** *Re* Fenwick, *Ex p.* Brown (1849), 13 L. T. O. S. 468.

2892. Covenant to pay marriage trustees—Life interest to bankrupt—Application of dividends.]—Bkpt. had, upon his marriage, secured to his wife £25,000 upon bond in the penalty of £50,000, conditioned to secure the payment of £25,000 to be invested upon the trusts of the settlement, which were to permit bkpt. during the joint lives of himself & wife to receive the interest, with a life interest to the wife in the event of her surviving her husband, remainder to the use of the husband's will:—*Held:* the trustees of the settlement, could prove & retain the interest upon the dividend during the joint lives of bkpt. & his wife, until the £25,000 should be received & invested upon the trusts of the settlement.—*Re* RAMSAY, *Ex p.* MAISTER (1816), Mont. 452, n.; cited 1 L. J. Bcy. at p. 50.

Annotations:—**Apld.** *Re* Brown, *Ex p.* Turpin (1832), 1 L. J. Bcy. 46, Ct. of R. **Consd.** *Re* Severn, *Ex p.* King (1835), 1 Deac. 143. **Refd.** Smith *v.* Smith (1835), 1 Y. & C. Ex. 338; *Re* Good, *Ex p.* Good (1850), 15 L. T. O. S. 50. **Mentd.** *Re* Prior, *Ex p.* Young (1835), 4 Deac. & Ch. 645.

2893. —— —— ——.]—Bkpt., in consideration of his wife's fortune, gave a bond to trustees to pay them £3,000, to the interest of which by the terms of a settlement it was declared that bkpt. should be entitled during his life, & after his death the principal was to go to his wife. Bkpt. made default in the payment of the money:—*Held:* the trustees might prove for £3,000, & the interest upon the dividends to be received under such proof should accumulate until the £3,000 should be realised, after which, but not before, the interest might be paid to the assignees for the benefit of the creditors.—*Re* BROWN, *Ex p.* TURPIN (1832), 1 Deac. & Ch. 120; Mont. 443; 1 L. J. Bcy. 46, Ct. of R.

Annotations:—**Distd.** *Re* Shute, *Ex p.* Shute (1833), Mont. & B. 385, Ct. of R. **Apld.** *Re* Saunders, *Ex p.* Saunders (1834), 3 Deac. & Ch. 568, Ct. of R. **Consd.** *Re* Prior, *Ex p.* Young (1835), 4 Deac. & Ch. 645; Smith *v.* Smith (1835), 1 Y. & C. Ex. 338. **Refd.** *Re* Severn, *Ex p.* King (1835), 1 Deac. 143; *Re* Good, *Ex p.* Good (1850), 15 L. T. O. S. 50. **Mentd.** *Re* Manning, *Ex p.* Smith (1836), 2 Mont. & A. 536, Ct. of R.; Courtenay *v.* Williams (1844), 3 Hare, 539; Jones *v.* Mossop (1844), 3 Hare, 568.

2894. —— —— **Husband insolvent at marriage.**]—A trader, being in insolvent circumstances, covenanted by an antenuptial settlement to pay £500 to trustees, to be held by them upon trust for such persons as the intended wife should appoint, & subject thereto upon trust for the intended wife for life for her separate use, then for the husband for life, & then as to the capital, in trust for the survivor. The settlement also extended to certain property belonging to the intended wife, who was wholly unaware of the intended husband's insolvency. On the husband's bkpcy.:—*Held:* the settlement was valid against the assignees, & entitled the trustees to prove for the £500.—*Re* M'BURNIE, *Ex p.* M'BURNIE'S TRUSTEES (1852), 1 De G. M. & G. 441; 21 L. J. Bcy. 15; 18 L. T. O. S. 266; 16 Jur. 807; 42 E. R. 623, L. JJ.

Annotation:—**Mentd.** *Re* Reis, *Ex p.* Clough, [1904] 2 K. B. 769, C. A.

2895. —— **For benefit of wife & children—Application of dividends.**]—Bkpt. had covenanted to pay a sum, to be invested on the trusts of his marriage settlement, for the benefit of his wife & the issue of the marriage. He became bkpt. without having done so. Proof ordered in the usual way, & the dividends to be paid into the bank, & the interest thereof to be paid to the parties entitled under the settlement. A. having advanced the wife sums for her support, ordered, on the consent of all interested, the sum being small & there being no chance of further issue, that the interest might be paid over to A. till he was repaid.—*Re* MAY, *Ex p.* MAY (1833), 2 L. J. Bcy. 72.

See 1914 Act, s. 42 (2).

—— **On happening of event which may or may not happen.**]—*See* Nos. 2468 *et seq.*, *ante.*

—— **At future date.**]—*See* Nos. 2611, 2622, *ante.*

2896. Covenant to charge particular debt on specific fund.]—A claim founded on a covenant to charge a particular debt upon a specific fund, in which the covenanter has no present interest, but merely an expectancy, is not barred by the bkpcy. & certificate of the covenanter, before he acquires an actual interest in the fund.

A. granted an annuity to B., & covenanted to charge it upon all such property as, in the event of C. dying before him, he might become possessed of at C.'s death, either by will or otherwise. A. became bkpt. & obtained his certificate, & afterwards C. died, having bequeathed an annuity in trust for A.:—*Held:* B. was entitled to a decree specifically charging his annuity upon the annuity bequeathed in trust for A.—LYDE *v.* MYNN (1833), 1 My. & K. 683; Coop. *temp.* Brough. 123; 47 E. R. 44, L. C.

Annotations:—**Distd.** Thompson *v.* Cohen (1872), L. R. 7 Q. B. 527. **Consd.** Collyer *v.* Isaacs (1881), 19 Ch. D. 342, C. A. **Refd.** *Re* North, *Ex p.* McTurk (1836), 2 Deac. 58; Robinson *v.* Ommanney (1882), 21 Ch. D. 780; Montagu *v.* Sandwich (1886), 32 Ch. D. 525, C. A. **Mentd.** Parker *v.* Downing (1833), Coop. *temp.* Brough. 148; Wellesley *v.* Wellesley (1839), 4 My. & Cr. 561; Mornington *v.* Keane (1858), 2 De G. & J. 292; *Re* Lind, Industrials Finance Syndicate *v.* Lind, [1915] 2 Ch. 345, C. A.

See, further, Part XVIII., *post.*

See, also, Sub-sect. 3, G. (*a*), *ante.*

2897. Covenant to share profits.]—An agreement to share the profits of a member of a firm constitutes a debt provable against the member for the share.—*Re* KENDALL, *Ex p.* DODGSON (1830), Mont. & M. 445, L. C.

2898. Covenant to pay by instalments—Debts in respect of which discharge granted—Whether future payments provable in second bankruptcy.]—B. obtained an order of discharge under 1861 Act, s. 159, on the condition that he set aside £200 *per annum* for payment of his debts by half-yearly instalments. He was subsequently adjudicated bkpt. a second time, & arrears of £200 had accrued on the former order, for which the official assignee proved against the estate. Upon application being made by bkpt. for an order of discharge:—*Held:* the debts provable under the first bkpcy. were not, so long as the order of discharge remained unrevoked, provable under the second bkpcy., nor were the future payments under the order provable by the effect of 1861 Act, s. 154.—*Re* WILSON (1869), 20 L. T. 119; 17 W. R. 493.

See, further, Part XVIII., *post.*

Sect. 4.—What debts are provable and for what amount: Sub-sect. 3, L.]

2899. —— Composition on debt—Whether composition or whole debt provable.]—Where a creditor for £1,700 agrees with his debtor, a failing man, to take 11*s.* in the pound, to be paid by instalments, & debtor, after the first payment, becomes bkpt. :—*Semble :* the £1,700, & not the amount of the composition only, may be proved under the commission of bkpcy.—*Ex p.* BENNET (1743), 2 Atk. 527 ; 26 E. R. 716, L. C.

Annotations :—**Distd.** Thompson *v.* Hudson (1867), 2 Ch. App. 255, L. C. & L. J. **Mentd.** *Re* Plummer (1841), 1 Ph. 56.

2900. Covenant not to revoke will.]—An unmarried woman, having a power of appointing a sum of money by will, made a will appointing it to a mtgee., & covenanted not to revoke the will. She afterwards became bkpt. & obtained her discharge. After her discharge she revoked her will, & made another appointing the sum of money to another person :—*Held :* as the contingent liability under the covenant was incapable of proof under 1849 Act, the covenant was not released by the bkpcy., & an action would lie for damages for a breach of the covenant committed after the bkpcy.—ROBINSON *v.* OMMANNEY (1883), 23 Ch. D. 285 ; 52 L. J. Ch. 440 ; 49 L. T. 19 ; 31 W. R. 525, C. A.

Annotations :—**Consd.** Morgan *v.* Hardy (1886), 17 Q. B. D. 770. **Refd.** *Re* Lind, Industrials Finance Syndicate *v.* Lind, [1915] 2 Ch. 345, C. A. **Mentd.** *In the Estate of* Heys, Walker *v.* Gaskill, [1914] P. 192.

2901. Covenant to assign after acquired property—Whether absolute assignment or contract to assign.]—A debtor by bill of sale assigned for value to a creditor certain specified chattels at his place of business, "& all other chattels which might be or at any time thereafter be brought thereon in addition to or in substitution thereof." Debtor became bkpt., & after his order of discharge brought other chattels upon the premises. The creditor did not prove for his debt in the bkpcy. : —*Held :* the assignment of the after-acquired chattels, although absolute in form, amounted merely to a contract to assign, for the breach of which the assignor incurred a liability provable in his bkpcy., & from which he was released by the order of discharge, & the goods brought on the premises after the order of discharge could not be seized by the creditor under his bill of sale. —COLLYER *v.* ISAACS (1881), 19 Ch. D. 342 ; 51 L. J. Ch. 14 ; 45 L. T. 567 ; 30 W. R. 70, C. A.

Annotations :—**Consd.** Robinson *v.* Ommanney (1882), 21 Ch. D. 780. **Distd.** *Re* Reis, *Ex p.* Clough, [1904] 2 K. B. 769, C. A. ; *Re* Lind, Industrials Finance Syndicate *v.* Lind, [1915] 1 Ch. 744. **Consd.** *Re* Lind, Industrials Finance Syndicate *v.* Lind, [1915] 2 Ch. 345, C. A. **Refd.** *Re* Bastable, *Ex p.* Trustee, [1901] 2 K. B. 518, C. A. **Mentd.** Clements *v.* Mathews (1882), 47 L. T. 251 ; Joseph *v.* Lyons (1884), 15 Q. B. D. 280, C. A. ; Aberdare & Plymouth Co. *v.* Hankey (1887), 3 T. L. R. 493 ; *Re* Lawley, Zaiser *v.* Lawley (1902), 71 L. J. Ch. 895, C. A. ; *Re* Dallas, [1904] 2 Ch. 385, C. A. ; Pullan *v.* Koe, [1913] 1 Ch. 9.

2902. —— ——.]—In 1905, L. mortgaged to the N. Society, his then expectant share in the estate of his mother as security for an advance. In 1908 he mortgaged to A. his expectant share, subject to the mtge. of 1905 as security for an advance. In 1908 L. was adjudicated a bkpt., & in 1910 he obtained his discharge, neither the N. Society nor A. having proved in the bkpcy. In 1911, L., by deed as beneficial owner, assigned to pltfs. his expectant share. In Feb., 1914, L.'s mother died intestate, & his share thereupon came into existence :—*Held :* the mtges. of 1905 & 1908 were not mere contracts to assign the then expectant share of L., but were actual assignments of that share directly it came into existence on the death of L.'s mother, & the rights of the N. Society & of A. were not discharged by their having failed to prove in the bkpcy. of L., & the N. Society & A. were entitled in respect of the share in priority to pltfs.—*Re* LIND, INDUSTRIALS FINANCE SYNDICATE, LTD. *v.* LIND, [1915] 2 Ch. 345 ; 84 L. J. Ch. 884 ; 113 L. T. 956 ; 59 Sol. Jo. 651 ; [1915] H. B. R. 204, C. A.

2903. Continuing contracts generally—Trustee not disclaiming but abandoning.]—If the trustee of a bkpt., when called upon to decide whether he will disclaim a continuing contract of bkpt., does not disclaim it, but carries it on for the benefit of the estate, he is still at liberty, when he finds it unprofitable, to cease to perform it, & in that case the other party to the contract is entitled, under 1869 Act, s. 31, to prove against bkpt.'s estate for the damages occasioned by the breach of the contract, & this is his only remedy.—*Re* SNEEZUM, *Ex p.* DAVIS (1876), 3 Ch. D. 463 ; 45 L. J. Bcy. 137 ; 35 L. T. 389 ; 25 W. R. 49, C. A.

Annotations :—**Consd.** *Re* Westbourne Grove Drapery Co., Mann's Claim (1877), 46 L. J. Ch. 525 ; *Re* Solomon, *Ex p.* Dressler (1878), 48 L. J. Bcy. 20, C. A. ; Wilson *v.* Wallani (1880), 5 Ex. D. 155 ; Alloway *v.* Steere (1882), 10 Q. B. D. 22. **Distd.** Titterton *v.* Cooper (1882), 9 Q. B. D. 473, C. A. **Refd.** Hopkinson *v.* Lovering (1883), 11 Q. B. D. 92. **Mentd.** L. C. C. *v.* Aylesbury Dairy Co., [1898] 1 Q. B. 106.

2904. Exchange contract—Obligation to give bill for difference.]—By agreement between pltfs., bankers at C., & defts., bankers at N., pltfs. were weekly to send to defts. all their own notes & the notes of certain other banking houses, & defts. were in exchange to return to pltfs. their own notes & the notes of certain other bankers, & the deficiency, if any, was to be made up by a bill drawn by defts. in favour of pltfs. at a certain date :—*Held :* the notes so sent by pltfs. to defts. constituted a debt against them, which defts. might pay by a return of notes according to the agreement, but if they made no such return, or a short return, & gave no bill for the balance, such balance remained as a debt against them, which was provable by pltfs. under a commission of bkpcy. issued against defts., on an act of bkpcy. committed after the time when the bill for the balance, if drawn, would have been due & payable, & pltfs. could not maintain an action to recover damages as for a breach of contract against defts., who had obtained their certificates.—FORSTER *v* SURTEES (1810), 12 East, 605 ; 104 E. R. 236.

Annotations :—**Distd.** Parker *v.* Crole (1828), 5 Bing. 63. **Refd.** Groom *v.* West (1838), 8 Ad. & El. 758.

2905. Loan—Child's earnings given to father—Bankruptcy of father.]—A father received his child's earnings while living with him, & became bkpt. The child by agreement was admitted a creditor for a particular sum to avoid an inquiry, although it might have been dangerous to lay down such a rule.—*Ex p.* MACKLIN (1755), 2 Ves. Sen. 675 ; 28 E. R. 430.

2906. —— Alteration of intention to forgive debt.]—A father lent his son £1,000 to set him up in business, for which he took his promissory note. Two years afterwards, he said, in a letter to his son, "I may venture to inform you that the promissory note will descend to you, without any deductions," but four years after that, the father took a bond from his son for the amount, & died. The son became bkpt. :—*Held :* the taking of the bond showed an alteration of the father's intention to forgive the debt at his death, & his exor. might prove the amount of the bond, under the fiat against the son.—*Re* MARKLAND, *Ex p.* RIDLER (1837), 2 Deac. 225, Ct. of R.

2907. —— For furtherance & in execution of illegal contract.]—Money advanced to S. by B., one of several partners, out of the partnership funds, on account of payments to be made on policies of insurance underwritten by S. on account of himself & B., in pursuance of a previous agreement between them to become sharers in profit & loss on such policies :—*Held :* not provable by the surviving partners of B.—*Re* SCOTT, *Ex p.* BELL (1813), 1 M. & S. 751 ; 2 Rose, 136 ; 105 E. R. 280.

Annotations :—**Consd.** Simpson *v.* Bloss (1816), 2 Marsh. 542. **Mentd.** M'Callan *v.* Mortimer (1842), 9 M. & W. 636, Ex. Ch.

2908. —— To bankrupt's wife.]—A husband, a sea captain, handed over his income amounting to more than £1,000 to his wife for the support of herself & the household, of which she was the responsible manager. The wife got into difficulties & borrowed from her sister various sums amounting in all to £1,327, for which a proof was tendered in the subsequent bkpcy. of the husband, on the ground that the wife had authority to pledge his credit :—*Held :* although in certain cases it might be that an authority to a wife to pledge her husband's credit would be presumed, even though that which the wife did was to borrow money, *viz.*, where a wife borrowed money to pay for absolute necessaries, yet in the present case that had not been done, & as there was no authority either in law or in fact to the wife to incur the debt, the proof against the husband's estate could not be admitted.—*Re* COOK, *Ex p.* VERNALL (1892), 10 Morr. 8, D. C.

See No. 2919, *post*, and, *generally*, Part XII., *post ;* HUSBAND & WIFE.

2909. Loan of money from proceeds of stock—To be repaid by instalments on given days.]—A., B. & C. being in partnership as bankers, A. advanced money to the bank by sales of stock, & took bonds for £15,000 from B. & C. separately, conditioned for replacing £9,000 stock each. The stock was not replaced, & A. brought actions on the bonds & recovered judgments. A. withdrew from the bank, being then a creditor for £20,000 stock, which B. & C., by the deed of dissolution, agreed to replace by four instalments, covenanting that if they made default therein, A. might proceed on the judgments, & that he should have a lien on certain securities, both for that debt, & as an indemnity against the partnership debts, which they agreed to pay. B. & C. replaced the first instalment when due, but made default in the second. A written agreement, not under seal, was then made, that the debt should be treated as a loan of money from the first, & that the proceeds of the £15,000 stock then due, being £10,083, should be the debt, & should be repaid at a subsequent time, with legal interest. When that agreement was made, the £15,000 stock was worth only £8,437. Before any part of the £10,083 was paid, B. & C. became bkpts., & at the date of the commission, two out of the three remaining days, named in the deed of dissolution for replacing the stock, were past :—*Held :* A. might prove under the commission against B. & C. for the £15,000 stock, the value of the two instalments, due before the bkpcy., to be estimated by the price of stocks on the days when they became due, & the value of the third by the price of stocks on the day of the date of the commission, with a rebate for the interval between that day & the day when that instalment would have become due.—PARKER *v.* RAMSBOTTOM (1824), 3 B. & C. 257 ; 5 Dow. & Ry. K. B. 138 ; 3 L. J. O. S. K. B. 16 ; 107 E. R. 729.

Annotations :—**Distd.** *Re* Badnall, *Ex p.* Ellis (1827), 2 Gl. & J. 312, L. C. **Folld.** *Re* Caton, *Ex p.* Higgins (1842), 11 L. J. Bcy. 34. **Refd.** Sammon *v.* Miller (1829), 9 B. & C. 770 ; *Re* Naylor, *Ex p.* Grazebrook (1832), 2 Deac. & Ch. 186. **Mentd.** Powles *v.* Page (1846), 10 Jur. 526 ; *Re* Dunn, *Ex p.* Paynter (1862), 6 L. T. 510.

2910. Loan of stock—No particular day for replacement—Proof for price where breach not prior to bankruptcy.]—If A. lend B. so much stock, to be replaced as stock, without naming any particular day, & B. become a bkpt. before any request by A to replace the stock, A. cannot come in under B.'s commission.—UTTERSON *v.* VERNON (1792), 4 Term Rep. 570 ; 100 E. R. 1181.

Annotations :—**Consd.** *Ex p.* Hunter (1801), 6 Ves. 94. **Distd.** *Ex p.* Granger (1805), 10 Ves. 349. **Consd.** Parker *v.* Crole (1828), 5 Bing. 63 ; Green *v.* Bicknell (1838), 3 Nev. & P. K. B. 634 ; *Re* Biddulph, *Ex p.* Eyre (1841), 6 Jur. 41, Ct. of R. **Distd.** Owen *v.* Routh (1854), 14 C. B. 327. **Consd.** *Re* Routledge, *Ex p.* Bateman (1856), 8 De G. M. & G. 263, L. JJ. ; Betteley *v.* Stainsby (1862), 12 C. B. N. S. 477. **Refd.** *Ex p.* Minet (1807), 14 Ves. 189 ; *Ex p.* Campbell (1809), 16 Ves. 244 ; *Ex p.* Charles (1809), 16 Ves. 256 ; Sammon *v.* Miller (1832), 3 B. & Ad. 596 ; *Re* Pearson, *Ex p.* Benecke (1836), 2 Deac. 46. **Mentd.** Trent *v.* Hanning (1805), 10 Ves. 495 ; *Re* Dunn, *Ex p.* Paynter (1862), 6 L. T. 510.

See 1914 Act, s. 30 (3).

2911. —— Verbal engagement—Contract implied from.]—Loan upon a parol engagement to give security to replace stock by a given day. The positive contract failing by an intervening bkpcy., proof may be made in respect of the contract implied by law from the loan.—*Ex p.* COMING (1803), 9 Ves. 115 ; 32 E. R. 545.

Annotations :—**Consd.** Green *v.* Bicknell (1838), 3 Nev. & P. K. B. 634. **Mentd.** Norris *v.* Wilkinson (1806), 12 Ves. 192.

2912. —— Bond for replacement.]—B. gave to A. a bond & warrant of attorney to secure the reinvestment of stock lent. After judgment entered up B. was discharged under 53 Geo. 3, c. 102, as to his scheduled creditors, of whom A. was one. B. being afterwards arrested in an action on the judgment was discharged out of custody upon filing common bail :—*Semble :* the debt itself was barred.

The whole debt was provable against deft., & by analogy to proceedings in a case of bkpcy., he is released in respect of that debt. The judgment had been entered up at the time when deft. obtained his discharge. A bond to replace stock on or before a given day may be proved under a commission of bkpt., if it be forfeited before the bkpcy. by a breach of any of the conditions (PARKE, J.).—SAMMON *v.* MILLER (1829), 9 B. & C. 770 ; 7 L. J. O. S. K. B. 337 ; 109 E. R. 286 ; *sub nom.* SALMON *v.* MILLER, 4 Man. & Ry. K. B. 551 ; *further proceedings* (1832), 3 B. & Ad. 596.

Annotation :—**Distd.** Clements *v.* Langley (1833), 2 Nev. & M. K. B. 269.

2913. —— —— & for payment of dividend.]—Bond upon a loan of stock, to secure a retransfer & the dividends in the meantime. The obligor becoming bkpt. after the day mentioned in the condition, proof was admitted for the amount of the dividends due before the bkpcy., & the value of the stock at the date of the commission, by analogy to the case of annuities.—*Ex p.* DAY (1802), 7 Ves. 301 ; 32 E. R. 122, L. C.

2914. —— —— ——.]—Bkpt., before his bkpcy., on a loan of stock, which stood in the names of trustees for a brother of bkpt., gave a bond to retransfer the principal within three years, & pay the amount of the dividends in the meantime, & also agreed to convey a real estate as a security. No retransfer was made, nor any dividends paid :—*Held :* on his bkpcy., the security should be sold, the dividends paid out of the produce, & stock purchased, & if not sufficient to repurchase the whole principal stock, proof should be made for the remainder, & the assignees were not entitled to have three years to retransfer the

Sect. 4.—What debts are provable and for what amount: Sub-sect. 3, L.; sub-sect. 4.]

stock.—*Re* BARKER, *Ex p.* FISHER (1818), 3 Madd. 159; Buck, 188; 56 E. R. 469.

Annotations:—**Consd.** Sammon *v.* Miller (1832), 3 B. & Ad. 596. **Refd.** Clements *v.* Langley (1833), 5 B. & Ad. 372.

2915. —— Damages for failure to return.]—*Semble:* a demand for damages for not returning certain shares lent is not provable.—*Re* YOUNG, *Ex p.* HELLINGS (1837), 3 Mont. & A. 147; 6 L. J. Bcy. 27, Ct. of R.

2916. —— To be replaced by given day.]—If a person undertakes to replace stock by a certain day & the contract is broken before the bkpcy., the claim is a debt provable under the bkpcy.—*Re* DUNN, *Ex p.* PAYNTER (1862), 6 L. T. 510.

2917. Loan of wife's settled funds to husband.]—A settlement, previous to marriage, of money, the property of the wife, upon the event of the husband's bkpcy., is valid, & part, being lent to the husband upon his bond under a power for that purpose, was proved under the commission.—*Ex p.* HINTON (1808), 14 Ves. 598; 33 E. R. 650.

See, also, No. 2410, *ante,* and Part XII., Sect. 2, sub-sect. 1, *post.*

2918. Money paid in error.]—In 1806, P. proved a debt against the estate of B. & Co., bkpts., on a bill of exchange, & died in 1807 appointing G. his exor. G. became bkpt. in 1816 & obtained his certificate in 1817. In 1811, 1814, 1815, G. had, as exor., received three dividends on P.'s debt, & in 1817, 1822, & 1828, he received three other dividends. It afterwards turned out that the bill of exchange was paid by another party in 1807, so that no dividend was ever due. On petition by B. & Co.'s assignees to expunge the proof & for G. to refund the six dividends:—*Held:* as the first three dividends were paid in error & were a legal debt against G. & might have been proved under his bkpcy., the claim as to them was barred by G.'s certificate, but the other three received since his bkpcy. should be refunded.—*Re* BAILLIE, *Ex p.* BOLTON (1832), 1 Deac. & Ch. 556; 1 Mont. & A. 60; 3 L. J. Bcy. 22; *subsequent proceedings, sub nom. Re* BAILLIE, *Ex p.* GREENWOOD (1834), 1 Mont. & A. 65, Ct. of R.

2919. Necessaries supplied to bankrupt's wife.]—A proof was tendered in the bkpcy. of a husband, in respect of the amount due for articles of attire supplied to the wife, to whom an ample allowance had been made & a direction given by the husband not to incur debt:—*Held:* as there was no evidence of any authority, either express or implied, to the wife to pledge the husband's credit, proof against his estate could not be allowed.—*Re* COOK, *Ex p.* HOLMES (1892), 10 Morr. 12, D. C.

See No. 2908, *ante,* and, *generally,* HUSBAND & WIFE.

2920. Pledge of debentures held as security by pledgor—Proof against pledgor—For amount paid to redeem debentures.]—Deft. indorsed pltf.'s promissory note, to be discounted at a bank, receiving as security negotiable debentures, which deft. pledged. Pltf.'s note was afterwards paid, & deft. subsequently became bkpt. & received his certificate. Pltf. redeemed the debentures, & brought an action to recover the amount paid to redeem the debentures:—*Held:* the debt might have been proved under the bkpcy.—JOHNSON *v.* SPILLER (1784), 1 Doug. K. B. 167, n.; 99 E. R. 109.

Annotations:—**Consd.** Parker *v.* Norton (1796), 6 Term Rep. 695; Woolley *v.* Smith (1846), 3 C. B. 610. **Refd.** Betteley *v.* Stainsby (1862), 12 C. B. N. S. 477. **Mentd.** De Tastet *v.* Walker (1818), Buck, 153; *Re* Dunn, *Ex p.* Paynter (1862), 6 L. T. 510.

2921. Promise of marriage—Damages for breach.]—Damages in an action for breach of promise of marriage are provable under a bkpcy.—*Re* BILLINGHAM (1865), 13 L. T. 25.

2922. Stock exchange transaction.]—Proof of debt tendered by a sharebroker:—*Held:* admissible, as not incurred in any contract by way of gaming or wagering within Gaming Act, 1845 (c. 109).—*Re* WILSON (1866), 14 L. T. 492.

See, generally, GAMING & WAGERING; STOCK EXCHANGE.

2923. Underwriting shares—Proof of loss—Amount of loss.]—By a contract made in Feb., 1898, H. agreed to sell to a co. certain properties, & by the same contract H. agreed to subscribe & pay for in cash so much of the share capital of the co. as should not be taken up by the public. In the events which happened H. became bound under a contract to take up & pay for certain preference shares & twenty-five thousand ordinary shares of £1 each in the co. In June, 1898, H. became bkpt., & in the July following his trustee in bkpcy. disclaimed the contract. Soon afterwards the co. went into liquidation, & the liquidator lodged a proof against H.'s estate for damages for breach of the contract. H.'s estate was estimated to realise not more than 4*s.* in the pound. The liabilities of the co. were about £16,000, whilst its assets comprised, practically about £4,000 at a bank & the claim against H.'s estate. The liquidator made a call of £1 per share on the ordinary shares of the co., & claimed that the proof against H.'s estate should stand at £25,000, on the ground that the measure of damages

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2917 i. *Loan of wife's separate estate to husband—Married Women's Property Act,* 1884, *s.* 5.]—Land devised in Mar., 1883, to such uses as A., a married woman, should appoint, &, in default, to her use, was sold, & A., without exercising the power of appointment, lent the proceeds to her husband, who, in July, 1883, agreed to repay same but subsequently became bkpt.:—*Held:* the wife was entitled to prove for the full amount advanced to the husband, it having by the arrangement between herself & her husband become her separate estate, the above sect. not being retrospective.—*Re* MCGREGOR, *Ex p.* MCGREGOR (1888), 6 N. Z. L. R. 672.—**N.Z.**

2917 ii. —— *For the purpose of his business.*]—Advances were made by a wife out of her separate estate to her husband for the purpose of his business:—*Held:* she was entitled to rank in her husband's sequestration for these advances.—LAIDLAW *v.* MILLER (LAIDLAW'S TRUSTEE) (1882), 10 R. (Ct. of Sess.) 374; 20 Sc. L. R. 261.—**SCOT.**

k. *Conveyance by wife to husband—Intention to repay.*]—A wife conveyed property to her husband for business purposes for a nominal consideration, on the understanding that she was to be repaid the value of the property:—*Held:* she was entitled to prove for the value in his insolvency.—PETT *v.* ATTWOOD (1907), 9 O. W. R. 178, 748.—**CAN.**

l. —— ——.]—A married woman transferred certain shares, part of her separate estate, to her husband, the insolvent, for the purpose of use in his business, upon a promise of repayment by him:—*Held:* she was entitled to prove.—*Re* MILLER (1877), 1 A. R. 393.—**CAN.**

m. *Mortgage of wife's property—To secure loan to husband—Loan discharged by wife.*]—A bkpt.'s wife, who at his request executed a mtge. of her property to secure an advance from the mtgee. to bkpt., & afterwards discharged it, can prove for the amount against his estate.—*Re* EVAN WILLIAMS, [1919] N. Z. L. R. 301.—**N.Z.**

2921 i. *Promise of marriage—Damages for breach.*]—*Held:* barred by discharge.—FORRESTER *v.* THRASHER, 9 P. R. 383; 2 O. R. 38.—**CAN.**

PART VIII. SECT. 4, SUB-SECT. 4.

2925 i. *In respect of what breaches—Ultra vires transactions by company directors.*]—A claim against the directors of a joint stock co. to make good funds of the co. expended by them on behalf of the co., in transactions that the co. was forbidden by its articles of assocn. to engage in, was provable under Act XXVIII. of 1865.—INDIAN PENINSULAR, LONDON & CHINA BANK LIQUIDATORS *v.* SCOTT, 5 Bom. O. C. 167.—**IND.**

2925 ii. —— *Receipt of commission by director of building society.*]—The wrongful receipt by a director of a building society of money of the society by way of commission, being a breach of trust & contractual, constitutes a debt provable in insolvency within Insolvency Act, 1890, s. 114.—BRITTER *v.* SPRIGG (1900), 26 V. L. R. 65.—**AUS.**

for the injury caused to the co. by the disclaimer was the loss of the call of £1 per share on the twenty-five thousand shares which H. was bound to take up. The trustee admitted the proof for £10,500 only, that being the difference between the then estimated assets & liabilities of the co.:—*Held:* as the disclaimer had put an end to the contract, & the claim of the co. could only be for damages for breach of the contract, the trustee had assessed the damages on the right principle, & the proof must stand at £10,500.—*Re* HOOLEY, *Ex p.* UNITED ORDNANCE & ENGINEERING CO., LTD., [1899] 2 Q. B. 579; 68 L. J. Q. B. 993; 6 Mans. 404.

See, also, Part XX., Sect. 16, *post.*

2924. —— —— Deceased debtor—Whether contract personal.]—By an agreement dated Nov. 30, 1912, W. agreed with a French co. (*inter alia*) to form an English co. with a capital of £105,000 divided into one hundred thousand ordinary shares of £1 & one hundred thousand participation shares of 1s. each, & to place the ordinary share capital in three blocks of shares by certain short dates. On Dec. 10, 1912, the English co. was registered with the stipulated capital. W. placed the first block of shares & died in Feb. without placing any further shares. A claim by the French co. to prove against his estate, which was being administered in bkpcy., for damages for breach of the agreement of Nov. 30, 1912, was objected to by the trustee, on the ground that that agreement was a contract personal to W. which determined at his death:—*Held:* the agreement was not a contract personal to W., but was enforceable against his exors., for the breach of which damages would lie.—*Re* WORTHINGTON, *Ex p.* PATHÉ FRÈRES, [1914] 2 K. B. 299; 83 L. J. K. B. 885; 110 L. T. 599; 21 Mans. 119, C. A.

See, also, EXECUTORS & ADMINISTRATORS.

SUB-SECT. 4.—CLAIMS ARISING OUT OF BREACH OF TRUST.

2925. In respect of what breaches—Breach committed but undiscovered at previous bankruptcy.]—A trustee, who was directed to convert the whole of testatrix's property into money, & place same out at interest upon mtge. for the benefit of the *cestuis que trust*, employed the money in his business, paying interest to the parties entitled to it, & afterwards became bkpt. & obtained his certificate, without any proof having been made under his commission for the amount of the trust-money, either by himself, or the *cestuis que trust*, who were entirely ignorant of his misapplication of the trust-money, & he continued to pay the interest to them after his bkpcy., the same as before. He became bkpt. a second time, when the *cestuis que trust* discovered that he had not invested the money pursuant to the trusts of the will:—*Held:* his certificate under the first commission was a bar to any proof for the amount under the subsequent fiat.—*Re* MAKIN, *Ex p.* HOLT (1835), 1 Deac. 248; 5 L. J. Bcy. 9, Ct. of R.

See 1914 Act, s. 28 (1) (b).

2926. For what amount—Investment only partly in excess of authority.]—If an exor., who is directed to carry on his testator's partnership trade, exceeds his authority, by employing the assets in the trade to an extent not warranted by the will, & the surviving partner & the exor. become bkpt., the excess of the assets so employed may be proved by the exor. under their commission.—*Re* HODSON, *Ex p.* RICHARDSON (1818), 3 Madd. 138; Buck, 202; 56 E. R. 461; *affd.* (1819), Buck, 421, L. C.

Annotations:—**Consd.** Owen *v.* Delamere (1872), L. R. 15 Eq. 134; *Re* Mellor, *Ex p.* Manchester Bank (1879), 12 Ch. D. 917. **Refd.** Thompson *v.* Derham (1842), 1 Hare, 358; Labouchere *v.* Tupper (1857), 11 Moo. P. C. C. 198; *Re* Mellor, *Ex p.* Butcher (1880), 13 Ch. D. 465, C.A.; Fraser *v.* Murdoch (1881), 6 App. Cas. 855, H.L. **Mentd.** M'Nellie *v.* Acton (1853), 4 De G. M. & G. 744, L. JJ.

2927. —— Bankrupt entitled to sum for his trouble.]—H. assigned to R. £600 in trust to invest, to pay the interest or dividends thereof to H. for life, & after her death, in trust that R. should pay all interest or dividend, except of the principal sum of £100, part of the £600, which it was declared R. might deduct & retain for his care & pains during one year next after the death of H., for the benefit of the children which H. might leave, & if H. should die without issue, then in trust, as to the remaining stock & the dividends or interest due thereon, unto A. & N., the sisters of H., or their children in case of the death of either of them, in equal proportions, & H. thereby agreed that R. should retain out of the trust money all costs & charges in respect of his trust, & the clear yearly sum of £20 for his care & trouble, & also the sum of £100 for one year's allowance for such care & trouble which he should have from the death of H., & then the annual sum of £20 from the end of such year until the trusts should be completed. R. applied the £600 to his own use, paying the interest to H. during his life. H. died in July 1819, & in Jan., 1822, R. became bkpt. Upon a petition by the parties entitled upon the death of H.:—*Held:* the proof should be only for the £500.—*Re* SMITH, *Ex p.* KETTLEWELL (1823), 1 Gl. & J. 321.

2928. —— Interest added.]—The master found that two exors. had, by signing joint cheques, enabled each other to receive sums belonging to the estate of their testatrix, when they were both largely indebted to that estate, & that the sums so received by them were debts provable under their respective commissions, both exors. having become bkpt.:—*Held:* interest at 5 per cent., as the consequence of the *devastavit*, should be added to the principal sums found to be provable against the bkpt. estates of the exors.—BICK *v.* MOTLY (1835), 2 My. & K. 312; 39 E. R. 962.

2929. —— Trust fund consisting of two separate debts—Trustees in possession as tenants in common.]—By an antenuptial settlement, the intended wife assigned a debt due to her from A., & another debt due to her from B., to A. & B., upon trust to invest same, & stand possessed thereof upon the trusts of the settlement. Neither of the debts was invested, but A. & B. continued to pay interest on their respective debts to the *cestuis que trust.* B. became bkpt:—*Held:* proof could only be made by the *cestuis que trust* for the amount of the debt due from B.—*Re* TURNER, *Ex p.* WOODWARD (1837), 2 Deac. 401; 3 Mont. & A. 232; 6 L. J. Bcy. 60; 1 Jur. 385, Ct. of R.

2930. —— Amount received for stock improperly sold—Or value thereof at bankruptcy.]—Where a bkpt. trustee has sold out stock, forming the trust fund, & converted the proceeds to his own use, proof may be made against his estate, either for the amount of the produce of the stock, or for the value of the stock at the time of his bkpcy.,

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2926 i. *For what amount—Defaulting trustee entitled to life interest—Proof for whole corpus of fund.*]—Where a *cestui que trust*, who is a trustee of a fund, & entitled to a life interest in the whole of the fund, misapplies it & becomes bkpt., the representative of the trust estate in the interest of the other beneficiaries is entitled to prove for the whole *corpus* of the fund, & not merely for the present value of the reversionary interest.—*Re* GLOAG'S ESTATE (1892), 11 N. Z. L. R. 90.—N.Z.

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as shall appear most for the benefit of the *cestui que trust.*—*Re* IVESON, *Ex p.* GURNER (1841), 1 Mont. D. & De G. 497.

2931. —— Breach of trust resulting in large profits.]—The father of infants received a legacy bequeathed to them & by investing it in unauthorised securities made large profits, but subsequently became bkpt:—*Held:* the legatees were entitled to have proof made in respect of such profits.—*Re* MONTEFIORE, *Ex p.* MONTEFIORE (1845), De G. 171; 5 L. T. O. S. 222; 9 Jur. 562, Ct. of R.

2932. —— Loss caused by ultra vires investment—Proof against one of several trustees.]—By a will & seven codicils three exors. were made residuary legatees subject to a life interest, & although no valid trust had been created, they had always treated themselves as not being beneficially interested. By an eighth codicil the residuary gift was converted into a trust for certain other persons, subject to the life estate. The eighth codicil was not proved or discovered for many years after the testatrix's death. In the meanwhile, & during the lifetime of the tenant for life, the exors. invested part of the funds upon a security, which would be an improper one for investment by trustees, & which afterwards proved deficient. The security was appropriated to the purposes of the trusts of the eighth codicil. It did not appear whether the tenant for life consented to the investment, but she received the interest during her life, & did not in fact suffer from the insufficiency of the security:—*Held:* a proof against the estate of one of the trustees who had become bkpt. by the persons claiming under the codicil for the deficiency was good.—*Re* BIDDULPH, *Ex p.* NORRIS (1869), 4 Ch. App. 280; 38 L. J. Bcy. 5; 19 L. T. 755; 17 W. R. 452, L. JJ.

2933. —— Improper investment adopted by cestui que trust—Proof for damage to trust estate.]—L., a trustee, advanced trust funds on a contributory mtge. which was an unauthorised investment. He afterwards became bkpt. The mtgor. commenced an action against L., & all others claiming through or under him, to set aside the mtge. on the ground of fraud. L.'s *cestuis que trust* compromised their claims in the action without the concurrence of L.'s trustee in bkpcy:—*Held:* as L.'s *cestuis que trust* had adopted the improper investment they could not prove in L.'s bkpcy. for the whole amount of the trust fund, but their remedy was a proof for the damages the trust estate had sustained by reason of the improper investment, & the measure of damages was the difference between the total sum invested & the assessed value of the compromise.—*Re* LAKE, *Ex p.* HOWE TRUSTEES, [1903] 1 K. B. 439; 72 L. J. K. B. 213; 88 L. T. 31; 51 W. R. 496; 47 Sol. Jo. 205.

2934. —— Proof of whole amount against any one trustee—Until twenty shillings received.]—Where an action has been brought by pltfs. as beneficiaries under a settlement to enforce liability against trustees for a breach of trust, & a sum has been certified to be due from the insolvent estate of a deceased trustee, & from the other trustees, pltfs. will be entitled to prove against the insolvent estate for the full amount of the sum certified to be due. The liability of all the trustees being joint & several, until pltfs. have received 20*s.* in the pound they are entitled to claim the whole debt from any one trustee, notwithstanding that another trustee has made a payment by way of compromise in respect of his several liability.—EDWARDS *v.* HOOD-BARNES, [1905] 1 Ch. 20; 74 L. J. Ch. 167; 91 L. T. 766; 21 T. L. R. 89.

Who may prove.]—*See* Sect. 3, *ante.*

SUB-SECT. 5.—JUDGMENTS AND AWARDS.

Right of court to go behind judgments and awards.]—*See* Sect. 7, sub-sect. 1, *post.*

2935. Verdict before bankruptcy—Judgment after.]—A judgment for damages & costs in *assumpsit* is a debt contracted within 46 Geo. 3, c. 135, s. 2, & provable under a bkpt.'s commission, though final judgment is not entered up until after the commission issues.—*Re* LEDSTER, *Ex p.* BIRCH (1825), 7 Dow. & Ry. K. B. 436.

Annotation:—**Folld.** Greenway *v.* Fisher (1827), 1 Man. & Ry. K. B. 330.

2936. —— —— But during same term as bankruptcy.]—A verdict in trover was obtained in vacation against a trader, who, after the first day of the next term, but before final judgment was signed, became bkpt.:—*Held:* final judgment, signed afterwards during the same term, related to the first day of the term, & the debt thereby created was barred by bkpt.'s certificate.—GREENWAY *v.* FISHER (1827), 7 B. & C. 436; 1 Man. & Ry. K. B. 330; 6 L. T. O. S. K. B. 34; 108 E. R. 786.

Annotation:—**Mentd.** *Re* Pickering, *Ex p.* Thornthwaite (1854), 1 Bankr. & Ins. R. 201.

2937. —— Decree absolute after — Damages in divorce court.]—Damages awarded in the Divorce Ct. by a verdict of a jury against a co-resp. are a provable debt.—*Re* GRAHAM, *Ex p.* LANGRIDGE (1871), 19 W. R. 951.

Annotation:—**Mentd.** *Re* O'Gorman, *Ex p.* Bale (1899) 68 L. J. Q. B. 650.

See, also, No. 2954, *post.*

2938. Verdict after bankruptcy—Judgment for mesne profits.]—Money due upon a judgment for mesne profits, the verdict being after the bkpcy.:—*Held:* not within 49 Geo. 3, c. 121, s. 9.—MOGGRIDGE *v.* DAVIS (1810), Wight. 16; 1 Rose, 120; 145 E. R. 1157.

2939. Order of Court of Chancery for payment of sum.]—An order of the Ct. of Ch. for payment of a sum of money may be proved under the commission, & will be barred by the certificate.—WALL *v.* ATKINSON (1815), Coop. G. 198; 2 Rose, 196; 35 E. R. 529.

Annotations:—**Follds.** *Re* Helsby (1832), 1 L. J. Bcy. 5; *Re* Fenwick, *Ex p.* Brown (1849), 13 L. T. O. S. 468.

PART VIII. SECT. 4, SUB-SECT. 5.

2941 i. *Judgment before bankruptcy—Debtor taken in execution—Judgment debt—Right to prove.*]—S. sued D. for defamation & obtained judgment, whereon he sued out a *ca. sa.* & imprisoned D. Whilst D. was in prison S. obtained sequestration of D.'s estate, on a distinct debt & tried to prove his defamation judgment. The chief comr. ordered it to be entered as a claim, with leave to S. to prefer his proof again when D.'s year of imprisonment was out, which S. did:—*Held:* he was entitled to prove for his judgment.—*Re* DIBBS, SHEPHERD'S CLAIM (1881), 2 N. S. W. L. R. 10.—**AUS.**

2941 ii. —— —— —— ——.]—A judgment creditor who resides in England, although he has his debtor confined there in execution, will be allowed to prove in Ireland for the same debt in a cause, so as to be paid out of the produce of the sale of debtor's estate.—CAMPBELL *v.* HAY (1830), 4 Ir. L. Rec. 1st ser. 65.—**IR.**

2941 iii. —— *On bond given by principal debtors & surety jointly—Proof in bankruptcy of principal debtors.*]—When two debtors execute a joint bond, with a third party as their surety, the creditor who enters up a joint judgment on the bond cannot, upon the original debtors becoming bkpt., prove upon their estate upon foot of the joint judgment, whilst their co-conusor remains solvent.—

2940. Interlocutory judgment before bankruptcy — Final judgment after.]— Interlocutory judgment having been obtained against bkpt. before his bkpcy. in an action of detinue, trover & case :—*Held :* pltf. was entitled to prove for the amount of damages & costs ascertained under a writ of inquiry in the action, although final judgment was not signed till after the bkpcy.—*Re* BAXTER, *Ex p.* MAURICE'S ASSIGNEES (1861), 3 L. T. 633.

2941. Judgment before bankruptcy—Damages assessed after.]—Deft. entered into a charterparty with pltfs., by which he bound himself to supply a cargo of guano. An action was brought against him for an alleged breach, in not supplying the cargo in pursuance of his agreement, & he suffered judgment by default. Before the execution of a writ of inquiry, a fiat in bkpcy. issued against him, & he obtained his certificate, with a suspension for six months. The damages were afterwards assessed at £1644 3*s.* 9*d.*, & for that amount he was arrested :—*Held :* this was not a debt provable under the fiat, & deft. was not entitled to be discharged.—WOOLLEY *v.* SMITH (1846), 3 C. B. 610 ; 4 Dow. & L. 469 ; 16 L. J. C. P. 81 ; 8 L. T. O. S. 276 ; 11 Jur. 310 ; 136 E. R. 244.

Annotations :—**Consd.** *Re* Routledge, *Ex p.* Bateman (1855), 25 L. J. Bcy. 19, n. **Distd.** *Re* Routledge, *Ex p.* Bateman (1856), 8 De G. M. & G. 263, L. JJ. **Mentd.** Betteley *v.* Stainsby (1862), 12 C. B. N. S. 477 ; *Re* Dunn, *Ex p.* Paynter (1862), 6 L. T. 510

See 1914 Act, s. 30 (3).

See, also, No. 2883, *ante.*

2942. —— Judgment not registered.] — A trustee in bkpcy. rejected a proof tendered in respect of a debt, for which judgment had been entered against bkpt. under a judge's order by consent, on the ground that the order had not been filed as required by Debtors Act, 1869 (c. 62, s. 27), so that the judgment was void :—*Held :* there was no ground for contending that the invalidity of the judgment affected the right of pltf. to prove for the debt for which the action was brought, & the decision of the trustee must be reversed.—*Re* SMITH, *Ex p.* BROWN (1886), 17 Q. B. D. 488 ; 3 Morr. 202, C. A.

Annotation :—**Mentd.** Gowan *v.* Wright (1886), 18 Q. B. D. 201, C. A.

2943. —— To be reduced to nothing in certain events—Execution stayed—Bankruptcy during stay.]—Pltf. in an action for the wrongful detention of a lease recovered judgment for £100, to be reduced to nothing if the lease was returned. Execution was stayed for a month, to give deft. time to search for the lease, which had been mislaid. Before the month had expired, deft. filed a petition. No execution was issued. The lease was found, & was tendered to pltf. who refused to accept it :—*Held :* the £100 was not a provable debt.—*Re* SCARTH, *Ex p.* SCARTH (1874), 10 Ch. App. 234 ; 44 L. J. Bcy. 29 ; 31 L. T. 737 ; *sub nom.* SCARTH *v.* SCARTH, 23 W. R. 153, L. JJ.

Annotations :—**Mentd.** Eberle's Hotels & Restaurant Co. *v.* Jonas (1887), 18 Q. B. D. 459, C. A. ; Peruvian Guano Co. *v.* Dreyfus, [1892] A. C. 170, n.

2944. —— Not to be entered up until happening of contingency—Bankruptcy before contingency.]—If A. gives a warrant of attorney to B. to confess a judgment immediately, with a defeasance that judgment shall not be entered up until a subsequent day on a contingency, & A. becomes bkpt. before that day, though B. afterwards enters up judgment on the happening of the contingency, he cannot prove such debt under A.'s commission. —STAINES *v.* PLANCK (1799), 8 Term Rep. 386 ; 101 E. R. 1448.

See 1914 Act, s. 30 (3).

2945. Judgment after bankruptcy.]—When in support of a claim to prove a debt in a bkpcy. the only evidence of the debt is a judgment, & that judgment has been obtained after the act of bkpcy., the judgment debt cannot be proved.—*Re* TOLLEMACHE, *Ex p.* BONHAM (1885), 14 Q. B. D. 604 ; 54 L. J. Q. B. 388 ; 52 L. T. 17 ; 33 W. R. 628, C. A.

2946. —— Relation back to first day of term.]—A judgment signed on any day in term relates back to the first day of the term, so as to entitle pltf. to prove under a commission of bkpcy. issued against deft. during the term, &, *Semble :* it is immaterial whether the commission has issued before or after the day on which judgment was actually signed.—BOYER *v.* —— (1826), 5 L. J. O. S. K. B. 71.

2947. —— In action by accommodation acceptor against bankrupt drawer of bill—Proof by assignee of judgment.]—Acceptor without effects, for the accommodation of the drawer, being compelled on his bkpcy. to pay the bill, before 49 Geo. 3, c. 121, obtained judgment in an action for the amount, with interest & costs. The assignee of that judgment was admitted under the Act, which passed in the interval, to prove the original debt, not disturbing any dividends already made, the judgment being considered as a security for the original debt, which might be proved, & would be barred by the certificate.—*Re* LLOYD, *Ex p.* LLOYD (1810), 1 Rose, 4 ; 17 Ves. 245 ; 34 E. R. 94.

Annotations :—**Consd.** Bassett *v.* Dodgin (1833), 9 Bing. 653 ; Filbey *v.* Lawford (1841), 4 Scott, N. R. 208.

2948. Award before bankruptcy—Judgment after.]—In an action to recover the balance upon an account current, a verdict for pltf. was taken by consent, subject to a reference to an arbitrator, who was empowered to direct that a verdict should be entered for pltf. or deft., & the costs were to abide the result of the award. After the award, which was in favour of pltf., & before judgment, deft. committed an act of bkpcy., of which notice was given to pltf. in the action, but judgment was nevertheless entered upon the award. On deft. being adjudicated a bkpt. :—*Held :* the amount for which judgment was entered up, with interest & costs, constituted a provable debt.—*Re* PICKERING, *Ex p.* HARDING (1854), 5 De G. M. & G. 367 ;

Re AGNEW (1856), 8 Ir. Jur. 252.—IR.

2941 iv. *Judgment before assignment —Action for seduction.*]—*Held :* under Insolvent Act, 1864, s. 9 (5), a discharge in insolvency would form no answer to proceedings upon a judgment against deft. for seduction.—BENINGER *v.* THRASHER (1882), 1 O. R. 33.—**CAN.**

2941 v. —— *In actions for breach of promise of marriage & for seduction.*] —In 1866 judgment was recovered against deft. in this action for breach of promise of marriage, & in another for seduction. Deft. then made an assignment under Insolvent Act, 1864, having no assets, & his only creditors being pltfs. in the two actions. No creditors appeared, & after twelve months he petitioned for his discharge. The application was duly advertised, & no opposition being made, was granted. He subsequently acquired some property, & execution was then issued in this action :—*Held :* pltf.'s claim was one which was barred by the discharge.—FORRESTER *v.* THRASHER (1882), 9 P. R. 383 ; 2 O. R. 38.—**CAN.**

o. *Cause of action existing before bankruptcy—Judgment entered up after —But before discharge.*]—A judgment on a cause of action existing before the issue of a commission in bkpcy., under Imperial Act, 12 & 13 Vict. c. 106, which is entered up after bkpcy., but before bkpt. has obtained a certificate of discharge is provable under the commission.—GILBERT *v.* RAYMOND (1879), 3 P. & B. 315.—**CAN.**

p. *Verdict for damages—Not followed by judgment.*]—A verdict for damages, not followed by judgment, did not create a demand or provable claim within Debtors & Creditors Act, 1876, s. 75. A demand must be something capable of being legally demanded, & of being at once enforced by action or execution.—*Re* TONKS, *Ex p.* POLL, 3 J. R. N. S. 1.—**N.Z.**

Sect. 4.—What debts are provable and for what amount: Sub-sects. 5 & 6.]

23 L. J. Bcy. 22; 2 W. R. 386; 43 E. R. 912; *sub nom. Re* PICKERING, *Ex p.* THORNTHWAITE, 1 Bankr. & Ins. R. 201; 18 Jur. 760, L. JJ.

Annotations :—**Distd.** *Re* Williamson, *Ex p.* Todd (1855), 6 De G. M. & G. 744, L. JJ. **Consd.** *Re* Routledge, *Ex p.* Bateman (1855), 25 L. J. Bcy. 19, n. **Distd.** *Re* Weller, *Ex p.* Weller (1867), 17 L. T. 125, L. JJ.

2949. Award made after bankruptcy.]—Proof upon an award made after the act of bkpcy. expunged, & an account directed before the comrs.—*Re* COTTRELL, *Ex p.* KEMSHEAD (1811), 1 Rose, 149, L. C.

2950. —— Reference to master before.]—Pltf. obtained a decree against deft., referring it to the master to take an account of what was due to pltf., & that what the master should so find to be due should be paid to pltf., with costs to be taxed by the master. The master did not make his report, until after a fiat had issued against deft. :—*Held :* the decree was not final, & pltf. was not entitled to prove for the amount of the debt & costs found due by the master's report.—*Re* BEDINGFIELD, *Ex p.* CROSSE (1841), 2 Mont. D. & De G. 308.

2951. —— Consent to order of reference before.]—Deft., in an action for injury to pltf.'s property caused by the explosion of deft.'s steam engine, consented at the trial to an order of reference, & the award was not made till after deft.'s bkpcy. :—*Held :* deft. had not before the bkpcy. contracted a liability to pay money upon a contingency within 1849 Act, s. 178.—*Re* WILLIAMSON, *Ex p.* TODD, (1855), 6 De G. M. & G. 744; 2 Bankr. & Ins. R. 131; 24 L. J. Bcy. 20; 25 L. T. O. S. 285; 1 Jur. N. S. 897; 3 W. R. 644; 43 E. R. 1422, L. JJ.

Annotations :—**Folld.** *Re* Routledge, *Ex p.* Bateman (1855), 25 L. J. Bcy. 19, n. **Distd.** *Re* Strahan, *Ex p.* Barwis (1855), 6 De G. M. & G. 762, L. JJ. **Mentd.** Betteley *v.* Stainsby (1867), L. R. 2 C. P. 568.

See, also, No. 3063, *post.*

2952. Order to pay money into court before bankruptcy—Whether claim allowed—Application of dividends.]—Bkpt. had been ordered to pay a sum into ct. in a Ch. suit against him, pending at the time of his bkpcy. :—*Held :* a claim should be entered for that sum on behalf of pltf. in the suit, & the dividends on that sum should be paid into the Ct. of Ch. & invested in the name of the Accountant General.—*Re* GILBURD, *Ex p.* HANCOCK (1833), 3 Deac. & Ch. 523; 1 Mont. & A. 220, Ct. of R.

2953. —— Damages & costs in divorce court.]—By a decree made in a suit of dissolution of marriage, co-resp. was condemned in damages & costs, & an order issued that the damages should be paid into the registry within three weeks. Before the expiration of that period, & before the costs had been taxed, co-resp. on his own petition, was adjudicated a bkpt., & subsequently he obtained an order of discharge :—*Held :* as both the damages & costs were debts which might have been proved under the bkpcy., they were covered by the order of discharge, & no attachment could issue against co-resp. for their non-payment.—WOOD *v.* WOOD & STANGER (1868), L. R. 1 P. & D. 467; 37 L. J. P. & M. 25; 18 L. T. 110; 16 W. R. 568.

Annotation :—**Folld.** *Re* O'Gorman, *Ex p.* Bale, [1899] 2 Q. B. 62.

See 1914 Act, s. 28 (1) (*c*).

2954. —— Damages in divorce court.]—Damages awarded to a petitioner in the Divorce Ct. against a co-resp., & ordered to be paid into ct., although they will not support a bkpcy. petition against co-resp., are nevertheless a debt provable in his bkpcy., & the payment of such damages cannot, if his bkpcy. supervenes, be enforced against him by a judgment summons under Debtors Act, 1869 (c. 62), s. 5.—*Re* O'GORMAN, *Ex p.* BALE. [1899] 2 Q. B. 62; 68 L. J. Q. B. 650; 80 L. T. 501; 47 W. R. 543; 43 Sol. Jo. 480; 6 Mans. 204.

See, also, No. 2937, *ante.*

SUB-SECT. 6.—COSTS.

See, also, No. 2652, *ante.*

2955. General rules.]—If an action is brought against a person, who afterwards becomes bkpt., for the recovery of a sum of money, & the action is successful, the costs are regarded as an addition to the sum recovered & to be provable if that is provable, but not otherwise. If what is recovered is unliquidated damages "arising otherwise than by reason of a contract, promise, or breach of trust," that sum is not recoverable unless judgment, or at least a verdict for it, has been obtained before adjudication, or now the receiving order; & if the sum recovered is not provable, neither are the costs of recovering it. On the other hand, if what is recovered is provable, so are the costs of recovering it. If the action against a person who becomes bkpt. is unsuccessful, no costs become payable by him or out of his estate, & no question as to them can arise. But if an unsuccessful action is brought by a man who becomes bkpt., then, if he is ordered to pay the costs, or if a verdict is given against him before he becomes bkpt., they are provable. On the other hand, if no verdict is given against him & no order is made for payment of costs until after he becomes bkpt., they are not provable. In such a case there is no provable debt to which the costs are incident, & there is no liability to pay them by reason of any obligation incurred by the bkpt. before bkpcy.; nor are they a contingent liability to which he can be said to be subject at the date of his bkpcy. (LINDLEY, M. R.).—*Re* BRITISH GOLD FIELDS OF WEST AFRICA, LTD., [1899] 2 Ch. 7; 68 L. J. Ch. 412; 80 L. T. 638; 47 W. R. 552; 15 T. L. R. 363; 43 Sol. Jo. 494; 6 Mans. 334, C. A.

Annotation :—**Apld.** *Re* A Debtor (No. 68 of 1911), [1911] 2 K. B. 652, C. A.

2956. Proof by successful plaintiff against bankrupt defendant—Verdict before bankruptcy—Judgment after.]—A creditor, who obtains a verdict before commission against a bkpt., is entitled to prove his costs as well as his debt under the commission, though judgment was not signed till after the commission issued.—AYLETT *v.* HARFORD (1779), 2 Wm. Bl. 1317; 96 E. R. 770.

Annotations :—**Distd.** *Ex p.* White (1792), 2 Ves. 9. **Refd.** *Re* Charles (1811), 14 East, 197.

2957. —— —— —— Action on contract.]—Where in an action upon contract, the verdict is before, & the judgment after the bkpcy., the costs are provable.—*Re* CABLE, *Ex p.* POUCHER (1824), 1 Gl. & J. 385; 2 L. J. O. S. Ch. 162.

PART VIII. SECT. 4, SUB-SECT. 6.

2959 i. *Proof by successful plaintiff against bankrupt defendant—Verdict before bankruptcy—Costs taxed after.*]—The provision in Debtors & Creditors Act, 1876, s. 94, enabling pltfs. entitled to costs under a verdict or judgment to prove for such costs when taxed, although the taxation was not had before the bkpcy., was intended to meet the case of a right to costs perfected before the bkpcy., but not ascertained by taxation.—*Re* TONKS, *Ex p.* POLL, 3 J. R. N. S. 1.—**N.Z.**

q. —— *Judgment before arrangement.*]—Where judgment is recovered against a person who afterwards becomes an arranging debtor, the ct. will not allow to the judgment creditor payment in full of the costs incurred by him in the action.—*Re* DEBTOR (1910), 44 I. L. T. 210.—**IR.**

Annotations :—**Distd.** Dod *v.* Herring (1829), 3 Sim. 143. **Apld.** Metcalf *v.* Watling (1834), 2 Dowl. 552 ; Bishop *v.* Leigh (1836), 1 Har. & W. 664. **Foll.** *Re* Bourne, *Ex p.* Ferris (1842), 2 Mont. D. & De G. 746, Ct. of R. ; *Re* Barwise, *Ex p.* Cocks (1847), De G. 446, Ct. of R. **Apld.** *Re* Pickering, *Ex p.* Thornthwaite (1854), 1 Bankr. & Ins. R. 201 ; Simpson *v.* Mirabita (1869), 10 B. & S. 77.

2958. —— —— —— **Action on tort.**]—The rule being that there can be no proof for damages in an action of tort until judgment has been signed, the costs, being a mere addition or appurtenance to the damages, must follow the same rule as that to which they are attached (MELLISH, L. J.).—*Re* NEWMAN, *Ex p.* BROOKE (1876), 3 Ch. D. 494 ; 25 W. R. 261, C. A.

Annotations :—**Mentd.** Watson *v.* Holliday (1882), 20 Ch. D. 780 ; *Re* British Gold Fields of West Africa [1899] 2 Ch. 7, C. A.

2959. —— —— **Costs taxed after.**]—Creditor admitted to prove costs taxed after the commission, on verdict obtained before.—*Re* FLETCHER, *Ex p.* SIMPSON (1789), 3 Bro. C. C. 46 ; 29 E. R. 400.

2960. —— —— ——.]—A liquidating debtor was indebted to a creditor in £357 recovered by a verdict at law, & costs, which had not been taxed. The creditor attended the first meeting of creditors, & stated in his affidavit that debtor was indebted to him in £357 on the verdict & an amount of costs which he estimated at £200, & claimed to vote in respect of the aggregate amount. The creditor had been restrained by injunction from taking any further proceedings in the action : —*Held :* (1) the estimated amount of untaxed costs was an unliquidated debt within 1869 Act, s. 16 (3), & he could not vote in respect thereof ; (2) the proper course for the creditor to pursue was either to apply for leave to sign judgment & tax his costs, or else to swear to such a sum as the costs when taxed would at least amount to.—*Re* DUMMELOW, *Ex p.* RUFFLE (1873), 8 Ch. App. 997 ; 42 L. J. Bcy. 82 ; 29 L. T. 384 ; 21 W. R. 932, L. JJ.

Annotations :—**Apld.** Canadian Pacific Colonization Corpn., [1891] W. N. 122. **Mentd.** *Re* Thrift, *Ex p.* Kimber (1879), 11 Ch. D. 869, C. A. ; *Re* A Debtor (1910), 102 L. T. 691, C. A.

2961. —— **Order for taxation before bankruptcy —Costs taxed after.**]—S. was committed for contempt in non-payment of costs, given upon a petition, which were taxed subsequent to his bkpcy., but the order for taxation was made before it :—*Held :* the debt was subsequent to the bkpcy. & was not discharged by bkpt.'s certificate.—*Ex p.* SNEAPS (1783), 1 Cooke's Bankrupt Laws, 7th ed., p. 211.

2962. —— **Verdict after bankruptcy—Costs taxed after.**]—Where a debt arises before bkpcy., but a verdict is obtained & costs taxed after, the costs are considered as part of the original debt, & the certificate extends to both.—LEWIS *v.* PIERCY (1788), 1 Hy. Bl. 29 ; 126 E. R. 18.

Annotations :—**Expld.** Watts *v.* Hart (1797), 1 Bos. & P. 134. **N.F.** Walker *v.* Barnes (1814), 5 Taunt. 778. **Refd.** *Ex p.* Hill (1804), 11 Ves. 646.

2963. —— —— ——.]—An action was commenced on Oct. 2 in England for a debt contracted there. On Nov. 20 deft. was adjudged bkpt. by the Irish Ct. of Bkpcy., in Dublin. On Dec. 10 pltf. obtained a verdict. On Jan. 8 the costs were taxed, & judgment having been signed a *ca. sa.* issued for the debt & costs. On Jan. 12 deft. obtained a certificate of conformity, under Irish Bkpt. & Insolvent Act, 1857 (c. 60). On Jan. 13 deft. was arrested in London under the *ca. sa.* :—*Held :*—the certificate of conformity discharged deft., not only from pltf.'s debt, but from the costs also as incident thereto, although they were not provable under the bkpcy. ; & deft. was therefore entitled to be immediately discharged out of custody.—SIMPSON *v.* MIRABITA (1869), L. R. 4 Q. B. 257 ; 10 B. & S. 77 ; 38 L. J. Q. B. 76 ; 20 L. T. 275 ; 17 W. R. 589.

Annotation :—**Refd.** *Re* Nelson, *Ex p.* Dare & Dolphin, [1918] 1 K. B. 459, C. A.

2964. —— —— **Judgment signed after—Action on contract.**]—Even in contract, if a verdict be not obtained till after the bkpcy., the costs which result from the verdict & judgment are not provable (LEACH, V.-C.).—*Re* CABLE, *Ex p.* POUCHER (1824), 1 Gl. & J. 385 ; 2 L. J. O. S. Ch. 162.

Annotations :—**Apld.** Bishop *v.* Leigh (1836), 1 Har. & W. 664. **Foll.** *Re* Barwise, *Ex p.* Cocks (1847), De G. 446, Ct. of R. **Apld.** *Re* Pickering, *Ex p.* Thornthwaite (1854), 1 Bankr. & Ins. R. 201. **Apprvd.** Simpson *v.* Mirabita (1869), L. R. 4 Q. B. 257. **Mentd.** Dod *v.* Herring (1829), 3 Sim. 143 ; Metcalf *v.* Watkins (1834), 2 Dowl. 552 ; *Re* Bourne, *Ex p.* Ferris (1842), 2 Mont. D. & De G. 746.

2965. —— —— —— **Action on contract or tort.**]—Where verdict & judgment are after bkpcy. in an action previously brought, whether for an antecedent debt by contract or mere damages in tort, the costs cannot be proved as a debt under the commission.—*Ex p.* HILL (1804), 11 Ves. 646 ; 2 Bos. & P. N. R. 192, n. ; 32 E. R. 1239.

Annotations :—**Foll.** *Re* Cable, *Ex p.* Poucher (1824), 1 Gl. & J. 385. **Refd.** *Ex p.* Charles (1809), 16 Ves. 256 ; Haswell *v.* Thorogood (1828), 7 B. & C. 705. **Mentd.** *Re* Sill, *Ex p.* Geller (1817), 2 Madd. 262 ; Simpson *v.* Mirabita (1869), L. R. 4 Q. B. 257.

2966. —— **Verdict subject to award before bankruptcy—Award after.**]—Upon an action on a contract there was a verdict for pltf. at *Nisi Prius*, subject to a reference (before the bkpcy.), by which it was directed that the costs of the action should abide the event of the award, & the award was made in favour of pltf. after the bkpcy. :—*Held :* the costs were provable under the commission.—*Re* FISHER, *Ex p.* HELM (1828), Mont. & M. 70.

Annotations :—**Distd.** Dod *v.* Herring (1829), 3 Sim. 143. **Apld.** *Re* Pickering, *Ex p.* Thornthwaite (1854), 1 Bankr. & Ins. R. 201.

2967. —— **Action referred before bankruptcy—Award after.**]—An action had been referred, the arbitrator to have power to award costs. Before the award was made deft. became bkpt., & his trustee wrote to the arbitrator purporting to revoke the submission. The arbitrator gave pltf. the costs of the arbn. :—*Held :* pltf. was entitled to prove for the costs.—*Re* SMITH, *Ex p.* EDWARDS (1886), 3 Morr. 179, D. C.

Annotation :—**Mentd.** *Re* British Gold Fields of West Africa (1899), 68 L. J. Ch. 412, C. A.

2968. —— **Award before bankruptcy—Costs taxed after.**]—The costs of a suit in Ch. directed to be paid by an award made before the bkpcy. of deft., but which costs were not taxed till after he became bkpt., cannot be proved under the commission, but bkpt. remains liable to be attached for the amount under the award made a rule of ct.—R. *v.* DAVIS (1808), 9 East, 318 ; 103 E. R. 595.

Annotation :—**Refd.** West *v.* Pryce (1825), 10 Moore, C. P. 154.

2969. —— —— —— .]—An action was referred to arbn., & deft. paid a sum awarded against him, but not the costs of the cause, as they had not been taxed. A fiat then issued against him, after which pltf. taxed his costs :—*Held :* the costs were provable under the fiat.—BISHOP *v.* LEIGH (1836), 1 Har. & W. 664.

2970. —— —— **Judgment after.**]—A creditor brought an action against his debtor for the balance alleged to be due upon an account between them. Debtor consented to a verdict for £100,000, subject to a reference, the arbitrator to have authority to order a verdict to be entered for

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either party, with the costs of the suit & of the arbn. The arbitrator, after more than six years, made an award in favour of the creditor for £11,345. After the date of the award, & before judgment was signed, debtor committed an act of bkpcy., & gave notice thereof to the creditor, who afterwards entered up judgment, & subsequently debtor was adjudicated bkpt.:—*Held:* the creditor was entitled to prove for the debt awarded, interest & costs as a liquidated sum, on the ground that the award was more than a verdict rendering such sum provable as a debt, until it could be shown that the award could be set aside at law.—*Re* PICKERING, *Ex p.* HARDING (1854), 5 De G. M. & G. 367; 23 L. J. Bcy. 22; 2 W. R. 386; 43 E. R. 912; *sub nom. Re* PICKERING, *Ex p.* THORNTHWAITE, 1 Bankr. & Ins. R. 201; 18 Jur. 760, L. JJ.

Annotations:—**Distd.** *Re* Williamson, *Ex p.* Todd (1855), 6 De G. M. & G. 744. **Consd.** *Re* Routledge, *Ex p.* Bateman (1855), 25 L. J. Bcy. 19, n. **Distd.** *Re* Weller, *Ex p.* Weller (1867), 17 L. T. 125, L. JJ.

2971. —— Judgment before bankruptcy—Scire facias or writ of error after.]—If A. recovers a judgment against B. before the bkpcy. of B. & revives it by *sci. fa.* after the bkpcy., the costs of the *sci. fa.* relate back to the judgment, & may be proved under the commission. If a writ of error be brought after the bkpcy. to reverse a judgment against bkpt. before, & the judgment be affirmed, the costs of the writ of error refer to the judgment; & in either of such cases bkpt.'s certificate discharges him as to costs as with regard to the judgment.—PHILIPS *v.* BROWN (1795), 6 Term Rep. 282; 101 E. R. 554.

Annotation:—**Apld.** Young *v.* Taylor (1818), 2 Moore, C. P. 326.

2972. —— —— Action on bill—Reference to master to ascertain sum due.]—A bill of exchange was dishonoured by the acceptor, & actions were brought by the holder against the drawer as well as the acceptor. The drawer became bkpt. after judgment signed & a reference to the master to see what was due & to tax costs, & afterwards the acceptor paid the amount due on the bill:—*Held:* the holder could prove for the costs.—*Re* BARWISE, *Ex p.* COCKS (1847), De G. 446; 9 L. T. O. S. 5; 11 Jur. 270, Ct. of R.

2973. —— Judgment after bankruptcy—Cognovit.]—Where deft. gives a *cognovit* for debt & costs as between attorney & client, & before judgment signed he becomes bkpt., his certificate is a bar to pltf.'s claim.—METCALF *v.* WATLING (1834), 2 Dowl. 552.

Annotation:—**Apld.** Bishop *v.* Leigh (1836), 1 Har. & W. 664.

2974. —— —— Agreement to consent to judgment before.]—B. having sued W., an arrangement was come to, by which he should be entitled to sign judgment on a stated day, before which W. executed & registered a composition-deed within 1861 Act. On the stated day B., to whom notice of the deed had been given, signed judgment for the debt & costs:—*Held:* the costs could not have been proved against W.'s estate, if he had been adjudged bkpt. on the day when the deed was registered, &, as under such a deed, the Act put all parties upon the same footing as under a bkpcy., debtor was entitled to the composition upon the debt alone.—*Re* WELLER, *Ex p.* WELLER (1867), 17 L. T. 125; 15 W. R. 1186, L. JJ.

2975. —— Interlocutory costs under order before bankruptcy.]—Interlocutory costs payable under an order of *Nisi Prius* by a deft., previous to his bkpcy., are provable under the fiat.—JACOBS *v.* PHILLIPS (1834), 1 Cr. M. & R. 195; 2 Dowl. 716; 4 Tyr. 652; 3 L. J. Ex. 306; 149 E. R. 1050.

Annotations:—**Apld.** Bishop *v.* Leigh (1836), 1 Har. & W. 664. **Mentd.** Osborne *v.* Williamson (1836), 1 M. & W. 550.

2976. —— Order for payment on named date with liberty to sign judgment on default—Time for payment extended—Bankruptcy during extended time before judgment.]—Pltf., in an action at law, obtained a judge's order for payment of the debt & costs on a particular day, in default of which he was to be at liberty to sign judgment. Deft. not being able to pay the debt at the time specified, pltf. extended the time of payment, before the expiration of which deft. became bkpt., & the costs were not taxed until after his bkpcy:—*Held:* pltf. could prove for the amount of the taxed costs, as well as for the principal sum.—*Re* BOURNE, *Ex p.* FERRIS (1842), 2 Mont. D. & De G. 746; 11 L. J. Bcy. 54; 6 Jur. 1070, Ct. of R.

Annotation:—**Refd.** *Re* Pickering, *Ex p.* Thornthwaite (1854), 1 Bankr. & Ins. R. 201.

2977. —— Unliquidated damages assessed by commissioner.]—Where unliquidated damages are assessed by the comr., under 1861 Act, s. 153, claimant, if successful, must add his costs to the amount of damages obtained, & prove for the whole; if unsuccessful, he must bear his own costs.—*Re* SIKES, *Ex p.* WEISS (1867), 15 W. R. 542, C. A.

2978. —— Recovery in ejectment before—Action for mesne profits after.]—Where after a recovery in ejectment, & before an action of trespass for mesne profits, deft. became a bkpt., & the jury did not include the costs of the ejectment in their verdict in executing a writ of inquiry in the action for mesne profits, the ct. refused to set aside the inquisition, because pltf. might have proved the costs, as a debt, under deft.'s commission of bkpcy.—GULLIVER *v.* DRINKWATER (1788), 2 Term Rep. 261; 100 E. R. 142.

Annotation:—**Consd.** Symonds *v.* Page (1830), 1 Cr. & J. 29.

2979. Proof by successful defendant against bankrupt plantiff—Nonsuit before bankruptcy—Costs taxed after.]—If pltf. becomes a bkpt. after he is non-suited, & before the taxation of costs, the costs of the nonsuit are a debt provable under the commission.—HURST *v.* MEAD (1793), 5 Term Rep. 365; 101 E. R. 204

Annotations:—**Consd.** Watts *v.* Hart (1797), 1 Bos. & P. 134. **N.F.** *Ex p.* Hill (1804), 11 Ves. 646, L. C. **Refd.** Walker *v.* Barnes (1814), 5 Taunt. 778; Young *v.* Taylor (1818), 8 Taunt. 315.

2980. —— —— Judgment of nonsuit after.]—If pltf. becomes bkpt. after a nonsuit at *Nisi Prius*, & before the judgment of nonsuit, the costs of the nonsuit are a debt provable under the commission.—WATTS *v.* HART (1797), 1 Bos. & P. 134; 126 E. R. 820.

Annotations:—**Dbtd.** *Ex p.* Hill (1804), 11 Ves. 646; Walker *v.* Barnes (1814), 5 Taunt. 778. The ct. in *Ex p. Charles* (1811) 14 East, 197 fully considered all the authorities: *Watts* v. *Hart*, etc., & they considered that they overturned those cases, & I cannot but think their decision was a sound one (GIBBS, C.J.). **Consd.** Young *v.* Taylor (1818), 2 Moore, C. P. 326.

2981. —— —— Action for wrongful imprisonment.]—A commission of bkpcy. was sued out against the pltf. in Apr. & superseded on Aug. 2. A second commission was sued out on Aug. 7, on the same act of bkpcy., under which pltf. obtained

2979 i. *Proof by successful defendant against bankrupt plaintiff—Judgment before bankruptcy—What costs provable.*]—Before filing a petition for arrangement with his creditors a trader brought a suit against deft. in which the latter succeeded, with costs. At the second composition meeting in the arrangement deft. applied for payment of the costs in full:—*Held:* the application must be refused.—*Re* ARRANGING DEBTOR (1873), 8 I. L. T. 8.—IR.

his certificate. Pltf. sued defts., comrs. under the first commission, for an alleged wrongful imprisonment, & they entered up judgment of nonsuit against him in July, & afterwards charged him in execution for costs:—*Held:* defts. might have proved their debt under the second commission, & pltf. was entitled to be discharged from it under his certificate.—HOLDING *v.* IMPEY (1823), 1 Bing. 189; 7 Moore, C. P. 614; 130 E. R. 77.

Annotations:—**Consd.** Berry *v.* Irwin (1849), 8 C. B. 532. **Mentd.** *Re* Lloyd, *Ex p.* Lloyd (1864), 11 L. T. 251.

2982. —— Nonsuit after bankruptcy—First day of term before.]—Judgment of nonsuit was signed & execution sued out after a commission of bkpcy., against pltf., but the first day of the term, to which the judgment related, was anterior to the commission:—*Held:* the costs were not a debt provable under the commission, & pltf. was not entitled to set aside the execution.—BROUGH *v.* ADCOCK (1831), 7 Bing. 650; 5 Moo. & P. 678; 9 L. J. O. S. C. P. 230; 131 E. R. 251.

2983. —— Action dismissed after bankruptcy.]—A *feme covert* sued as extrix., & the action being brought before Married Women's Property Act, 1882 (c. 75), came into operation, her husband was joined as co-pltf. After the action was set down but before the trial, the husband filed a liquidation petition, & obtained his discharge thereunder. The action was dismissed with costs:—*Held:* the husband, who had no beneficial interest which could pass to the trustee, having allowed the action, which was a continuing action after his liquidation, to come on for trial, was liable for the costs which were not provable in the liquidation.—VINT *v.* HUDSPITH (1885), 30 Ch. D. 24; 54 L. J. Ch. 844; 52 L. T. 774; 33 W. R. 738, C. A.

Annotations:—**Folld.** *Re* British Gold Fields of West Africa, [1899] 2 Ch. 7, C. A.; *Re* A Debtor (No. 68 of 1911), [1911] 2 K. B. 652, C. A. **Distd.** Hession *v.* Jones, [1914] 2 K. B. 421.

2984. —— Verdict before bankruptcy—Judgment after.]—If pltf., after a verdict found for deft., but before judgment signed, becomes bkpt., the costs are not a debt provable under the commission, & execution for them may issue against him, notwithstanding his certificate.—WALKER *v.* BARNES (1814), 1 Marsh. 346; 5 Taunt. 778; 128 E. R. 898.

Annotations:—**Consd.** Young *v.* Taylor (1818), 8 Taunt. 315; *Re* Ledster, *Ex p.* Birch (1825), 7 Dow. & Ry. K. B. 436; Bire *v.* De Moreau (1827), 5 L. J. O. S. C. P. 61. **Folld.** Haswell *v.* Thorogood (1828), 7 B. & C. 705; *Re* Bedingfield, *Ex p.* Crosse (1841), 5 Jur. 777. **Consd.** *Re* Enefer, *Ex p.* Browning (1867), 16 W. R. 248. **Refd.** Brough *v.* Adcock (1831), 7 Bing. 650.

2985. —— —— ——.]—Verdict for deft. in July. Commission of bkpcy. against pltf. in Aug.; judgment against him, & certificate under the commission, for him, in Michaelmas term ensuing:—*Held:* he was liable to an execution for costs, notwithstanding 6 Geo. 4, c. 16, s. 56.—BIRE *v.* MOREAU (1827), 4 Bing. 57; 12 Moore, C. P. 226; 5 L. J. O. S. C. P. 61; 130 E. R. 689.

Annotations:—**Distd.** Greenway *v.* Fisher (1827), 1 Man. & Ry. K. B. 330. **Apld.** Hankin *v.* Bennett (1852), 8 Exch. 107. **Folld.** Oxlade *v.* N. E. Ry. Co. (1864), 15 C. B. N. S. 695.

2986. —— —— ——.]—Defts.' costs, where although the verdict be given before, the judgment is not obtained until after pltf. has become bkpt., are not provable under such bkpcy.—OXLADE *v.* NORTH EASTERN RY. CO. (1864), 15 C. B. N. S. 695; 33 L. J. C. P. 171; 143 E. R. 957.

Annotation:—**Consd.** Maughan *v.* Vinesberg (1868), 37 L. J. C. P. 210.

2987. —— Cause referred before bankruptcy—Judgment after—Costs taxed after.]—A cause, & all matters of difference, were referred at *Nisi Prius* to an arbitrator, & he found that a sum of money was due from pltf. to deft., & ordered that sum to be paid to the latter. Between the time of making the order of reference & taxing costs, & signing judgment, pltf. became bkpt:—*Held:* the amount of the taxed costs did not constitute a debt provable under the commission, & bkpt. was not discharged as to that debt, by his certificate.—HASWELL *v.* THOROGOOD (1828), 7 B. & C. 705; 108 E. R. 887.

Annotations:—**Folld.** Brough *v.* Adcock (1831), 7 Bing. 650. **Consd.** Metcalf *v.* Watling (1834), 2 Dowl. 552; *Re* Bedingfield, *Ex p.* Crosse (1841), 5 Jur. 777; Taylor *v.* Marling (1841), Drinkwater, 121. **Mentd.** Jacobs *v.* Phillips (1834), 1 Cr. M. & R. 195.

2988. —— —— Award before bankruptcy—Costs taxed after.]—A. brought an action for libel against B., who pleaded not guilty, & justification, & upon the matters at issue being referred to arbn., the arbitrator directed a verdict for A. on the first plea of not guilty, but he directed a verdict for B. upon the other pleas of justification. The arbitrator also directed payment by A. of B.'s costs of the reference & of the award. A. then became insolvent, but at the date of the petition B.'s costs were not taxed:—*Held:* the costs due, although the amount was unascertained, constituted a debt due by A. & might be retained in the schedule, upon the principle *certum est quod certum reddi potest.*—*Re* DAVIES (1856), 26 L. T. O. S. 247.

2989. —— Verdict & judgment after bankruptcy.]—On Dec. 18, a receiving order was made against debtor, & on Dec. 20, verdict & judgment for the defts. was given in an action previously brought by debtor. A proof for the costs in the action having been tendered by defts. against the estate:—*Held:* the debt was not provable in the bkpcy.—*Re* BLUCK, *Ex p.* BLUCK (1887), 56 L. J. Q. B. 607; 57 L. T. 419; 35 W. R. 720; 4 Morr. 273

Annotations:—**Consd.** *Re* British Gold Fields of West Africa, [1899] 2 Ch. 7, C. A. **Distd.** *Re* Benoist, [1909] 2 K. B. 784. **Consd.** *Re* A Debtor (No. 68 of 1911), [1911] 2 K. B. 652, C. A.

2990. —— Judgment after bankruptcy—Relation back to first day of term.]—Costs recovered by deft. against unsuccessful pltf., when taxed, become a debt, relating back to the first day of the term, on which judgment is signed.—BOYER *v.* —— (1826), 5 L. J. O. S. K. B. 71.

2991. —— Action abandoned on bankruptcy—What costs provable.]—C., having instituted a suit in the Ecclesiastical Ct. against his wife for a divorce, upon the ground of adultery, subsequently became bkpt., & abandoned the suit:—*Held:* (1) the costs incurred up to the bkpcy. by the wife's proctor constituted a debt provable on C.'s separate estate; (2) the costs of a commission for examining witnesses, which was issued before, but not returned until after, the bkpcy. should in the circumstances, be allowed in full.—*Re* WESTROP & COCKSEDGE, *Ex p.* MOORE (1845), De G. 173; 4 Notes of Cases, Supp. i; 14 L. J. Bcy. 19; 5 L. T. O. S. 313; 9 Jur. 604, Ct. of R.

2992. —— Judgment before composition agreement—Costs not taxed—Proof for estimated amount.]—A claim for costs is a provable debt under 1869 Act, s. 31, although the costs have not been taxed at the date of the adjudication.

Debtor, who made a composition with his creditors under s. 126, was liable to a creditor for payment of untaxed costs in an action at law, & debtor inserted them in his statement at an estimated amount. The costs were not taxed at the time appointed for payment of the composition, & debtor did not tender the composition to the creditor. The creditor then signed judgment & had the costs taxed, & levied execution against the

Sect. 4.—*What debts are provable and for what amount: Sub-sects.* 6, 7 & 8. *Sect.* 5.]

goods of debtor for the whole amount. Debtor applied for an injunction to restrain the creditor :—*Held :* debtor ought to have paid the composition on the estimated amount of the debt, & the creditor was entitled to proceed with his execution notwithstanding the composition.—*Re* DUFFIELD, *Ex p.* PEACOCK (1873), 8 Ch. App. 682 ; 42 L. J. Bcy. 78 ; 28 L. T. 830 ; 21 W. R. 755, L. JJ.

Annotations :—**Distd.** *Re* Newman, *Ex p.* Brooke (1876), 3 Ch. D. 494, C. A. **Consd.** Breslauer *v.* Brown (1878), 3 App. Cas. 672, H. L. ; *Re* British Gold Fields of West Africa, [1899] 2 Ch. 7, C. A. **Mentd.** *Re* Harper, *Ex p.* King (1873), L. R. 17 Eq. 336, n. ; Campbell *v.* Im Thurn (1876), 1 C. P. D. 267 : *Re* Bestwick, *Ex p.* Hodgtunson (1876), 34 L. T. 73 ; Melhado *v.* Watson (1877), 2 C. P. D. 281 ; Tea Co. *v.* Jones (1880), 43 L. T. 255 ; Vint *v.* Hudspith (1885), 33 W. R. 738, C. A. ; *Re* Bluck, *Ex p.* Bluck (1887), 4 Morr. 273 ; *Re* A Debtor (No. 68 of 1911), [1911] 2 K. B. 652, C. A.

2993. —— Costs of first trial to abide result of new trial—Bankruptcy & annulment between trials.]—An order for a new trial provided that the costs of the first trial should abide the event of the new trial. Pltf. in the action subsequently became bkpt., but the bkpcy. was annulled before the new trial took place. The new trial resulted in favour of deft., & pltf. was ordered to pay the costs of the first trial, which had been taxed, & the costs of the second trial to be taxed. Deft. served on pltf. a bkpcy. notice in respect of the costs of the first trial. Pltf. impeached the validity of the bkpcy. notice on the ground that it related to a debt provable in the late bkpcy. :—*Held :* at the date of the annulled bkpcy. pltf. was not subject to a contingent liability to pay costs by reason of any obligation incurred before the date of the bkpcy., & the objection to the bkpcy. notice failed.—*Re* A DEBTOR (No. 68 of 1911), [1911] 2 K. B. 652 ; 80 L. J. K. B. 1224 ; 104 L. T. 905 ; 18 Mans. 311, C. A.

Annotation :—**Mentd.** *Re* Pincus, *Re* Hutchinson (1911), 56 Sol. Jo. 36, C. A.

2994. Proof by successful respondent against bankrupt appellant—Judgment in lower court before bankruptcy—Appeal dismissed after discharge.]—Judgment was given against petitioners in 1860, & they were condemned to pay the costs of the suit. They appealed against the judgment, & in 1861 one of them obtained a discharge in the Ct. of Bkpcy. from all his outstanding liabilities, under 7 & 8 Vict. c. 70, s. 5. In 1869 the appeal was dismissed, & in 1870 an order was made on petitioner to pay the costs of the original suit. On motion by petitioner to rescind the order :—*Held :* as the appeal was still pending in 1861, the debt did not exist until the order was made in 1870, & was not discharged by bkpt.—SHEDDEN & SHEDDEN *v.* A.-G. (1870), 23 L. T. 282 ; 18 W. R. 1006.

2995. Costs of execution.]—The expenses of an execution cannot be proved as a debt due from a bkpt. estate.—*Re* LIGHTFOOT (1851), 18 L. T. O. S. 54.

See, also. No. 1136, *ante.*

SUB-SECT. 7.—OTHER CASES.

2996. Vested legacy.]—*Held :* a legacy to A. payable at twenty-one or marriage with interest, was a vested legacy, &, the exor. having become bkpt., might have been proved under the commission, & his certificate was a bar, & the residuary legatees were not liable.—WALCOTT *v.* HALL (1788), 2 Bro. C. C. 305 ; 29 E. R. 167.

Annotations :—**Folld.** *Re* Makin, *Ex p.* Holt (1835), 5 L. J. Bcy. 9, Ct. of R. **Refd.** *Re* Fenwick, *Ex p.* Brown (1849), 13 L. T. O. S. 468 ; **Mentd.** Davies *v.* Fisher (1842), 5 Beav. 201.

2997. Money in hands of overseer.]—Money in the hands of an overseer of the poor, in respect of his office, at the date of his bkpcy., is a debt provable under the commission.—R. *v.* TUCKER (1816), 2 Chit. 286 ; 5 M. & S. 508 ; 105 E. R. 1137.

Annotation :—**Refd.** R. *v.* Master (1869), L. R. 4 Q. B. 285.

2998. ——.]—An auditor on Apr. 14 certified a balance to be due from the late overseer of a parish, & on May 5, laid an information against him for the non-payment. At the hearing on May 18, the overseer proved an order of discharge dated May 11, on an adjudication of bkpcy., dated Jan. 4, & relied on it as a bar to the proceedings :—*Held :* the balance was a debt only, & the debt being provable under the bkpcy. & barred by the order of discharge, no proceedings could be taken to enforce it.—R. *v.* MASTER (1869), L. R. 4 Q. B. 285 ; 10 B. & S. 42 ; 38 L. J. M. C. 73 ; *sub nom.* R. *v.* MARTIN, ETC. GLOUCESTER JJ., *Re* JAMES, 19 L. T. 733.

Annotations :—**Refd.** Marginson *v.* Tildsley (1903), 67 J. P. 226. **Mentd.** R. *v.* Kerswill, [1895] 1 Q. B. 1 ; Seaman *v.* Burley, [1896] 2 Q. B. 344, C. A.

2999. Debt included in schedule in previous insolvency.]—A creditor whose debt is inserted by his debtor in his schedule on his passing the Insolvent Debtors Ct., may prove that debt under a subsequent fiat in bkpcy. issued against his debtor.—*Re* BENDER, *Ex p.* FENWICK (1836), 2 Mont. & A. 681 ; 5 L. J. Bcy. 46, Ct. of R.

3000. ——.]—A debt set forth in the schedule of a person who has obtained his discharge in the Insolvent Ct., & afterwards became bkpt., may be proved under the fiat.—*Re* EMMINGS (1849), 14 L. T. O. S. 208.

3001. Poor rate.]—A person, from whom a poor rate was payable, became bkpt., & obtained his certificate. The overseers afterwards applied to justices to enforce the payment by distress, who refused to grant such warrant. On an application for a rule to compel them to do so :—*Held :* the claim was provable under the fiat, & as bkpt. had obtained his certificate, the amount could not be levied upon his goods.—R. *v.* WETHERELL &

PART VIII. SECT. 4, SUB-SECT. 7.

r. *Admission of assets by executor—Assets provable.*]—Where an extrix. marries, & she & her husband admit assets, in answer to a bill filed against them, the assets become a debt of the husband, in respect of this admission, & may be proved under a commission of bkpcy. issued against him.—*Re* M'WILLIAMS (1803), 1 Sch. & Lef. 169.—**IR.**

s. *Person entitled to statutory penalty—Diamond Trade Act,* 1882.]—The person in whose favour the penalty under Diamond Trade Act, 1882, has been imposed is entitled to prove the amount of the fine in competition with the other creditors of the insolvent.—CONTAT *v.* CONTAT'S TRUSTEE (1893), 10 S. C. 314 ; 3 C. T. R. 416.—**S. AF.**

w. *Preferential payment—Recovery from creditor—Revival of debt.*]—Where the official assignee of an insolvent recovers a preferential payment from a creditor of the insolvent the creditor's debt is thereby revived & will be admitted to proof on the estate under Insolvency Stat., 1871 (No. 379).—*Re* WALKER, *Ex p.* WOOD & SON (1872), 3 V. R. 16.—**AUS.**

y. *Debt payable by instalments—Under terms of will.*]—Under their father's will, two of his sons were to receive a share of the proceeds of certain land to be sold on the death of his widow, who was still alive. They also owed testator a debt, which, by the will, was to be payable in five yearly instalments from the time of his death. About two years subsequent thereto the sons made an assignment for the benefit of their creditors under R. S. O. 1887, c. 124 :—*Held :* the effect of the assignment was to accelerate payment of the debt due to the estate.—TILLIE *v.* SPRINGER (1892), 21 O. R. 585.—**CAN.**

COURTHORPE, SUSSEX JJ. (1850), 4 New Mag. Cas. 45; 14 L. T. O. S. 402.

3002. ——.]—A sum assessed by way of poor rate is "a claim or demand" provable under a commission of bkpcy., under 5 & 6 Vict. c. 122, & a certificate under that Act is a bar to any subsequent proceedings under Poor Relief Act, 1601 (c. 2), to levy the amount by distress & sale of bkpt.'s goods.—*Ex p.* BURWASH (CHURCHWARDENS) (1850), 1 L. M. & P. 60.

3003. Goods lost by true owner—Under reputed ownership clause.]—A real owner, who loses his goods by virtue of the reputed ownership clause, is entitled to prove for their value in the bkpcy.—*Re* BUTTON, *Ex p.* HAVISIDE, [1907] 2 K. B. 180; 76 L. J. K. B. 833; 97 L. T. 71; 23 T. L. R. 422; 51 Sol. Jo. 373; 14 Mans. 180, C. A.

Counsel's fees—In hands of bankrupt solicitor.]—*See* BARRISTERS, Vol. III., p. 333.

SUB-SECT. 8.—WHAT IS A GOOD PETITIONING CREDITOR'S DEBT.—*See* Part III., *ante*.

SECT. 5.—TIME FOR PROOF AND EFFECT OF DELAY.

See, also, Sect. 12, *post*.

3004. Accidental omission to prove at final dividend.]—If a creditor through accident omits to prove at the final dividend, he may be permitted to prove, without disturbing any payment made by the assignees, & placing the creditors not paid in the same situation as if he had originally proved.—*Re* FENTON, *Ex p.* DAY (1831), Mont. 212, L.C.

Annotation:—**Folld.** *Re* Holland, *Ex p.* Dilworth (1842), 3 Mont. D. & De G. 63, Ct. of R.

See 1914 Act, s. 65.

3005. ——.]—Where a creditor, through inadvertence, omits to prove at the final dividend meeting, the ct. will allow him to call a fresh meeting for that purpose, at his own costs, & will rescind the former dividend, so, however, as not to disturb any payments made to the creditors who have already received it.—*Re* HOLLAND, *Ex p.* DILWORTH (1842), 3 Mont. D. & De G. 63; 7 Jur. 95, Ct. of R.

3006. Omission to prove caused by failure of assignee to report progress.]—A creditor delayed proving her debt until after a dividend had been declared, having relied upon the promise of the assignee to inform her of the progress of the commission, which he failed to do:—*Held:* the creditor might prove her debt within a month, & payment of the dividend should be, in the meantime, suspended.—*Re* HIRST, *Ex p.* COLTON (1833), 3 Deac. & Ch. 194, Ct. of R.

3007. Omission to prove through solicitor forgetting day.]—Where a creditor sent up the proper documents to prove his debt at a dividend meeting, & his solr. forgot the day, another meeting was appointed at his expense to enable him to prove his debt, the payment of the dividend being ordered to be stayed meantime, & to be calculated afresh, in case he substantiated his proof.—*Re* GRAHAM & TATE (1833), 2 Deac. & Ch. 554, Ct. of R.

3008. Omission to prove through being misled as to composition.]—Where a creditor delayed proving his debt, in consequence of having been misled by an intended composition of bkpt. with his creditors, the ct. allowed him to call a meeting to establish his proof, &, in the meantime, stayed the payment of a dividend.—*Re* MEYER, *Ex p.* HUNT (1837), 2 Deac. 213; 6 L. J. Bcy. 51, Ct. of R.

3009. Omission to prove until after payment of dividend.]—Where a creditor has omitted to prove his debt, until after a dividend has been declared & is in course of payment, the ct. will not permit him to prove, so as to interfere with the amount of the dividend payable on the proof of the other creditors.—*Re* M'CHEANE, *Ex p.* M'CHEANE (1840), 1 Mont. D. & De G. 329, Ct. of R.

3010. Omission to prove through other business in court & subsequent insolvency.]—Where a creditor of the bkpcy. after attending to prove, & being prevented from doing so by the other business in ct., became insolvent, & the title of his assignee was not complete in time to enable the assignee to prove:—*Held:* he must pay the costs of his petition to stay the dividend, & of the requisite sitting to receive his proof, & retain them out of insolvent's estate.—*Re* OSBORNE, *Ex p.* HUGHES (1847), De G. 387.

3011. Omission to prove until after close of bankruptcy—Bankrupt becoming entitled to further property.]—After the close on Dec. 1, 1874, of a bkpcy., debtor, who had been made bkpt., became entitled, under the will of a testatrix who died in 1875, & under a decree dated Jan. 8, 1878, in a suit for the administration of her estate, to property amounting to about £20,000. During the three years which elapsed after the close of the bkpcy., debtor did not pay 10*s.* in the pound, & he had not obtained an order of discharge. On Feb. 26, 1878, a creditor, whose name & debt appeared in bkpt.'s statement of affairs, but who had not proved before the close of the bkpcy., sent in a proof for his debt to the registrar, who had become the trustee:—*Held:*—the proof was good, & the creditor, notwithstanding his debt was not proved before the close of the bkpcy., was entitled to apply for leave to enforce payment of his debt as a judgment debt against the property of debtor, under 1869 Act, s. 54 (2).—*Re* WESTBY, *Ex p.* LANCASTER BANKING CORPN. (1879), 10 Ch. D. 776; 48 L. J. Bcy. 89; 39 L. T. 673; 27 W. R. 292.

Annotations:—**Consd.** *Re* Gosling, *Ex p.* Pitt (1882), 20 Ch. D. 308, C. A.; *Re* Smith, Green *v.* Smith (1883), 24 Ch. D. 672.

3012. Omission to prove before estate administered & trustee released—Proof of unliquidated damages.]—*Semble:* a creditor who, with full knowledge of his rights, neglects to assert them, until after the estate has been fully administered

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PART VIII. SECT. 5.

a. *Unavoidable delay in filing—Exercise of discretion to admit.*]—The presiding officer refused to allow proof of appct.'s claims, amounting to £17,000, on the ground that they had been filed only twenty-two instead of twenty-four hours, before the first meeting, as required by Act 32 of 1916, s. 42. The delay arose in circumstances which gave him a discretion to allow the claim. Resp. was elected trustee by vote of the only creditor for £700, who proved his claim:—*Held:* resp.'s election as trustee should be set aside, & a new meeting of creditors called to prove their claims & elect a trustee.—GRAAFF-REINET BOARD OF EXECUTORS *v.* THE MAGISTRATE, PEARSTON & TAUTE (1917), C. P. D. 332.—**S. AF.**

b. *Application out of time—How made.*]—Applications being made to lodge proofs of debt after sitting for proof of debt:—*Held:* appcts. must issue a summons & take out a sitting.—*Re* CORMACK (1871), 5 I. L. T. 67.—**IR.**

c. *Further evidence—Time limit not required.*]—*Held:* an order for further evidence did not require to have a time limit attached to it.—CAMPBELL *v.* HOWDEN (1909), 2 S. L. T. 209.—**SCOT.**

d. *Proof against separate estate—After proof against joint estate—Right to dividend.*]—In the bkpcy. of a firm a creditor proved against the joint estate for the whole amount due, but afterwards made two amended proofs for part of the amount against the joint estate, & the remainder against the separate estate of one of the partners in the firm. A dividend in the latter estate had then been declared & partly paid:—*Held:* the creditor making the amended proof against the separate estate was entitled to a dividend only out of the funds remaining in the hands of the official assignee after payment of the dividend already declared.—*Re* ROBINS & DAY *Ex p.* GALLAGHER (1884), 3 N. Z. L. R. 93.—**N.Z.**

Sect. 5.—Time for proof and effect of delay. Sect. 6: Sub-sects. 1 & 2. Sect. 7: Sub-sect. 1.]

& the trustee released, comes too late to prove for unliquidated damages & claim a dividend thereon. —*Re* GILL, *Ex p.* BARNARD (1882), 46 L. T. 824.

3013. Laches.]—When the omission to prove a debt proceeds from a creditor's own laches, the ct. will not order a dividend to be stayed until his petition to prove can be heard.—*Re* SMITH, *Ex p.* BREES (1833), 3 Deac. & Ch. 283, Ct. of R.

3014. ——.]—S. became bkpt. on July 8, 1835, & B. became bkpt. on Oct. 8, 1835, & on Apr. 2, 1837, a dividend of 2*s.* 6*d.* in the pound was declared in B.'s bkpcy. The result of a long investigation into the accounts between S. & B., which was completed in May 1837, was, that B.'s estate was indebted to S.'s in the sum of £8,000. A petition by assignees of S. that the dividend of 2*s.* 6*d.* might be rescinded, & that they might be allowed to prove on the £8,000, was refused, on the ground of laches.—*Re* BOUTLAND, *Ex p.* TODD (1837), 2 Deac. 416; 1 Jur. 434, Ct. of R.

3015. ——.]—A party delaying to prove, & not giving satisfactory reason for the delay, cannot stay the certificate in order to prove.—*Re* YOUNG, *Ex p.* HELLINGS (1837), 3 Mont. & A. 147; 6 L. J. Bcy. 27, Ct. of R.

3016. —— Assignee proving on behalf of many creditors.]—Assignees of one bkpt. applying to prove against the estate of another are not bound by the same laches as might bind a mere individual creditor.

As the parties come here as assignees, for the benefit of a large body of creditors, we are bound to entertain the application (ERSKINE C.J.).—*Re* MARSH, *Ex p.* SMITH (1832), 1 Deac. & Ch. 267, Ct. of R.

3017. Effect of delay—Application of Statute of Limitations.]—Creditors sought to prove in 1824, upon promissory notes dated May, 1810, payable four months after date, under a commission dated July, 1810:—*Held:* they were entitled to prove, as the effect of the commission was to vest the property in the assignees, as trustees, for the creditors, & unless debts were barred by Stat. Limitations when the trust was created, they were not afterwards affected by lapse of time.—*Re* COLES, *Ex p.* ROSS (1827), 2 Gl. & J. 330, L. C.

Annotations:—**Refd.** *Re* Cullwick, [1918] 1 K. B. 646. **Mentd.** *Re* Benzon, Bower *v.* Chetwynd, [1914] 2 Ch. 68, C. A.

See, also, No. 4369, *post.*

SECT. 6.—MODE OF PROOF.

SUB-SECT. 1.—THE AFFIDAVIT.

3018. What must be stated in—Consideration.]—An affidavit in support of a deposition of proof on a bill must state the consideration.—*Re* YOUNG, *Ex p.* MABERLEY (1834), 2 Mont. & A. 23, Ct. of R.

3019. —— Proof by public officer of bank.]—Proof of debt by the public officer of a banking co. must aver that he is authorised to make the proof.—*Re* DOBBS, *Ex p.* COUNTY OF GLOUCESTER BANK (1866), 15 L. T. 53.

3020. —— Proof by manager of company.]—The affidavit of the manager of a co. filed in support of a debtor's summons served on a trader in respect of two overdue bills of exchange, described himself as the registered public officer of the co., & stated that he had authority to affirm that the debt was due to the co., but did not state that he had authority to sue on behalf of the co. Debtor objected that the affidavit was insufficient, & that the debt ought to be proved with the same particularity as in an action at law on the bills:—*Held:* as all the requirements of 1870 Rules had been complied with, & debtor had not been misled, the debt was sufficiently proved.—*Re* LOWENTHAL, *Ex p.* LOWENTHAL (1874), 9 Ch. App. 324; 43 L. J. Bcy. 132; 30 L. T. 282; 22 W. R. 459, L. C. & L. J.

Annotations:—**Mentd.** *Re* Latham, *Ex p.* Latham (1876), 4 Ch. D. 105; Blaiberg *v.* Parke (1882), 10 Q. B. D. 90.

3021. —— Proof by married woman against husband.]—When a married woman seeks to prove under her husband's bkpcy. for money lent by her to him, she must show that the money was not lent for the purposes of his trade or business; & if she fails to do so, she cannot prove or vote until all the other creditors have been paid 20*s.* in the pound.—*Re* GENESE, *Ex p.* DISTRICT BANK OF LONDON (1885), 16 Q. B. D. 700; 55 L. J. Q. B. 118; 34 W. R. 79; 2 Morr. 283.

Annotations:—**Consd.** *Re* May, Crawford *v.* May (1890), 45 Ch. D. 499. **Apprvd.** *Re* Leng, Tarn *v.* Emmerson, [1895] 1 Ch. 652, C. A. **Distd.** *Re* Cronmire, *Ex p.* Cronmire, [1901] 1 K. B. 480, C. A.

3022. Signature of—By liquidator of company without qualification.]—The liquidator of a limited co. in voluntary liquidation in his affidavit of proof in bkpcy. described himself as "the liquidator" of the co., & at the foot of the affidavit there was a proxy in this form: "I appoint T. & D. jointly & severally my proxy," which was signed by the liquidator in his own name, without adding any description or stating that he acted in the name & on behalf of the co.:—*Held:* the description of the liquidator was sufficient, & the proxy good.—*Re* POOLEY, *Ex p.* TAYLOR (1877), 36 L. T. 679; 25 W. R. 641, C. A.

3023. Who must join in—Proof by assignee of bankrupt creditor.]—Where a creditor becomes bkpt., he must join with his assignee in the affidavit in proof of the debt. The affidavit of the assignee, alone, is not sufficient.—*Re* AMNER, *Ex p.* ROBSON (1841), 2 Mont. D. & De G. 65, Ct. of R.

PART VIII. SECT. 6, SUB-SECT. 1.

3018 i. *What must be stated in—Primâ facie evidence of debt.*]—The duty of the presiding officer under Act 32 of 1916, s. 42, is a judicial one; he must see that *primâ facie* proper proof is produced; he must examine the proof of debts carefully & decide whether they should be admitted or not.—ASPELING *v.* HOFFMAN'S TRUSTEE (1917), T. P. D. 305.—**S. AF.**

3018 ii. —— ——.]—A creditor's proof of debt against an insolvent's estate is complete when he delivers or sends through the general post-office to the assignee or trustee, as the case may be, the affidavit or declaration required by Insolvency Act, 1890, s. 106, containing a full & complete statement of account between himself & the insolvent, & that the debt thereby appearing is justly due from the estate to him.—*Re* BENNESS (1890), 16 V. L. R. 691.—**AUS.**

3018 iii. —— *Account subscribed to & referred to in affidavit.*]—Where the deduction of the interest of bills falling due after sequestration was made in a subscribed account on the same sheet with the affidavit & referred to therein:—*Held:* a sufficient compliance with the requirement of the bkpcy. stat., that such deduction should be made in the oath.—CULLEN *v.* M'FARLANE (1842), 4 Dunl. (Ct. of Sess.) 1522.—**SCOT.**

3018 iv. —— *Debtor carrying on two businesses—Creditor of one business only.*]—Where a single individual carried on business at two places under different co. firms, & separate sequestrations of the two firms were awarded:—*Held:* as there was but one estate to be disposed of in both sequestrations, the affidavit of a creditor lodged in one of the sequestrations, describing bkpt. carrying on business under the two firms as indebted to him, was in proper form.—CULLEN *v.* M'FARLANE (1842), 4 Dunl. (Ct. of Sess.) 1522. —**SCOT.**

3022 i. *Signature of vouchers—As relative to affidavit.*]—*Held:* it was not necessary for claimants in a sequestration to subscribe their vouchers as relative to the affidavit.—CULLEN *v.* M'FARLANE (1842), 4 Dunl. (Ct. of Sess.) 1522.—**SCOT.**

3024 i. *Before whom sworn—English commissioner.*]—A proof sworn in England before a comr. for taking affidavits for the English Ct. of Ch. may be used in a case in the Irish ct. —*Re* M'DONALD (1875), 9 I. L. T. 175.—**IR.**

3024. Before whom sworn—Scottish creditor.]—*Held:* a creditor in Scotland was within 5 Geo. 2, c. 30, s. 26, as to the mode of proving debts under a commission of bkpcy. by creditors in "foreign parts," & might make affidavit of his debt before a magistrate in Scotland.—*Ex p.* MACDOUGALL (1788), 2 Cox, Eq. Cas. 8; 30 E. R. 4, L. C.

3025. —— Creditor sworn abroad—Notarial verification.]—*Held:* an affidavit to prove a foreign debt, sworn abroad by a creditor before a British consul or vice-consul, must, under 6 Geo. 4, c. 16, s. 46, be verified by a notary.—*Re* MAIDEN, *Ex p.* MOENS (1829), Mont. 15.

3026. —— —— ——.]—When an affidavit or proof in bkpcy. is sworn abroad before a British consul, or vice-consul, the ct. will take judicial notice of his seal & signature, & a notarial certificate in verification of the signature & qualification of the consul, or vice-consul, is not required. The notarial certificate is only required when such an affidavit or proof is sworn before a foreign functionary.—*Re* MAGEE, *Ex p.* MAGEE (1885), 15 Q. B. D. 332; 54 L. J. Q. B. 394; 33 W. R. 655.

See 1914 Act, s. 140.

3027. Whether fresh deposition necessary—Objection to proofs made under proceedings in arrangement.]—Where a creditor objects to the admission in bkpcy. of proofs of debt made under proceedings in arrangement, it is necessary to produce fresh proofs; & the ct. will, for that purpose, adjourn a meeting for choice of assignees. —*Re* WILLIAMS (1861), 4 L. T. 343; 9 W. R. 561.

3028. —— Proofs made under liquidation proceedings.]—At the first meeting held under a petition for liquidation pursuant to 1869 Act, s. 125, the creditors resolved upon a bkpcy., & a petition for adjudication was presented:—*Held:* the affidavits of debt made by the creditors under the petition for liquidation need not be resworn for the purposes of proofs under the bkpcy., but the proper course was to transfer the proceedings under the petition for liquidation to the petition for adjudication, whereby all the proceedings would be consolidated.—*Re* GOODBEHERE & GAINE, *Ex p.* HOPKINS (1870), 22 L. T. 450.

3029. —— ——.]—A bkpcy. had been resorted to by the creditors to obtain redress after having been defeated by the delays of the liquidation. On an application to require further proof of certain debts:—*Held:* when the ct. had already been satisfied, they could dispense with further formal proof.—*Re* MCHENRY, *Ex p.* NEW YORK, LAKE ERIE & GREAT WESTERN RY. CO. (1886), 35 W. R. 20; 2 T. L. R. 801, C. A.

SUB-SECT. 2.—WHAT MUST BE PRODUCED.

3030. By attorney for bill of costs—Signed bill.]—An attorney may prove his bill under a commission of bkpcy., without delivering a signed bill.—EICKE *v.* NOKES (1829), Mood. & M. 303.

Annotations:—**Refd.** Brown *v.* Tibbits (1862), 11 C. B. N. S. 855. **Mentd.** Egginton *v.* Cumberledge (1847), 1 Exch. 271; Dwyer *v.* Collins (1852), 7 Exch. 639.

3031. By creditor abandoning execution & proving on contract debt—Office copy judgment.]—A judgment & execution creditor, who abandons his judgment & execution, claiming only to prove as for a simple contract debt, need not produce, for the purposes of proof, the office copy of the judgment.—*Re* WATERS, *Ex p.* SPILLER (1841), 2 Mont. D. & De G. 43; 5 Jur. 659, Ct. of R.

3032. In proof for costs in divorce suit—Order for payment.]—In proving for costs ordered to be paid in a divorce suit, the order for payment must be set out in the proof or exhibited.—*Re* MALLETT, *Ex p.* COLLARD (1864), 10 L. T. 792.

3033. In proof on bill—Bill proved on.]—Where a creditor of a bkpt. tenders proof of a debt due to him on bills of exchange, the bills must, unless there be some special reason to the contrary, be produced before the proof can be admitted.—*Re* CARTER, *Ex p.* JACOBS (1874), L. R. 17 Eq. 575; 43 L. J. Bcy. 46; 30 L. T. 133; 22 W. R. 439.

Proof on lost bill.]—*See* Nos. 2743, 2744, *ante*.

SECT. 7.—**WHAT EVIDENCE SUFFICIENT TO SUPPORT PROOF.**

SUB-SECT. 1.—VERDICTS, JUDGMENTS AND AWARDS.

3034. Verdict primâ facie evidence only—May be impeached.]—A verdict is only *primâ facie* evidence of a debt, which the creditors or bkpt. are at liberty to impeach, & into the circumstances of which, if impeached, the comrs. are bound to inquire.—*Re* DINGLE, *Ex p.* BUTTERFILL, *Ex p.* RASHLEIGH (1811), 1 Rose, 192, L. C.

Annotations:—**Apld.** *Re* Ridsdale, *Ex p.* Marson (1837), 2 Deac. 245, Ct. of R. **Consd.** *Re* Pickering, *Ex p.* Harding (1854), 5 De G. M. & G. 367, L. JJ. **Mentd.** *Re* Pickering, *Ex p.* Thornthwaite (1854), 1 Bankr. & Ins. R. 201; *Re* Harrison, *Ex p.* Crowther (1871), 24 L. T. 330.

3035. Whether judgment conclusive—Power of court to inquire.]—Where a judgment creditor is attempting to prove in bkpcy.:—*Semble:* the comrs. may inquire into the consideration of the judgment debt.—*Re* RIDSDALE, *Ex p.* MARSON (1838), 3 Deac. 79; 3 Mont. & A. 444, Ct. of R.

Annotation:—**Refd.** *Re* Hawkins, *Ex p.* Troup (1895), 1 Q. B. 404, C. A.

3036. —— ——.]—Any creditor, who alleges that another creditor has proved upon a judgment for more than was due to him, has a right to an inquiry as to the amount really due. A judgment,

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3027 i. *Whether fresh deposition necessary—Proof of debt missing from file.*]—Where it appears that a creditor of a bkpt. has proved his debt, & that his deposition is lost off the file of the proceedings, he will be allowed to put another proof on the file.—*Ex p.* DEEY (1828), 2 Mol. 142; 2 Ir. L. Rec. 1st ser. 41.—**IR.**

PART VIII. SECT. 7, SUB-SECT. 1.

3035 i. *Whether judgment conclusive—Power of court to inquire.*]—The consideration for the judgment is always subject to investigation.—*Re* JENNINGS (1851), 1 I. Ch. R. 236.—**IR.**

3035 ii. —— —— *On debtor's summons.*]—Y., obtained judgment against M. for the price of a horse. M. had pleaded infancy in his defence, but had withdrawn the plea at the trial, & fought the case on other grounds. Y. issued a debtor's summons for the amount of the judgment & costs. The judge in bkpcy., being of opinion that the horse was not a necessary, dismissed the summons:—*Held:* the Ct. of Bkpcy. had power to go behind the judgment, & inquire into the consideration; & there being evidence before the judge entitling him to find as he did, he was right in dismissing the summons.—*Re* MEAD, [1916] 2 I. R. 285.—**IR.**

3035 iii. —— —— *Defence of infancy raised after voluntary sequestration.*]—In 1883 the estate of A., an infant, was voluntarily sequestrated. The only debts proved against the estate was a judgment debt & costs in an action for money had & received, in which A. did not raise the defence of infancy. In 1901 A. applied for a certificate of discharge:—*Held:* the Ct. of Insolvency ought not to go behind the original judgment.—*Re* CAULFIELD (1901), 27 V. L. R. 588.—**AUS.**

3035 iv. —— —— *Judgment by confession.*]—Where a creditor's petition in bkpcy. is founded on a judgment by confession, evidence will be admitted to impeach the *bonâ fides* of petitioning creditor in obtaining such judgment, & to show that in fact the money is not owing.—*Re* SCOTT (1884), 2 N. Z. L. R. 287.—**N.Z.**

3035 v. —— —— *Action pending by judgment debtor against creditor.*]—Where a judgment debtor has commenced an action against his creditor, & sets this up as a bar against an order being granted for his adjudication as a bkpt., the ct. will take cognisance of the subject-matter of the action by which the judgment debt was incurred, & if it be found that the result of the pending action cannot affect the judgment already delivered, the order will be made.—*Re* HUMPHREYS (1890), 8 N. Z. L. R. 421.—**N.Z.**

Sect. 7.—What evidence sufficient to support proof: Sub-sect. 1.]

in bkpcy., is not conclusive evidence of a debt.—*Re* PRESCOTT, *Ex p.* PRESCOTT (1840), 1 Mont. D. & De G. 199; 4 Jur. 852, Ct. of R.

Annotation :—**Refd.** *Re* Lennox, *Ex p.* Lennox (1885), 16 Q. B. D. 315, C. A.

3037. —— ——.]—The Ct. of Bkpcy. is not conclusively bound by a judgment for a debt, but has power, on a claim to prove the debt in the bkpcy. of the judgment debtor, to inquire into the consideration for the debt :—*Qu. :* whether it will do so unless a *primâ facie* case of suspicion is shown.—*Re* TOLLEMACHE, *Ex p.* REVELL (1884), 13 Q. B. D. 720; 54 L. J. Q. B. 89; 51 L. T. 376; 33 W. R. 288, C. A.; *subsequent proceedings, sub nom. Re* TOLLEMACHE, *Ex p.* EDWARDS (1884), 14 Q. B. D. 415, C. A.

Annotation :—**Mentd.** *Re* Tollemache, *Ex p.* Anderson (1885), 14 Q. B. D. 606, C. A.

3038. —— ——.]—Upon the hearing of a creditor's petition for a receiving order against a judgment debtor, the Ct. of Bkpcy. has power, at the instance of debtor himself, to go behind the judgment & to inquire into the validity of the debt, even though debtor has previously applied in the action to set aside the judgment, & his application has been refused, & the refusal affirmed by the Ct. of Appeal.—*Re* FRASER, *Ex p.* CENTRAL BANK OF LONDON, [1892] 2 Q. B. 633; 67 L. T. 401; 36 Sol. Jo. 714; 9 Morr. 256, C. A.

Annotation :—**Consd.** *Re* A Debtor, *Ex p.* Petitioning Creditor, [1917] 2 K. B. 60, C. A.

3039. —— ——.]—By a contract in writing debtor sold to petitioning creditors a quantity of coloured plums. By the Plums (Sales) Order, 1918, clause 11, which applied to the contract, contracts for the sale of scheduled plums, which included Blaisdon plums, but not coloured plums, were cancelled. Debtor failed to deliver any plums, & judgment in default of defence was entered against him in an action for breach of contract. The registrar of the county ct. refused to make a receiving order on a petition in bkpcy. founded on the judgment on the ground that there was no consideration for the contract :—*Held :* the decision of the registrar was wrong.

The discretion which a registrar has on the hearing of a bkpcy. petition should not be used to go behind a judgment on a nice balance of evidence, if the judgment was taken after a real & genuine consideration by debtor of the facts.—*Re* TURVEY, *Ex p.* LEWIS & SON, LTD., [1918–19] B. & C. R. 128, D. C.

3040. —— —— **Insufficient objections.**]—The registrar has a discretion to refuse to go behind a judgment debt, if the facts relied on by debtor are insufficient.—*Re* LIPSCOMBE, *Ex p.* KNIGHT (1887), 3 T. L. R. 446; 4 Morr. 43, C.A.

Annotation :—**Distd.** *Re* Easton, *Ex p.* Dixon (1893), 10 Morr. 111, D. C.

3041. —— —— ——.]—A receiving order was made in the county ct. against a debtor, who had failed to comply with the terms of a bkpcy. notice requiring him to pay a judgment debt. Debtor alleged that the county ct. registrar had wrongly refused to allow him to go behind the judgment & enquire into the consideration of the judgment debt, upon which the bkpcy. notice had been founded :—*Held :* no facts had been brought to the notice of the county ct. registrar which would afford any grounds for going behind the judgment, & he was right in refusing to do so & in making the receiving order as prayed.—*Re* SHURLY, *Ex p.* SHURLY (1888), 5 Morr. 158, D. C.

3042. —— —— **Frivolous objections.**]—Although upon a petition by a judgment creditor for a receiving order the ct. has power, at the instance of the judgment debtor, to go behind the judgment, yet the ct. will not do so on the mere suggestion that the judgment debt is bad, if it comes to the conclusion that the objections raised are frivolous.

On taxation of a bill of costs debtor offered no evidence of a surcharge carried in by him, & although on subsequent application for judgment under R. S. C. Ord. 14 for the amount certified, he filed an affidavit alleging that he had a counterclaim, yet he did not appeal from the order for judgment then made. On a bkpcy. petition being presented by the judgment creditors, such debtor was desirous of going into the merits of the surcharge or counterclaim :—*Held :* the registrar was right in refusing to allow the question to be reopened, & in making a receiving order as prayed.—*Re* SAVILLE, *Ex p.* BEYFUS (1887), 35 W. R. 791; 3 T. L. R. 791; 4 Morr. 277, C. A.

Annotations :—**Folld.** *Re* Flatau, *Ex p.* Scotch Whisky Distillers (1888), 22 Q. B. D. 83, C. A. **Distd.** *Re* Easton *Ex p.* Dixon (1893), 10 Morr. 111, D. C.

3043. —— —— **Fraud or collusion.**]—The ct. will not, as a matter of course, inquire into the validity of a judgment debt, but only when there is evidence that the judgment has been obtained by fraud or collusion, or that there has been some miscarriage of justice.—*Re* FLATAU, *Ex p.* SCOTCH WHISKY DISTILLERS, LTD. (1888), 22 Q. B. D. 83; 37 W. R. 42; 5 T. L. R. 5, C. A.

Annotations :—**Distd.** *Re* Easton, *Ex p.* Dixon (1893), 10 Morr. 111, D. C. **Folld.** *Re* Howell (1915), 84 L. J. K. B. 1399, D. C. **Refd.** *Re* Van Laun, *Ex p.* Chatterton (1907), 76 L. J. K. B. 644, C. A.; Boaler *v.* Power, [1910] 2 K. B. 229, C. A.

3044. —— —— ——.]—There is no power in the Bkpcy. Ct. on the hearing of a petition to go behind a judgment obtained in open ct. against a person represented there, no fraud being suggested.

The registrar should only go behind a judgment obtained by default or compromise, or where fraud or collusion is alleged. The registrar having refused in the exercise of his discretion to reopen a judgment obtained after trial in the presence of deft., the ct. declined to interfere.—*Re* HOWELL (1915), 84 L. J. K. B. 1399; [1915] H. B. R. 173; *sub nom. Re* A DEBTOR, 113 L. T. 704, D. C.

3045. —— —— **Judgment irregular or wrong in form.**]—The Ct. of Bkpcy. has power, on the hearing of a bkpcy. petition founded on a judgment debt, to go behind the judgment & inquire into the consideration for the debt; but the fact that the judgment may be irregular or wrong in form is not a sufficient reason for going behind the judgment & dismissing the petition. A judgment is conclusive in the Ct. of Bkpcy., unless the consideration can be questioned.—*Re* BEAUCHAMP, *Ex p.* BEAUCHAMP, [1904] 1 K. B. 572; 73 L. J. K. B. 311; 90 L. T. 594; 52 W. R. 545; 20 T. L. R. 269; 11 Mans. 5; *sub nom. Re* DEBTOR, *Ex p.* DEBTOR, 48 Sol. Jo. 297, C. A.; *subsequent proceedings, sub nom.* WATT *v.* WATT (1905), 92 L. T. 483, H. L.

Annotations :—**Consd.** *Re* Persse (1911), 55 Sol. Jo. 220. **Mentd.** *Re* A Debtor, [1912] 2 K. B. 533, C. A.

3046. —— **Equitable defence not raised.**]—

3046 i. —— *Equitable defence—Collusion—Who may raise.*]—Upon a proof of debt by a judgment creditor the ct. cannot review the judgment except upon the grounds of an equitable defence or of collusion between the insolvent & the creditor in obtaining the judgment; the latter being a ground which it is open to a creditor to raise but not to the insolvent himself.—*Re* GREGORY, *Ex p.* GREGORY, *Re* ROYCE (1864), 1 W. W. & A'B. 57.—**AUS.**

Pltf. at law recovered judgment by default, deft. having at the time an equitable defence to the action, upon which the Ct. of Ch., upon a proper application, would have granted an injunction to restrain the action. Deft. having afterwards become bkpt. :—*Held :* the jurisdiction in bkpcy., being both legal & equitable, the ct. would not admit a proof tendered by pltf. upon the judgment. —*Re* JAMES, *Ex p.* MUDIE (1842), 3 Mont. D. & De G. 66 ; 12 L. J. Bcy. 25 ; 6 Jur. 1093, Ct. of R. ; *subsequent proceedings* (1843), 7 Jur. 208, Ct. of R.

Annotations :—**Refd.** *Re* Ames, *Ex p.* Ames (1868), 19 L. T. 270, L. JJ. **Mentd.** *Re* Preston, *Ex p.* Preston (1861), 5 L. T. 89.

3047. —— Judgment on bond.]—The ct. may inquire into the consideration of a judgment recovered upon a bond executed by bkpt., but impeached upon the ground of fraud & want of consideration.—*Re* SOWERBY (1862), 7 L. T. 259.

3048. —— Judgment on bill.]—A creditor had recovered judgment by default in an action upon bills of exchange, &, the acceptor having subsequently become bkpt., he sought to prove for the amount of his judgment against bkpt.'s estate :—*Held :* the trustee under the bkpcy. could dispute the debt, notwithstanding the judgment, & the trustee having raised a defence, which might have been raised in the action the proof should be disallowed.—*Re* ORKNEY (EARL), *Ex p.* CHATTERIS (1872), 26 L. T. 174 ; 20 W. R. 322, C. A.

Annotation :—**Apld.** *Re* Onslow, *Ex p.* Kibble (1875), 32 L. T. 138, C. A.

3049. —— —— Given by infant.]—An infant, before the passing of Infants Relief Act, 1874 (c. 62), gave a bill of exchange, payable after his majority, to a jeweller in payment for jewelry. After his majority, & after the Act came into operation, the creditor obtained judgment by default against him in an action on the bill of exchange, & then took out a debtor's summons, &, on his failing to comply with it, filed a petition for adjudication against him :—*Held :* (1) the Ct. of Bkpcy. would look into the consideration for the judgment, & if the conduct of debtor, in allowing the judgment to go by default against him, operated as a ratification of the bill of exchange, such ratification was rendered void by s. 2 of the Act ; (2) the petition for adjudication should be dismissed.—*Re* ONSLOW, *Ex p.* KIBBLE (1875), 10 Ch. App. 373 ; 44 L. J. Bcy. 63 ; 32 L. T. 138 ; 23 W. R. 433, L. JJ.

Annotations :—**Distd.** *Re* Lynch, *Ex p.* Lynch (1876), 2 Ch. D. 227. **Expld.** *Re* Blythe, *Ex p.* Banner (1881), 44 L. T. 908, C. A. **Folld.** *Re* Jones, *Ex p.* Jones (1881), 18 Ch. D. 109, C. A. ; *Re* Tollemache, *Ex p.* Revell (1884), 13 Q. B. D. 720, C. A. **Consd. & Folld.** *Re* Lennox, *Ex p.* Lennox (1885), 16 Q. B. D. 315, C. A. **Consd.** *Re* Leavesley, [1891] 2 Ch. 1, C. A. **Apld.** Smith *v.* King, [1892] 2 Q. B. 543. **Distd.** *Re* A Debtor (1915), 113 L. T. 704, D. C. **Refd.** Duncan *v.* Dixon (1890), 44 Ch. D. 211 ; *Re* Manchester, Middleton & District Tram. Co., [1893] 2 Ch. 638 ; *Re* Hawkins, *Ex p.* Troup, [1895] 1 Q. B. 404, C. A. ; *Re* G. E. B., [1903] 2 K. B. 340, C. A. **Mentd.** *Re* Andrew (1875), 1 Ch. D. 358, C. A.

3050. —— Judgment on promissory note.]—On May 25, 1899, B. filed a petition against G. in respect of a sum of £112, the amount of a judgment recovered in respect of the balance due on a promissory note for £154. Prior to the adjourned hearing of his petition B. agreed with G. for the dismissal of the petition & the delivery of the promissory note on the terms that G. should pay £50 cash & give a new promissory note for £100 (the balance of the old debt & costs, plus a bonus of £20), payable by instalments. On Nov. 10, 1899, B. obtained judgment against G. for the sum of £90, the balance of the sum of £100 due on the second promissory note, & subsequently B. filed another petition :—*Held :* (1) the ct. was always entitled to look behind a judgment ; (2) the second promissory note was substantially, to some extent, obtained by extortion based on an abuse of the bkpcy. process, & in the circumstances the creditor must be left to his ordinary legal rights, without invoking the machinery of bkpcy.—*Re* G., *Ex p.* B. (1900), 44 Sol. Jo. 345, C. A.

Annotation :—**Consd.** *Re* Bebro, [1900] 2 Q. B. 316, C. A.

3051. —— Compromise not conclusive.]—The Ct. of Bkpcy. will go behind a judgment or a compromise, & refuse to admit a proof founded upon it, if it can see that the original claim was not a *bonâ fide* one, but was made for purposes of extortion, claimant knowing that he had no legal claim, but being aware of circumstances affecting the character of deft. which would prevent the latter from submitting to a cross-examination.—*Re* BLYTHE, *Ex p.* BANNER (1881), 17 Ch. D. 480 ; 51 L. J. Ch. 300 ; 44 L. T. 908 ; 30 W. R. 24, C. A.

Annotations :—**Consd.** Miles *v.* New Zealand Alford Estate Co. (1886), 32 Ch. D. 266, C. A. **Apprvd.** *Re* Hawkins, *Ex p.* Troup, [1895] 1 Q. B. 404, C. A. **Refd.** *Re* Tollemache, *Ex p.* Revell (1884), 13 Q. B. D. 720, C. A. ; *Re* Fraser, *Ex p.* Central Bank of London, [1892] 2 Q. B. 633, C. A. ; *Re* Shaw, *Ex p.* Gill (1901), 83 L. T. 754, C. A. ; Law *v.* Law, [1905] 1 Ch. 140, C. A. ; *Re* Sunderland, [1911] 2 K. B. 658, C. A. **Mentd.** *Re* Ford, *Ex p.* The Trustee (1900), 48 W. R. 688.

3052. —— ——.]—Where the debt of a petitioning creditor was a judgment debt founded upon the compromise of an action :—*Held :* (1) (LORD ESHER, M.R., & LOPES, L.J.) the Ct. of Bkpcy. was entitled to inquire into all the circumstances relating to the compromise, &, if it appeared to have been unfairly obtained, to refuse to make a receiving order ; (2) (RIGBY, L.J.) the evidence shewed that the judgment was founded upon a fair compromise of a disputed claim, & it constituted a good petitioning creditor's debt, & a receiving order ought to be made.—*Re* HAWKINS, *Ex p.* TROUP, [1895] 1 Q. B. 404 ; 64 L. J. Q. B. 373 ; 72 L. T. 41 ; 43 W. R. 306 ; 39 Sol. Jo. 115 ; 2 Mans. 14 ; 14 R. 44, C. A.

3053. —— Onus of proof of consideration.]—A judgment is *primâ facie* evidence in support of a proof for the debt on which the judgment was founded, but where there are circumstances of suspicion, the party claiming to prove may be called on to show consideration for the debt, & if none is shown the proof will be rejected.

A judgment may be proved by a certified copy of the entry of the judgment in the entry-book of the ct. in which it was recovered.

A proof tendered long after the bkpcy. on a judgment recovered on a bill of exchange shortly after bkpt.'s majority, the record & bill of exchange being both lost, was rejected.—*Re* TOLLEMACHE, *Ex p.* ANDERSON (1885), 14 Q. B. D. 606 ; 54 L. J. Q. B. 383 ; 52 L. T. 786, C. A.

3054. —— Grounds for rule.]—It has been long established, as regards the proof of a debt in bkpcy., that the trustee, acting on behalf of the creditors, can go behind a judgment, & that, although the judgment is *primâ facie* evidence of a debt due to the creditor who claims to prove for the judgment debt, yet the trustee, on behalf of the creditors, may show that in fact the judgment does not establish a debt. That rule is founded upon this principle, that, in whatever circumstances a judgment may have been obtained against bkpt., yet no act of his, collusion, compromise improperly entered into, or anything else, ought to prejudice the rights of the other creditors, because the assets ought to be distributed in the bkpcy. only amongst the honest *bonâ fide* creditors

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of bkpt. This rule is necessary, in order to prevent a man from allowing any number of judgments to be obtained by default against him by his friends or relations, for the purpose of giving them a right of proof in his bkpcy. without any debt being due to them at all (COTTON, L.J.).—*Re* LENNOX, *Ex p.* LENNOX (1885), 16 Q. B. D. 315; 55 L. J. Q. B. 45; 54 L. T. 452; 34 W. R. 51; 2 T. L. R. 60; 2 Morr. 271, C. A.

Annotations:—**Expld.** *Re* Saville, *Ex p.* Beyfus (1887), 35 W. R. 791, C. A.; *Re* Flatau, *Ex p.* Scotch Whisky Distillers (1888), 22 Q. B. D. 83, C. A. **Distd.** *Re* Russell, *Ex p.* Guest (1888), 37 W. R. 21, C. A. **Apprvd.** *Re* Fraser, *Ex p.* Central Bank of London, [1892] 2 Q. B. 633, C. A. **Expld.** *Re* Easton, *Ex p.* Dixon (1893), 10 Morr. 111, D. C. **Apprvd.** *Re* Hawkins, *Ex p.* Troup, [1895] 1 Q. B. 404, C. A. **Refd.** *Re* Vitoria *Ex p.* Vitoria, [1894] 2 Q. B. 387, C. A.; *Re* G. E. B., [1903] 2 K. B. 340, C. A.; *Re* Van Laun, *Ex p.* Chatterton, [1907] 2 K. B. 23, C. A.; *Re* Newey, *Ex p.* Whiteman (1912), 107 L. T. 832, D. C.; *Re* A Debtor, *Ex p.* Petitioning Creditor, [1917] 2 K. B. 60, C. A.

3055. —— Gambling debt.]—Betting commission agents obtained judgment under R. S. C. Ord. 14, against bkpt., who had not complied with terms imposed on him as a condition of defending the action:—*Held:* the proof on the judgment was rightly rejected, the evidence being such that a jury could not have found that the amount was due as money paid for bkpt. at his request.—*Re* LOPES, *Ex p.* HARDWAY & TOPPING (1889), 5 T. L. R. 685; 6 Morr. 245.

3056. —— Inquiry into whole preceding transactions.]—When a creditor comes to prove in bkpcy. the ct. will go behind the judgment & inquire into the whole transactions which preceded it.—*Re* HAWKINS, *Ex p.* TROUP, [1895] 1 Q. B. 404; 64 L. J. Q. B. 373; 72 L. T. 41; 43 W. R. 306; 39 Sol. Jo. 115; 2 Mans. 14; 14 R. 44, C. A.

3057. —— Except in regard to assessed taxes.]—The rule that, on a proof for a judgment debt, the ct. will go behind the judgment & ascertain whether there is a provable debt, does not apply to a proof for assessed taxes.

Where a debtor, who had carried in a scheme of arrangement, applied to expunge a proof for an assessment to income tax under Sched. D., which had not been appealed against, on the ground that he had made no profits assessable to duty, the application was dismissed, but without prejudice to any application he might be advised to make to the Inland Revenue under Board of Trade Regulations of May, 1888.—*Re* CALVERT, *Ex p.* CALVERT, [1899] 2 Q. B. 145; 68 L. J. Q. B. 761; 47 W. R. 523; 43 Sol. Jo. 480; 6 Mans. 256; *sub nom. Re* CALVERT, *Ex p.* THE DEBTOR *v.* WALKER, 80 L. T. 504; 4 Tax Cas. 79.

3058. —— Covenant for payment or account stated not conclusive—Right of trustee in bankruptcy.]—No judgment recovered against bkpt., no covenant for payment given by or account stated with him, can deprive the trustee in bkpcy. of his right & duty to investigate the nature & grounds of the claim made against bkpt.'s estate, & the trustee is entitled to go behind these forms & to require satisfactory evidence that the debt on which the proof is founded is a real debt.—*Re* VAN LAUN, *Ex p.* CHATTERTON, [1907] 2 K. B. 23; 76 L. J. K. B. 644; 97 L. T. 69; 23 T. L. R. 384; 51 Sol. Jo. 344; 14 Mans. 91, C. A; *affg.* S. C. *sub nom. Re* VAN LAUN, *Ex p.* PATTULLO, [1907] 1 K. B. 155.

Annotation:—**Distd.** London & Westminster Bank *v.* Button (1907), 51 Sol. Jo. 466.

3059. —— Money-lender's action.]—The power of the ct. to reopen a transaction with a money-lender under Money-lenders Act, 1900 (c. 51), s. 1, when satisfied that the transaction is "harsh & unconscionable," even though it is not "such that a Ct. of Equity would have given relief" before the Act, can be exercised by the Ct. of Bkpcy. upon the hearing of a petition by a money-lender for a receiving order against a borrower, the petition being founded on a final judgment recovered in an action in which debtor did not apply for relief, under the above sect.—*Re* DEBTOR, *Ex p.* DEBTOR, [1903] 1 K. B. 705; 72 L. J. K. B. 382; 88 L. T. 401; 51 W. R. 370; 19 T. L. R. 288; 47 Sol. Jo. 334; 10 Mans. 130, C. A.

Annotations:—**Consd.** *Re* Attree, *Ex p.* Ward, [1907] 2 K. B. 868. **Refd.** Carringtons *v.* Smith, [1906] 1 K. B. 79; Saunders *v.* Newbold (1904), 92 L. T. 67, C. A.; Wells *v.* Allott, [1904] 2 K. B. 842, C. A.; Part *v.* Bond (1906), 94 L. T. 390, C. A.; Samuel *v.* Newbold, [1906] A. C. 461, H. L.

3060. —— ——.]—Applt., an unregistered money-lender, became the holder of promissory notes made by debtor in respect of a money-lending transaction, & obtained judgment in default of defence against debtor in an action upon the notes. An arrangement was subsequently made, whereby debtor agreed to pay the debt with interest by instalments, & all further proceedings upon the judgment were to be stayed. Debtor having been adjudicated a bkpt., applt. claimed to prove in the bkpcy., for the amount due under the arrangement:—*Held:* the arrangement was an agreement entered into by the money-lender in the course of his business as a money-lender, "with respect to the advance & repayment of money" within Money-lenders Act, 1900 (c. 51), s. 2 (1) (*c*), & the original transaction being unlawful, the judgment was not conclusive against the trustee for the purposes of proof, & the subsequent arrangement did not prevent the ct. from going behind the transaction & rejecting the proof.—*Re* CAMPBELL, *Ex p.* SEAL, [1911] 2 K. B. 992; 81 L. J. K. B. 154; 105 L. T. 529; 19 Mans. 1, C. A.

Annotation:—**Refd.** Blair *v.* Holcombe (1912), 28 T. L. R. 198.

3061. —— ——.]—When an official receiver acting as a trustee in bkpcy. has rejected, in part, a proof on the ground that the transaction was harsh & unconscionable within Money-lenders Act, 1900, the ct. in considering such rejection will exercise the powers conferred by s. 1 (3) of the Act.—*Re* MACKENZIE, [1917] 2 K. B. 728; 117 L. T. 824; [1917] H. B. R. 208; *sub nom. Re* MACKENZIE, *Ex p.* BOWEN, 87 L. J. K. B. 792.

See, generally, MONEY & MONEY-LENDING.

3062. Interlocutory order for payment not conclusive.]—A party entitled to a legacy under a will filed a bill in Ch. against the exor. for an account & for payment of his legacy, & obtained an interlocutory order for payment of a certain sum into ct., after which the exor. became bkpt. The ct. refused an order for the legatee to prove for the specific sum mentioned in the order of the Ct. of Ch., but gave him leave to go before the comrs., & prove for such sum as might be due to him.—*Re* STANDLEY, *Ex p.* LAWDEN (1841), 1 Mont. D. & De G. 583; 10 L. J. Bcy. 37; 5 Jur. 295, Ct. of R.

Annotation:—**Refd.** *Re* Fenwick, *Ex p.* Brown (1849), 13 L. T. O. S. 468.

3063. Whether award conclusive.]—N. & bkpt., who had been in partnership, dissolved it in 1809. In Sept., 1810, they referred disputes as to the settlement of their accounts to arbn. The arbitrator in Jan., 1811, awarded N. £715. In Mar., 1811, the commission issued against bkpt. on an act of bkpcy. committed on Apr. 12, 1810. N. had been admitted to prove for the £715, but the proof had been resisted before the comrs., on the ground that only £190 was due. The comrs.

having considered that they were concluded by the award; a petition praying an inquiry before the comrs. & that the proof might be expunged, was granted.—*Re* COTTRELL, *Ex p.* KEMSHEAD (1811), 1 Rose, 149, L. C.

3064. —— No application to set aside award.]—All matters in difference between A. & B. were referred to arbitrators, who awarded £9,400 to be due to A. on a balance of accounts, & directed the money to be paid by instalments, & likewise awarded B. to deliver some amber & shells to A., but B. not appearing, nor any agent for him, on the day & place appointed for the delivery of the amber & shells, & for making one of the payments according to the award, attachments were made out against him into London & Middlesex, for a breach of the award, & upon his absconding to avoid his being arrested under the attachments, a commission of bkpcy. was taken out against him, & he was declared a bkpt. Subsequently B. preferred his petition to the Lord Chancellor, suggesting that he was not indebted to A. petitioning creditor, & that an issue might be directed at law to try whether petitioner was a bkpt. at or before the issuing of the commission of bkpcy. against him, & that all proceedings on the commission might be stayed in the meantime:—*Held:* petitioning creditor's was a just debt, while the award stood, for the arbn. bond was a debt at law, & bound the parties, until it was set aside for corruption or partiality, etc., & the bill brought by B. for that purpose, could not be a foundation to suspend it, for if it was, a person then had nothing more to do but to file such a bill, & frustrate the effect of the award, & the debt was sufficient to support the commission.—*Ex p.* LINGOOD (1742), 1 Atk. 240; 26 E. R. 155.

Annotation:—**Mentd.** Crowley's Case (1818), 2 Swan. 1.

3065. —— ——.]—Upon the hearing of a petition based on an award, the ct. will not entertain a question as to its validity, for debtor, if he questions it, must take steps to set it aside.—*Re* KIRKLAND, *Ex p.* KIRKLAND (1870), 18 W. R. 804.

3066. —— No allegation of fraud or improper conduct of arbitrator.]—Where a petition is based on a judgment debt, founded on an award, & there is no allegation of fraud or improper conduct made against the arbitrator, the Ct. of Bkpcy. will not go behind the judgment & reopen the award, for the purpose of retrying what has already been adjudicated upon by the arbitrator.—*Re* NEWEY, *Ex p.* WHITEMAN (1912), 107 L. T. 832; 57 Sol. Jo. 174, D. C.

See, also, Nos. 2948–2951, *ante.*

SUB-SECT. 2.—OTHER CASES.

3067. Petitioner too ill to prove by oath.]—Where a creditor is disabled by age & imbecility of mind from proving, by his own oath, a debt against the estate of a bkpt., the comrs. will be directed to admit the proof upon such evidence as shall be satisfactory to them, though the debt be of considerable amount.—*Re* WAUGH, *Ex p.* CLARKE (1826), 2 Russ. 575; 38 E. R. 451.

See 1914 Act, Sched. II., r. 3.

3068. Debt founded on cheque given to bankrupt—Payment of cheque must be proved.]—A petitioning creditor's debt was created by his giving bkpt. a cheque on petitioning creditor's banker:—*Held:* to establish the debt the payment of the cheque must be proved, & it was not sufficient, especially where bkpt.'s papers came to the hand of petitioning creditor to show the cheque to have come to his hands again, & that his bankers, the day after the date of the cheque, paid on his account to bkpt.'s bankers a sum corresponding with the amount in the cheque.—BLEASBY *v.* CROSSLEY (1826), 3 Bing. 430; 11 Moore, C. P. 327; 4 L. J. O. S. C. P. 136; 130 E. R. 578.

3069. Signature of accounts at time of granting annuity—Payment of annuity to date of grantor's bankruptcy.]—Bkpt. having granted an annuity ten years since, & paid it for ten years, until his bkpcy., & having at the time of granting it signed an account with the grantor, showing what the consideration was, is precluded from questioning the validity of that consideration, & so are his assignees.—*Re* LLOYD, *Ex p.* FAIRMAN (1838), 3 Deac. 467; Mont. & Ch. 125; 8 L. J. Bcy. 25.

3070. Creditor's oath—No adverse evidence.]—A creditor is entitled to have his proof admitted upon oath, unless there be adverse evidence, or surrounding circumstances rendering it improper to admit it.—*Re* BYRON, *Ex p.* BOLER (1841), 1 Mont. D. & De G. 602; 5 Jur. 323, Ct. of R.

3071. Admission by bankrupt—In account filed in regard to abortive deed of arrangement.]—A trader entered into a contract to deliver goods at a stated time at a specified price. He performed part of the contract, but before the time or times for the performance of the remainder he petitioned under 1849 Act, ss. 211 *et seq.*, but no arrangement being effected, he was adjudicated bkpt. on that petition. In the account of debts filed, he inserted a sum as due from him for loss on the unfulfilled parts of the contract. A proof was tendered by the purchaser of the goods, for the amount, less than that specified by bkpt., of the loss by reason of the non-delivery of the goods:—*Held:* the admission of the debt by bkpt. in his account was evidence of a debt as against the assignees, & the purchaser was entitled to prove for the amount he claimed.—*Re* LAWFORD, *Ex p.* HARRISON (1856), 26 L. J. Bcy. 30; 28 L. T. O. S. 197; 3 Jur. N. S. 228; 5 W. R. 193, L. JJ.

Annotation:—**Mentd.** Monk *v.* Sharp (1857), 2 H. & N. 540.

3072. —— After commencement of proceedings.]—An admission of a debt, contained in bkpt.'s statement of his affairs made after the commencement of the bkpcy. proceedings, is not evidence as against his creditors of the existence of a debt, even though the statement was verified by his oath without cross-examination, & he has since died.—*Re* TOLLEMACHE, *Ex p.* REVELL (1884), 13 Q. B. D. 720; 54 L. J. Q. B. 89; 51 L. T. 376; 33 W. R. 288, C. A.; *subsequent proceedings, sub nom. Re* TOLLEMACHE, *Ex p.* EDWARDS (1884), 14 Q. B. D. 415, C. A.

Annotation:—**Mentd.** *Re* Tollemache, *Ex p.* Anderson (1885), 14 Q. B. D. 606, C. A.

3073. Receipt of dividends—After lapse of time & loss of security.]—The receipt of dividends under

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PART VIII. SECT. 7, SUB-SECT. 2.

3071 i. *Admission by bankrupt—Statute-barred debt—Affidavit in other proceedings—Debtor too ill to read or sign admission.*]—One of two bkpt. partners, in a Ch. suit, made an affidavit in which he admitted a statute-barred debt. When he made the affidavit, he was too ill to read or sign it, but the British Consul at B. read it to him & he affixed his mark:—*Held:* the affidavit was not admissible in evidence in the bkpcy. proceedings.—*Re* CLENDINNING (1859), 9 I. Ch. R. 284.—**IR.**

e. *Proof for property of wife brought into settlement—Evidence of payment.*]—Where the assignees sought to expunge proof of the payment of the fortune of bkpt.'s wife, which proof was made in order to recover that fortune pursuant to articles covenanting that in case of her husband's bkpcy. trustees should be entitled to it. The amount of the evidence was that bills were passed for its payment, & this being sufficient to rebut the negative evidence that these bills did not appear in the books, the motion was refused.—*Re* ROBINSON, *Ex p.* MACKEY (1828), 2 Ir. L. Rec. 1st ser. 63.—**IR.**

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a bkpcy. will, after a great lapse of time & loss of the securities, be accepted as *primâ facie* proof of the existence of the debt, & any objection to it must rest on evidence showing some probable reason for supposing, not that it may be, but that it is, bad.

A bkpcy. took place in 1783, & a person claiming under an assignment of a proof received dividends in 1820 & 1824:—*Held:* the representatives of the assignee claiming in 1863 were entitled to the dividends subsequently declared, though the deed of assignment was not produced.—*Re* GRANT, *Ex p.* GRAHAM (1863), 33 L. J. Bcy. 1; 9 L. T. 278; 10 Jur. N. S. 1; 12 W. R. 1, L. C.

See, also, Nos. 3127-3130, *post.*

See 1915 Rules, rr. 252, 269.

SECT. 8.—REJECTION OF PROOF.

SUB-SECT. 1.—DUTY OF COURT.

3074. In general.]—Notwithstanding other creditors, who have proved, do not object to a proof by another creditor, the ct. is bound to see that the proof is a proper one to be admitted, &, if not satisfied, to reject it.—*Re* REDPATH, *Ex p.* GREAT NORTHERN RY. CO. (1857), 30 L. T. O. S. 211.

SUB-SECT. 2.—WITHIN WHAT TIME.

See 1915 Rules, r. 260.

3075. Effect of delay.]—A trustee does not, by allowing three months to elapse after a proof is sent in, lose his right to reject it.—*Re* SHALLOW & INGLE, *Ex p.* DE BOOS (1879), 40 L. T. 659.

3076. Time allowed to expire—Trustee wishing to reject.]—A proof was sent to the trustee in Dec., 1872. In Dec., 1875, he gave notice of rejection:—*Held:* it was too late for the trustee to proceed in that way, but the proper course would have been to apply to the ct. to have the proof expunged.—*Re* ARMITAGE, *Ex p.* GOOD (1877), 5 Ch. D. 46; 46 L. J. Bcy. 65; 36 L. T. 338; 25 W. R. 422, C. A.

Annotations:—**Refd.** *Re* Tait, *Ex p.* Harper (1882), 47 L. T. 421. **Mentd.** *Re* Wolmershausen, Wolmershausen *v.* Wolmershausen (1889), 62 L. T. 541; *Re* E. W. A., [1901] 2 K. B. 642, C. A.

3077. —— Rejection appealed from on that ground.]—A creditor's appeal against the rejection of a proof was allowed in the county ct., on the ground that it had not been made within the time limited by the Rules:—*Held:* the objection was good, but being only a matter of form, the creditor's application should have been treated as if it had been a motion by the trustee to expunge the proof.—*Re* SISSLING, *Ex p.* FENTON (1885), 53 L. T. 967; 2 Morr. 289, D. C.

Annotation:—**Folld.** *Re* Voght, *Ex p.* Spamer (1886), 3 Morr. 164.

3078. —— ——.]—Where objection is made to the rejection of a proof by the trustee, on the ground that it was out of time, the ct. will treat it as if it were a motion by the trustee to expunge the proof.—*Re* VOGHT, *Ex p.* SPAMER (1886), 3 Morr. 164.

SUB-SECT. 3.—ON WHAT GROUNDS.

A. Conduct or Status of Creditor.

3079. Contracting debt with bankrupt after commission—Before actual notice.]—*Semble:* one who lends money to a bkpt. after a commission sued out against him, but before actual notice of it, cannot come in as a creditor.—HITCHCOCK *v.* SEDGWICK (1690), 2 Vern. 156; 1 Eq. Cas. Abr. 234, pl. 4; 23 E. R. 707.

Annotations:—**Distd.** Collet *v.* De Gols (1735), Cas. *temp.* Talb. 65. **Expld.** Brooks *v.* Sowerby (1819), 3 Moore, C. P. 157; Sowerby *v.* Brooks (1821), 4 B. & Ald. 523. **Refd.** Wiseman *v.* Vandeputt (1690), 2 Vern. 203. **Mentd.** Brace *v.* Marlborough (1728), Mos. 50; Downing *v.* Bagnall (1755), Amb. 818; Downing *v.* Townsend (1755), Amb. 280; Rajunder Narain Rae *v.* Bijai Govind Sing (1839), 2 Moo. Ind. App. 181, P. C.; Langdale *v.* Briggs (1856), 8 De G. M. & G. 391, L. JJ.

3080. —— —— Onus of proof.]—When a creditor claims to prove in a bkpcy. in respect of a debt which came into existence after the commission of the act of bkpcy. on which the fiat was based, the bkpcy. being under 1849 Act, the *onus* is on him to prove that he had no notice of the act of bkpcy. before the creation of the debt.—*Re* TOLLEMACHE, *Ex p.* REVELL (1884), 13 Q. B. D. 727; 54 L. J. Q. B. 92; 51 L. T. 379; 33 W. R. 289, C. A.

Annotation:—**Consd.** *Re* Peel, *Ex p.* Honour (1913), 109 L. T. 223.

3081. Contracting debt with bankrupt between act of bankruptcy & commission—Without notice of act of bankruptcy.]—If a man trade with bkpt. between the act of bkpcy. & the commission sued out, whether by delivery of goods, or payment of money, without notice of the act of bkpcy.,

PART VIII. SECT. 8, SUB-SECT. 1.

f. *To inquire when debt contracted.*]—It is not correct for comrs. of bkpcy., when receiving the proof of a debt, not to inquire at what period the debt was contracted.—O'BRIEN *v.* GRIERSON (1813), 2 Ball & B. 323. —**IR.**

PART VIII. SECT. 8, SUB-SECT. 2.

g. *Not within time limited for further evidence.*]—In an appeal against deliverances rejecting claims:—*Held:* it was not the duty of the trustee to adjudicate upon the claims within the same fourteen days in which the deliverance requiring further evidence was issued.—CAMPBELL *v.* HOWDEN (1909), 2 S. L. T. 209.—**SCOT.**

PART VIII. SECT. 8, SUB-SECT. 3.—A.

h. *One creditor asking for time to be given to debtor—Proof in subsequent bankruptcy.*]—At a meeting of creditors it was agreed between the mother of debtor & the creditors present that debtor should be granted an extension of time, provided that the mother allowed a claim she had as extrix. of his father to stand over till the other creditors were paid. Debtor subsequently became bkpt.:—*Held:* whether or not the agreement come to at the meeting of creditors remained binding after the bkpcy., & whatever might be the ultimate destination of any dividends payable in respect of her claim, the extrix.'s proof must be admitted. —*Re* FAIRBROTHER, *Ex p.* FAIRBROTHER (1897), 16 N. Z. L. R. 43.—**N.Z.**

k. *Creditor suing bankrupt—Imprisonment under execution & subsequent discharge—Proof admitted by consent.*] —A reference will be granted to the comrs. to receive proof of a debt in a bkpcy. matter, where the creditors consent, although the party had proceeded against bkpt. at law for the debt, lodged him in gaol under an execution, & afterwards consented to his discharge.—*Re* ROBINSON, *Ex p.* CREAGH (1830), 4 Ir. L. Rec. 1st ser. 20. —**IR.**

l. *Creditor wife of insolvent—Whether payment loan or gift—Question of fact.*]—Where the trial judge found against the assignee, that money of the insolvent's wife used by him in his business was a loan from & not a gift by her & the judgment was affirmed on appeal:—*Held:* as the whole case was one of fact, the second appellate ct. would not interfere with such finding.—WARNER *v.* MURRAY (1889), 16 S. C. R. 720.—**CAN.**

m. *Creditor bank acting ultra vires—To whom objection available.*]—L. borrowed a sum of money from a savings bank, which he agreed to repay with interest, transferring in pledge as collateral security letters of credit on the Govt. of Quebec. L. having become insolvent the bank filed its claim for the amount of the loan, with interest, with the curator of the estate, & on appeal appcts., as creditors of L., contested on the ground that the securities were not of the class mentioned in R. S. C. c. 122, s. 20, & the bank's act in making the loan was *ultra vires* & illegal:—*Held:* L., having received good & valid consideration for his promise to repay the loan, could not, nor could appcts., his creditors, who had no other rights than debtor himself had, impugn the contract of loan, or be admitted to assail the pledge of the securities.—ROLLAND *v.* CAISSE D'ECONOMIE NOTRE DAME DE QUEBEC (1895), 24 S. C. R. 405.—**CAN.**

bkpt. keeping open trade, such person shall come in as a creditor.—CROSLY'S CASE (1716), 2 Eq. Cas. Abr. 104, pl. 2; 7 Vin. Abr. 69, pl. 6; 22 E. R. 89.

3082. Contracting debt with bankrupt after notice of prior act of bankruptcy—Before act on which commission issued.]—46 Geo. 3, c. 135, s. 2 does not restrain a creditor from proving under a commission of bkpcy. a debt contracted before the act of bkpcy., on which the commission issued, but after notice of a prior act of bkpcy.—*Re* PHILLIPS, *Ex p.* BOWNESS (1814), 2 M. & S. 479; 105 E. R. 459.

3083. —— ——.]—Bkpt., after executing a bill of sale whereby he assigned the whole of his property to his bankers, drew upon them various cheques in favour of several of his creditors, which cheques were duly paid by the bankers:—*Held:* although the execution of the bill of sale was not the act of bkpcy. on which the fiat issued, whatever was done by the bankers after the date of the bill of sale was done with notice of an act of bkpcy., & the payments subsequently made by the bankers could not be proved under the fiat.—*Re* MASON, *Ex p.* SHARP (1844), 3 Mont. D. & De G. 490; 8 Jur. 1012, Ct. of R.

3084. —— ——**"Notice of an act of bankruptcy available for adjudication."**]—The words "notice of an act of bkpcy. available for adjudication" used in 1869 Act, s. 31, mean notice of an act of bkpcy. which would have been available for the making of the particular adjudication, under which the proof is tendered, & a creditor, who contracted a debt with a bkpt. with notice only of an act of bkpcy. committed by him more than six months before the presentation of the petition upon which the adjudication is made, is not precluded from proving under the adjudication.—*Re* BEDELL, *Ex p.* CROSBIE (1877), 7 Ch. D. 123; 47 L. J. Bcy. 19; 37 L. T. 583; 26 W. R. 119, C. A.

Annotations:—**Apld.** *Re* Bedell, *Ex p.* Gilbey (1878), 8 Ch. D. 248, C. A. **Expld.** Hood *v.* Newby (1882), 21 Ch. D. 605, C. A. **Mentd.** *Re* Moojen, *Ex p.* Bouchard (1879), 12 Ch. D. 26, C. A.

3085. —— —— ——.]—The words "notice of an act of bkpcy. available for adjudication" in 1869 Act, ss. 94, 95, mean notice of an act of bkpcy., which would have been available for the making of the adjudication actually made, that is, an act of bkpcy. committed within six months from the presentation of the petition on which the adjudication was founded.—*Re* BEDELL, *Ex p.* GILBEY (1878), 8 Ch. D. 248; 47 L. J. Bcy. 49; 38 L. T. 728; 26 W. R. 768, C. A.

Annotations:—**Consd.** Hood *v.* Newby (1882), 21 Ch. D. 605, C. A. **N.F.** *Re* Barnes, *Ex p.* Tilleard (1882), 30 W. R. 568. **Refd.** *Re* Barnes, *Ex p.* Quilter (1882), 30 W. R. 739, C. A.

3086. —— **Costs incurred between act of bankruptcy & making receiving order.**]—Deft. applied to pltf., a solr., to file his petition in bkpcy., & in so doing committed an act of bkpcy. Pltf. filed the petition, & a receiving order was made against deft. Costs were incurred in the bkpcy. proceedings between the date of the act of bkpcy. & the making of the receiving order. Pltf. received from the estate, under 1886–1890 Rules, r. 125, part of the costs. In an action against deft. to recover the balance:—*Held:* pltf. was not entitled to recover, on the ground that the costs were a "provable debt," although pltf. could not prove for them in the bkpcy., because at the time when they were incurred he had notice of an act of bkpcy. committed by deft.—BUCKWELL *v.* NORMAN (1898), 1 Q. B. 622; 67 L. J. Q. B. 435; 78 L. T. 248; 46 W. R. 339; 14 T. L. R. 292; 42 Sol. Jo. 366; 5 Mans. 64, C. A.

3087. —— **Onus of proof of notice.**]—Where a trustee rejects a creditor's proof of debt, on the ground that the creditor, at the time of the creation of the debt, had notice of the commission of an act of bkpcy., it is for the trustee to show that the creditor had notice of the act of bkpcy., & not for the creditor to show that he had no notice thereof, 1883 Act having shifted the *onus* of proof from the creditor to the trustee.—*Re* PEEL, *Ex p.* HONOUR (1913), 109 L. T. 223; 57 Sol. Jo. 730.

3088. Refusing disclosure as to alleged payment of debt.]—Proof under a commission of bkpcy. refused, the party claiming the debt being charged by the examination of bkpt. with the receipt of money, & refusing a disclosure as to the receipt & application, on the ground that it might tend to criminate him.—*Ex p.* SYMES (1805), 11 Ves. 521; 32 E. R. 1191.

3089. Holding out as not a creditor—During negotiations for arrangement with creditors—Subsequently proving in bankruptcy after arrangement breaking down.]—Bkpt. was indebted to his father, by whose permission he occupied a leasehold farm. Two attempts were made to come to an arrangement with some of bkpt.'s creditors. The father did not disclose that he was a creditor, & at the second attempt he inserted the lease as bkpt.'s property. The creditors in question claimed that the father was not entitled to prove as against them:—*Held:* (1) although the general rule was well established that "a person dealing with another, & holding out that he is no creditor shall be bound by his representation," as both plans failed, the claim of petitioners must be dismissed; (2) if either plan had been adopted, the father could not have entered into competition with those particular creditors.—*Re* ROOKE, *Ex p.* OAKLEY (1811), 1 Rose, 138.

3090. Agreeing to change in contract—Election to keep bill in satisfaction of debt proved on.]—A. purchased coals of B. & agreed to give him a bill of exchange for part of the purchase-money payable at two months. Afterwards A. sent to B. a paper purporting to be a bill accepted by him with a blank left for the name of B. as drawer. The bill not being such as was stipulated to be given, B. consulted his attorney whether he should take it in satisfaction of his debt, & upon his advice decided to keep it. B. did not sign the bill until after he had sued out a commission against A. upon an affidavit for goods sold & delivered:—*Held:* B. having elected to keep the bill, thus giving his sanction to a change in the contract, could not prove his debt as petitioning creditor for goods sold & delivered.—*Re* FARENDEN, *Ex p.* FARENDEN (1817), Buck, 34, L. C.

3091. Selling contraband goods abroad—Participating in smuggling them.]—A seller abroad, of contraband goods, is entitled to prove, unless he be a participator in smuggling them.—*Re* POWELL, *Ex p.* CAVALIERE (1825), 2 Gl. & J. 227.

3092. Concealing facts from public—Inducing public to give bankrupt credit.]—A., an innkeeper, assigned the premises & furniture to B., as his successor in the inn, & placed his son, a minor, with B. at a yearly salary in the first instance, but upon the understanding that he was afterwards to be taken in as a partner. The licence was transferred to B. & A.'s son jointly. B. became bkpt., after contracting a large debt with A., the proof of which was rejected by the comrs., on the ground that A. concealed his son's minority, & thus induced parties to trust bkpt., who had no capital:—*Held:* the comrs. were not justified in

Sect. 8.—*Rejection of proof: Sub-sect.* 3, *A. & B.*]

rejecting the proof.—*Re* NEW, *Ex p.* ARCHER (1842), 2 Mont. D. & De G. 784, Ct. of R.

3093. Payment to assignees—Of proceeds of irregular execution.]—Execution, executed under a warrant of attorney, which was subsequently set aside for irregularity, & the amount levied paid over to the assignees by the judgment creditor, will not preclude him from proving under a fiat in bkpcy. issued against the judgment debtor.—ANON (1843), 1 L. T. O. S. 318.

3094. Party competing with his own creditors.]—A party cannot prove in competition with his own creditors.—*Re* SAMUEL (1848), 10 L. T. O. S. 464.

3095. Election to prove in foreign bankruptcy.]—Two commercial firms, one in Brazil, consisting of A., B. & C., the other in England, consisting of A. & B., had mercantile transactions with each other. The two firms were totally distinct, but both traded under the style of A. B. & Co. In the course of their dealings the Brazilian firm drew bills on the English firm in favour of petitioners. The English firm having accepted the bills became bkpt., & the Brazilian firm afterwards became insolvent, & entered into a concordata with their creditors. Petitioners received a dividend under the concordata out of the assets of the Brazilian firm as drawers of the bills, & also claimed to prove in respect of the same bills under the English bkpcy., against the English firm as acceptors:—*Held:* (1) the Brazilian concordata must be taken as equivalent to a bkpcy.; (2) petitioners having elected to prove against the Brazilian firm under the concordate, could not also prove against the English firm.—*Re* DEANE & YOULE, *Ex p.* GOLDSMID (1856), 1 De G. & J. 257; 25 L. J. Bcy. 25; 28 L. T. O. S. 47; 3 Jur. N. S. 1106; 4 W. R. 802; 44 E. R. 722, L. JJ.; *affd. sub nom.* GOLDSMID *v.* CAZENOVE (1859), 7 H. L. Cas. 785, H. L.

Annotation:—**Consd.** *Re* Jobson, *Ex p.* Thornton (1858), 3 De G. & J. 454.

See, also, Part XI., *post.*

3096. Entering into irregular submission—Bound by award.]—By an agreement between a creditor & the assignees in bkpcy., it was agreed that the creditor's right to prove as the holder of a bill of exchange, which bkpt. had accepted, should be referred to arbn. The submission to arbn. was made without leave of the ct. The arbitrator decided that the creditor had no right to prove as holder of the bill:—*Held:* having acted under the submission, the creditor was precluded from objecting to its informality, & was bound by the award.—*Re* WYLD, *Ex p.* WYLD (1860), 2 De G. F. & J. 642; 30 L. J. Bcy. 10; 3 L. T. 794; 7 Jur. N. S. 294; 9 W. R. 421; 45 E. R. 770, L. JJ.

3097. Covenanting not to receive payment until other creditors paid.]—A. & B. covenanted not to receive payment until all the other creditors of debtor had been paid a composition of 13*s.* in the pound. Before the whole was paid debtor became bkpt.:—*Held:* A. & B. were entitled to prove & receive dividends, although the other creditors had not received the full amount of their composition, but they were not entitled to their costs of establishing their right.—*Re* BALDWIN, *Ex p.* BALDWIN (1860), 2 L. T. 224.

3098. Allowing bankrupt to lie in prison for non-payment of penalty.]—Debtor was convicted under Fine Arts Copyright Act, 1862 (c. 68), s. 6, for violations of copyright in engravings, & sentenced to pay a fine, & in default was imprisoned. After the conviction he executed a deed of composition with his creditors, which was duly registered. He then applied for discharge from prison:—*Held:* he was not entitled to his discharge.

Semble: whether the fine was provable or not under the bkpcy. made no difference, as applt. could not prove, after having allowed debtor to be imprisoned for non-payment of the fine (PAGE WOOD, L.J.).—*Re* PRINCE, *Ex p.* GRAVES (1868), 3 Ch. App. 642; 19 L. T. 241; 32 J. P. 790; 16 W. R. 993, L. JJ.

3099. Making statement inducing debtor to alter position.]—A receiving order having been made against debtor, his debts were paid in full with certain exceptions, which included one due to K. & one due to B. K. held a mtge. as security, & debtor, having made an application to rescind the receiving order, asked K.'s solr. to write a letter saying that K. was satisfied with the security. K.'s solr. replied declining to say so, but adding that K. did not seek to prove against the estate for any possible deficiency. Eventually debtor was adjudicated bkpt. Afterwards the debt due to K. was assigned to R., & later debtor arranged for his mother's exors., of whom he was one, to buy all outstanding debts except those due to R. & to B. Subsequently a proof was put in by R.:—*Held:* R., who was in no better position than K., was estopped from putting in the proof.—*Re* WICKHAM (1917), 34 T. L. R. 158; [1917] H. B. R. 272.

3100. Creditor illegal society.]—An illegal society is incapable of proving for its debts.—*Re* DAY, *Ex p.* DAY (1876), 1 Ch. D. 699; 45 L. J. Bcy. 53; 33 L. T. 867; 24 W. R. 492.

Annotations:—**Refd.** Shaw *v.* Benson (1883), 11 Q. B. D. 563, C. A.; Marrs *v.* Thompson (1902), 86 L. T. 759, D. C.

3101. —— Illegality removed by registration—Payments made by debtor after knowledge of registration.]—In 1881 seven persons formed a loan society, & when business was commenced their members had increased to twenty. As the club in its inception comprised less than twenty members & was unregistered, it became an illegal assocn. within Cos. Act, 1862 (c. 89), s. 4, so soon as it comprised upwards of twenty members. In June, 1883, the society was registered under the Act, with the knowledge & consent of all the members. In 1881 the society advanced £100 to a borrowing member, repayable by monthly instalments, & he duly paid the instalments as they fell due until Dec. 1883, when he became bkpt.:—*Held:* in the circumstances the inference was that all the members had, either expressly or by acquiescence, mutually agreed that all the transactions of the society previous to its registration should continue to be binding on the registered society, & the registered society could prove for the balance of the loan.—*Re* THOMAS, *Ex p.* POPPLETON (1884), 14 Q. B. D. 379; 54 L. J. Q. B. 336; 51 L. T. 602; 33 W. R. 583.

3102. Creditor alien enemy.]—A joint proof by a limited co. of enemy character & by one of its trustees was rejected.—*Re* HILCKES, *Ex p.* MUHESA RUBBER PLANTATIONS, LTD. (1916), 32 T. L. R. 696; *revsd.* on the ground that the company in question was not an enemy company, [1917] 1 K. B. 48, C. A.

3103. Partnership with debtor—Joint stock bank.]—A member of a joint stock banking co. kept an account with them as his bankers, & at the time of his bkpcy. was indebted to them in a large balance on such banking account, the co., being also considerably indebted to various other persons:—*Held:* the co. had a right of proof against bkpt., for the balance due on such banking

account.—*Re* CALDECOTT, *Ex p.* DAVIDSON (1841), 2 Mont. D. & De G. 368; 11 L. J. Ch. 1; 6 Jur. 116, L. C.

Annotations:—**Refd.** *Re* Drewry, *Ex p.* Wallis (1841), 2 Mont. D. & De G. 201, Ct. of R. **Mentd.** Pinkett *v.* Wright (1842), 2 Hare, 120; Kearsley *v.* Cole (1846), 16 M. & W. 128.

3104. —— ——.]—Bkpt. was member of a joint stock banking co., & kept an account with the bank as a customer, being, at the time of his bkpcy., indebted to the bank in a considerable balance, beyond the value of his shares in the bank & some other property on which the co. had a lien:—*Held:* such balance constituted a provable debt.—*Re* DREWRY, *Ex p.* WALLIS (1841), 2 Mont. D. & De G. 201, Ct. of R.

See, further, Sect. 3, sub-sect. 1, *ante;* Part XI., *post.*

See, further, BANKERS & BANKING, Vol. III., pp. 148, *et seq.*

3105. Failure to prosecute.]—Bkpt., a banker's clerk, having absconded on Mar. 16, 1877, defalcations to the extent of a few hundred pounds were being discovered, when on the 24th of the month the bankers received from bkpt. a letter confessing thefts to the amount of £7,852 19*s.* Instructions were given on the 26th, in consequence of which a warrant for his apprehension was, on the 28th, placed in the hands of a detective, who failed to find him in England. Conversations on Mar. 19, & again on the 22nd, between a partner of the bank & relatives of bkpt., were deposed to. In the course of the former the partner said, "My advice is, that he should get out of the country to America, or elsewhere," & on the latter occasion an offer having been made by bkpt.'s wife that bkpt. should return & throw himself on the mercy of the bank, the partner said, "No, if he did that, we should be obliged to prosecute him; if he were abroad, I don't suppose we should trouble further for him." It was also in evidence that after the conversation on the 19th, one of the relatives who was present had an interview with bkpt. in England, since which he had disappeared. The registrar of the county ct. having refused to admit to proof a claim of the bankers for the sum of £7,852 19*s.*:—*Held:* there was not proof of such negligence on the part of the bankers to bring the criminal to justice as disentitled them to prove for the amount stolen, and appeal allowed.—*Re* SHEPHERD, *Ex p.* BALL (1879), 10 Ch. D. 667; 48 L. J. Bcy. 57; 40 L. T. 141; 27 W. R. 563; 14 Cox, C. C. 237, C. A.

Annotations:—**Consd.** Midland Insce. *v.* Smith (1881), 6 Q. B. D. 561. **Apld.** Roope *v.* D'Avigdor (1883), 10 Q. B. D. 412. **Consd.** Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L. **Refd.** Appleby *v.* Franklin (1885), 55 L. J. Q. B. 129. **Mentd.** *Re* Guerrier, *Ex p.* Leslie (1882), 30 W. R. 344, C. A.

See, further, ACTION, Vol. I., pp. 60 *et seq.*

B. Fraud.

3106. Fictitious sale on credit to bankrupt—By consignee for sale—Limitation of proof.]—Consignment with authority to sell, to reimburse advances on the consignment, any deficiency to be made good, & the surplus, if any, restored. Part of the goods being sold to the consignors, proof under their bkpcy. was limited to the balance of the original advance.—*Re* CARSON & DISTELL, *Ex p.* THOMPSON (1811), 18 Ves. 234; 1 Rose, 165; 34 E. R. 305, L. C.

3107. Claim under agreement for dissolution of partnership—Fraudulent deed.]—A partnership was dissolved in 1818, the two continuing partners indemnifying the outgoing partners against the outstanding partnership debts. One of the partners died, & in 1825 the survivor became bkpt. One of the original partners had to pay a debt due at the time of the dissolution of the original firm. His proof was objected to, on the ground that at the time of the dissolution he knew the firm was insolvent, & the deed of dissolution was therefore fraudulent:—*Held:* (1) the deed was not necessarily fraudulent because the retiring partners were allowed to retire without paying any proportion of the actual deficiency, & the long period during which the business was carried on negatived the suggestion of fraud; (2) the proof must be admitted.—*Re* JOHNS, *Ex p.* CARPENTER (1826), Mont. & M. 1.

Annotation:—**Folld.** *Re* Caton, *Ex p.* Higgins (1842), 11 L. J. Bcy. 34.

3108. —— ——.]—D., on entering into partnership with bkpt., brought in £7,000, of which £3,000 was furnished by T., & £4,000 by J. On the dissolution of the partnership D. was entitled to £8,000, which was secured by bkpt.'s bond. Bkpt., who continued the business, reduced the debt to £7,000, & entered into an agreement, under which his bond to D. was cancelled, & two joint & several bonds, in which D. joined, were executed, one to T. for £3,000, & one to J. for £4,000:—*Held:* J. was a creditor in his own right for valuable consideration, & entitled to prove.—*Re* TODD (1844), De G. 87, L. C.

3109. Payment to induce creditor to agree to composition.]—Before his bkpcy. bkpt. had compounded with his creditors. In addition to the composition he had paid a particular creditor £87, as the creditor alleged, in order to induce him to supply further goods, but as bkpt. alleged, to induce the creditor to agree to the composition:—*Held:* the probabilities being strongly against the account given by the creditor, the proof, which was for goods sold & delivered between the composition & the bkpcy., must be reduced by £87.—*Re* GREEN, *Ex p.* MINTON (1834), 1 Mont. & A. 440; 3 Deac. & Ch. 688, Ct. of R.

3110. ——.]—A composition deed was entered into by a debtor, subject to a proviso making the release therein contained void on the non-payment of the instalments agreed on. A., a creditor for £989, received £200 by a secret agreement. On the subsequent bkpcy. of debtor after some instalments had been paid, A. sought to prove for his original demand, deducting from it what he had received:—*Held:* he was not entitled to do so.—*Re* HODGSON, *Ex p.* OLIVER (1851), 4 De G. & Sm. 354; 64 E. R. 866.

Annotations:—**Apprvd.** *Re* Harvey, *Ex p.* Phillips, [1888] W. N. 88, C. A. **Folld.** *Re* Myers, *Ex p.* Myers, [1908] 1 K. B. 941. **Mentd.** Mayhew *v.* Boyes (1910), 103 L. T. 1, C. A.

See, further, Part XXIII., *post.*

3111. Debt founded on warrant of attorney & judgment in fraud of creditors.]—Although a creditor, whose debt has been inserted in the schedule of a party taking the benefit of Insolvent Debtors' Act, 1826 (c. 57), is not prevented from proving for the balance of his debt under a subsequent fiat against the insolvent, yet where the debt is founded on a warrant of attorney given by the insolvent, & a judgment thereon entered up by him, in fraud of his creditors, the creditor cannot then prove for the balance under a subsequent fiat.—*Re* COPLESTONE, *Ex p.* RORIE (1842), 2 Mont. D. & De G. 631.

PART VIII. SECT. 8, SUB-SECT. 3.—B.

n. *Claimant party to fraudulent assignment.*]—Pltf., who claimed to rank as a creditor upon the estate of T., had aided & abetted T. in a fraudulent assignment:—*Held:* corroborative evidence was required to support pltf.'s claim & in the absence of such evidence, the claim must be dismissed.—JOSEPHS *v.* MORTON (1916), 49 N. S. R. 417; 26 D. L. R. 433.—**CAN.**

Sect. 8.—Rejection of proof: Sub-sect. 3, B. & C.]

3112. Mere suggestion of fraud insufficient.]—The mere suggestion that a creditor has obtained a fraudulent preference from a debtor will not justify the ct. in delaying the admission of his proof of debt.—*Re* ALLEN, *Ex p.* SMITH'S ASSIGNEES (1860), 9 W. R. 148.

3113. Fictitious sale by bankrupt to surety.]—The owner of a business, who had procured A. to become surety for the payment of a debt, & for that purpose to join him in making promissory notes, upon the eve of his bkpcy. entered into an agreement with A. for the sale to him of his business & stock-in-trade. By the terms of the agreement A., by way of part payment of the purchase-money, took over the sole liability upon the notes. Subsequently the vendor was adjudicated bkpt., & the trustee in bkpcy. obtained a judgment declaring that the agreement & sale were a sham & void. A., who in the meantime had paid the notes, then put forward a proof against debtor's estate for the money so paid as in respect of a consideration which had failed:—*Held:* although debtor's estate had had the benefit of the payment, A. could not prove for it, as it had been paid in the course of carrying out a transaction devised in fraud of the general body of creditors, & so much of the fraudulent agreement as was disadvantageous to A., & precluded him from having recourse to debtor as the principal maker of the notes, was binding on him, though the part which was advantageous to him did not bind the other creditors.—*Re* MYERS, *Ex p.* MYERS, [1908] 1 K. B. 941; 77 L. J. K. B. 386; 15 Mans. 85.

C. Other grounds.

3114. Debt statute-barred.]—A debt, which could not be recovered in an action against a plea of Stat. Limitations, nor in equity by analogy to it, is not provable under a commission of bkpcy., & any dividends paid on it must be refunded.—*Ex p.* DEWDNEY, *Ex p.* SEAMAN (1809), 15 Ves. 479; 33 E. R. 836; *subsequent proceedings, sub nom. Re* DEWDNEY, *Ex p.* ROFFEY (1815), 19 Ves. 468; 2 Rose, 245, L. C.

Annotations:—**Distd.** Jellis *v.* Mountford (1821), 4 B. & Ald. 256. **Consd.** Shewen *v.* Vanderhorst (1831), 1 L. J. Ch. 107. **Distd.** *Re* Brakenridge (1847), 10 L. T. O. S. 249. **Consd.** Fuller *v.* Redman (1859), 26 Beav. 614; Adams *v.* Waller (1866), 35 L. J. Ch. 727. **Apld.** *Re* Fleetwood & District Electric Light & Power Syndicate, [1915] 1 Ch. 486. **Mentd.** Burke *v.* Jones (1813), 2 Ves. & B. 275; Mayor *v.* Pyne (1825), 3 Bing. 285; Jones *v.* Scott (1830), 1 Russ. & M. 255, L. C.; *Re* Baillie, *Ex p.* Greenwood (1834), 3 Deac. & Ch. 398; Briggs *v.* Wilson (1853), 5 De G. M. & G. 12, L. JJ.; Midgley *v.* Midgley, [1893] 3 Ch. 282, C. A.; *Re* Worsley, [1901] 1 K. B. 309, C. A.

—— **Whether Statute of Limitations applicable.**]—*See* LIMITATION OF ACTIONS.

3115. Debt arising out of illegal transaction.]—A debt on goods sold to be sent to India, contrary to stat., cannot be proved.—*Ex p.* MOGGRIDGE (1791), 1 Cooke's Bankrupt Laws, 7th ed., p. 203.

3116. —— In contravention of City of London regulations.]—A broker of the City of London may sustain a proof for a debt, arising out of transactions as a merchant, although such transactions are in contravention of the regulations under which he derives his office, & of the condition of the bond which he executes, & of the oath which he takes on his appointment. Not, however, if the debt arises out of a transaction in which he has acted both as broker & principal, that being void upon principles of common law.—*Re* MOLINE, *Ex p.* DYSTER (1816), 1 Mer. 155; 2 Rose, 349; 35 E. R. 632, L. C.

Annotations:—**Consd.** Green *v.* Weaver (1827), 1 Sim. 404; Cope *v.* Rowlands (1836), 2 Gale, 231; Bank of Bengal *v.* Macleod (1849), 5 Moo. Ind. App. 1, P. C.; Armstrong *v.* Jackson, [1917] 2 K. B. 822. **Mentd.** Smith *v.* Watson (1823), 3 Dow. & Ry. K. B. 751; Robinson *v.* Kitchin (1856), 2 Jur. N. S. 294.

See, generally, AGENCY, Vol. I., pp. 279, 524; CONTRACT.

3117. —— Trading with the enemy.]—A debt arising out of a contract to convey British goods to a market in an enemy's country cannot be proved under a commission of bkpcy. after the conclusion of peace.—*Re* ALDEBERT & Co., *Ex p.* SCHMALING (1817), Buck, 93.

See, generally, ALIENS, Vol. II., pp. 162 *et seq.*; CONTRACT.

PART VIII. SECT. 8, SUB-SECT. 3.—C.

3114 i. *Debt statute-barred.*]—Debts barred by prescription before the date of insolvency cannot be proved.—NAUDE'S EXECUTOR *v.* MARITZ (HALL & NAUDE'S TRUSTEE) (1902), 19 S. C. 171.—**S. AF.**

3114 ii. ——.]—The duty of the presiding officer is a judicial one; & where a debt appears *ex facie* the documents to be prescribed, he should reject it.—ASPELING *v.* HOFFMAN'S TRUSTEE (1917), T. P. D. 305.—**S. AF.**

3114 iii. ——.]—The assignees in bkpcy., being trustees for the general body of the creditors, are bound to set up the bar of the stat. against an individual creditor.—*Re* CLENDINNING (1859), 9 I. Ch. R. 284.—**IR.**

3114 iv. —— *Whether provable in arrangement.*]—Debts barred by Stat. Limitations cannot be proved in arrangement matters any more than in bkpcy.—*Re* J. F. B. (1873), 8 I. L. T. Jo. 109.—**IR.**

3114 v. —— *Debts under Scottish sequestration—Not revived by subsequent composition in England.*]—A sequestration had issued against a debtor in Scotland, where he resided & carried on business, & creditors (also residing in Scotland) proved & received dividends. Debtor did not obtain any order of discharge, & more than six years from the payment of the last dividend, having in the meantime carried on business in England he petitioned the Ct. of Bkpcy. in London for protection, & a composition secured by inspectorship trusts was confirmed under 1849 Act:—*Held:* Stat. Limitations was a valid objection to the claim of the Scottish creditors to be paid a composition on the unpaid portion of their debt under the inspectorship.—*Re* KIDD, *Ex p.* KIDD (1861), 3 De G. F. & J. 640; 45 E. R. 1027.—**SCOT.**

3114 vi. —— *Six years expiring after writ of attachment—But before dividend.*]—A claim less than six years old at the date of a writ of attachment is not barred by Stat. Limitations, because the six years expire before the declaration of a dividend.—*Re* LEAKE & LAIDLAW (1879), 3 R. & C. 484; 12 N. S. R. 484.—**CAN.**

3115 i. *Debt arising out of illegal transaction—Stock-jobbing contract—Proof for differences paid on behalf of bankrupt principal.*]—A stock-broker may prove against a bkpt. principal for differences paid by him on stock bought & actually sold & transferred for the same account; but not for differences paid for carrying over to the next account, the payment of differences being illegal under 7 Geo. 2, c. 8, s. 5.—*Re* BURKE, *Ex p.* MCKENNA (1856), 9 Ir. Jur. 35.—**IR.**

p. *Res judicata—Conflicting judgments in Scottish & English courts.*]—In a Scottish sequestration of the estates of a firm having a trading domicil both in Scotland & England a claim was lodged by a co. for repetition of purchase-money paid by them to bkpts., on the ground of fraudulent misrepresentation by the vendors & others. The House of Lords on appeal from the Ct. of Session found that the fraud alleged was not proved. Subsequently a second claim was lodged by the co., based (1) upon a decree of the Ct. of Ch. in England, finding that the sale was fraudulent, & that the co. were at liberty to prove against bkpt.'s estates, & (2) upon the grounds upon which the English decree had proceeded, viz. that the sale was fraudulent:—*Held:* the question whether the co. were entitled to rank on the ground that the sale was fraudulent, was *res judicata* by the judgment of the House of Lords. *Qu.:* whether, in regard to the plea of *res judicata*, a creditor claiming in a sequestration is in the same position as the pursuer of an action.—PHOSPHATE SEWAGE CO. *v.* LAWSON & SON'S TRUSTEE (1878), 5 R. (Ct. of Sess.) 1125.—**SCOT.**

q. *Unpaid cheques—Want of presentment & notice—Proof of injury to insolvent's estate.*]—In resisting a claim on cheques, drawn by insolvent & unpaid for want of funds, on the ground of want of presentment & notice, it is necessary to allege & show that, by reason of want of notice, the insolvent or his estate had sustained loss or injury.—*Re* OULTON BROTHERS (1874), 15 N. B. R. (Pug.) 333.—**CAN.**

—— **Gambling transactions.**]—*See* GAMING & WAGERING; STOCK EXCHANGE.

—— **Illegal insurance.**]—*See* No. 3173, *post*; ALIENS, Vol. II., pp. 165–167; INSURANCE.

3118. Infancy of bankrupt—Loan obtained by false representation as to age.]—An infant obtained a loan on a representation, which he knew to be false, that he was of age:—*Held:* a proof for the loan was properly admitted in bkpcy.—*Re* KING, *Ex p.* UNITY JOINT STOCK MUTUAL BANKING ASSOCN. (1858), 3 De G. & J. 63; 27 L. J. Bcy. 33; 31 L. T. O. S. 242; 4 Jur. N. S. 1257; 6 W. R. 640; 44 E. R. 1192, L. JJ.

Annotations:—**Consd.** Miller *v.* Blankley (1878), 38 L. T. 527. **Folld.** *Re* Jones, *Ex p.* Jones (1881), 18 Ch. D. 109, C. A.; Stocks *v.* Wilson, [1913] 2 K. B. 235. **Dbtd.** Leslie *v.* Sheil, [1914] 3 K. B. 607, C. A. **Mentd.** Wright *v.* Leonard (1861), 11 C. B. N. S. 258; *Re* Collie, *Ex p.* Adamson (1878), 8 Ch. D. 807, C. A.; Burton *v.* Levey (1891), 7 T. L. R. 248; Levene *v.* Brougham (1909), 25 T. L. R. 265, C. A.

See, further, INFANTS & CHILDREN.

Proof too late.]—*See* Sect. 5, *ante*.

3119. Debt not debt insisted on at commission.]—Bonds granted to secure annuities being void under Annuity Act, 1777 (c. 26), there being no enrolment of one & the consideration of the other not being truly stated, a petition to be admitted a creditor for the sums advanced was dismissed, on the ground that, petitioner having insisted on his securities at the date of the commission, it was not the same debt.—*Ex p.* JAMES (1800), 5 Ves. 708; 31 E. R. 817, L. C.

3120. Instrument proved on improperly stamped—Bill—Proof of original debt.]—If a bill given in discharge of a debt is rendered inadmissible by being on an improper stamp, the creditor may prove his original debt.—BROWN *v.* WATTS (1808), 1 Taunt. 353; 127 E. R. 870.

Annotations:—**Consd.** Geddes *v.* Mowat (1824), 1 Gl. & J. 414, H. L. **Mentd.** Fromant *v.* Ashley (1853) E. & B. 723.

3121. —— —— Purporting to be drawn abroad—Actually drawn in London.]—Petitioners were bankers at Lincoln, & the holders, for a valuable consideration, & without notice, of two bills of exchange, purporting to be drawn, one at Haerlem, & the other at Amsterdam, on bkpt., & accepted by him. Proof had been refused by the comrs., as both the bills had been drawn in bkpt.'s own counting-house in London, & were without stamps. A petition that the bills might be proved was dismissed.—*Re* VOSS, *Ex p.* MANNERS (1811), 1 Rose, 68.

3122. —— Guarantee.]—A guarantee, though not stamped at the date of the bkpcy., may be proved when stamped.—*Re* SHEPPARD, *Ex p.* NICHOLSON (1840), 10 L. J. Bcy. 8; 4 Jur. 1066.

3123. Debt commanding choice of assignee.]—There is no jurisdiction in bkpcy. to reject a debt, on the ground that it must command the choice of assignees, & the creditor has an adverse interest to the general creditors by property & security obtained from bkpt. immediately before the bkpcy.—*Ex p.* DE TASTET (1813), 1 Ves. & B. 280; 35 E. R. 109, L. C.

Annotation:—**Mentd.** *Ex p.* Smith (1813), 1 Ves. & B. 518, L. C.

3124. ——.]—The admission or rejection of a proof is an exercise of judicial discretion, & its consideration need not be adjourned merely because, if the proof is admitted, the creditor will secure the election of a trustee, in opposition to the wishes of the majority of the other creditors.—*Re* AMOR, *Ex p.* MARK (1883), 49 L. T. 356; 31 W. R. 101, C. A.

3125. Creditor liable to refund payment already received.]—A proof ought not to be rejected on the ground that the creditor has received payment of part of the debt, in such circumstances as to render it questionable whether he ought not to refund that payment. The proper course is to allow the proof, but to retain the dividends upon it till the question is determined.—*Re* PULLAN, *Ex p.* ACKROYD (1824), 1 Gl. & J. 391; 2 L. J. O. S. Ch. 158.

Annotations:—**Consd.** *Re* Champion, *Ex p.* Reay (1834), 4 Deac. & Ch. 525; *Re* Thompson, *Ex p.* Dobson (1834), 4 Deac. & Ch. 69. **Mentd.** *Re* Stanton (1846), 7 L. T. O. S. 119.

3126. Creditor holding property of bankrupt.]—A claim or proof cannot be resisted, because the creditor has property belonging to the estate in his possession; that is only a ground to restrain payment of the dividends.—*Re* THOMPSON, *Ex p.* DOBSON (1834), 1 Mont. & A. 666; 4 Deac. & Ch. 69; 3 L. J. Bcy. 117, Ct. of R.

Annotations:—**Mentd.** *Re* Smith, *Ex p.* Brand (1836), 5 L. J. Bcy. 57, Ct. of R.; *Re* Stanton (1846), 7 L. T. O. S. 119; *Re* Morton, *Ex p.* Robertson (1875), L. R. 20 Eq. 733.

3127. No entries of debt in creditor's books.]—A proof had been rejected solely because there were no entries of the items in the account books of the party seeking to prove:—*Held:* the mere fact of non-entry of items in books was not, standing by itself, & without further inquiry, sufficient to authorise any comr. to reject a proof.—*Re* PARKER, *Ex p.* BEASLEY (1836), 2 Mont. & A. 632, Ct. of R.

3128. ——.]—A creditor of bkpt., who had absconded with his books of account & had never surrendered to the fiat, applied to prove on two bills, one for £200, & the other for £123, the consideration for which the creditor alleged to be goods sold by him to bkpt. No entry appeared in the creditor's books of the sale of those goods, nor did he adduce any evidence of the fact, beyond his own statement:—*Semble:* the comr. was, in the circumstances, justified in rejecting the proof.—*Re* LEWIS, *Ex p.* KNIGHT (1836), 1 Deac. 408; 2 Mont. & A. 545, Ct. of R.

Annotation:—**Mentd.** *Re* Van Laun, *Ex p.* Chatterton, [1907] 2 K. B. 23, C. A.

3129. ——.]—A proof in respect of money lent, tendered against the estate by the father of bkpt., was rejected by the trustee, on the ground that no notice of the alleged debt appeared in bkpt.'s books of account:—*Held:* upon the evidence before it, the ct. would not be justified in saying that the claim of the father was not a *bonâ fide* one; but the ct. could not be insensible to the fact that the difficulty which had arisen was in great measure due to the conduct of the creditor himself in allowing his debt to remain without formal acknowledgment or entry in the books, by reason of which the trustee had been compelled to come to the ct. in the course of his duty, & although an order would be made allowing the proof, such order must be without costs, the trustee to take his costs out of the estate.—*Re* DES VIGNES, *Ex p.* DES VIGNES (1888), 5 Morr. 143.

3130. No evidence beyond deposition of creditor.—A comr. is not justified in rejecting the proof of a debt, which is admitted by bkpt., & not opposed by the assignees, because the deposition of the creditor is not supported by the evidence of third persons.—*Re* CLARKE, *Ex p.* CHAPMAN (1838), 3 Deac. 273, Ct. of R.

See, further, Sect. 7, sub-sect. 2, *ante*.

3131. Instrument proved on altered—Erasure of signature of one of parties.]—A. & B. entered into a joint & several bond to C., D., & E., & C., delivered the bond to A., who was her son, for safe custody. After for some time receiving the interest from A., she, & D., another of the obligees,

Sect. 8.—Rejection of proof: Sub-sect. 3, C.; sub-sect. 4.]

died, & B., one of the obligors, also died, when his exors. & A. made an arrangement together, without the privity of E., the surviving obligee, & erased the name & seal of B. from the bond :—*Held :* this did not invalidate the bond as against A., & on his bkpcy., the surviving obligee might prove for the amount of the principal & interest due upon the bond.—*Re* SMITH, *Ex p.* SMITH (1843), 3 Mont. D. & De G. 378 ; 1 L. T. O. S. 456 ; 7 Jur. 864.

3132. —— Addition of another signature.]—A proof in respect of a promissory note payable on demand was rejected, on the ground that the note had been altered some years after it was given with the consent of applt., the holder thereof, an additional signature having been placed on it :—*Held :* not an alteration rendering the note void, but an addition in the nature of an indorsement, although on the face of the note.—*Re* SMITH, *Ex p.* YATES (1857), 2 De G. & J. 191 ; 27 L. J. Bcy. 9 ; 30 L. T. O. S. 282 ; 4 Jur. N. S. 649 ; 6 W. R. 178 ; 44 E. R. 961, L. JJ.

Annotation:—**Dbtd.** Lecaan *v.* Kirkman (1859), 6 Jur. N. S. 17.

3133. Debt merged on bond.]—A. was indebted to B. in £20,000. An interview took place between B. & C., a son of A., in respect of the debt. A bond was subsequently drawn out & executed by A. & C., whereby they became jointly & severally bound to pay to B. £10,000, by instalments of £1,000 a year, with interest on such instalments as should be in arrear. The terms of the agreement, under which the bond was executed, were not put into writing. It was stated by B. that the agreement made at the above-mentioned interview was, that the debt should not be cancelled until the bond was satisfied, but it was stated by C. that the agreement was that the old debt should be at once cancelled on the execution of the bond. A. became bkpt. A proof for the old debt, tendered by B., was rejected, on the ground that the old debt was extinguished by the bond.—*Re* EWENS, *Ex p.* HERNAMAN (1848), 17 L. J. Bcy. 17 ; 11 L. T. O. S. 454 ; 12 Jur. 643.

3134. No privity of contract between party proving & bankrupt — Sub-contract.] — Bkpts., coal proprietors, for some time previous to & at the time of their bkpcy. worked a coal mine, & for that purpose employed colliers, to whom the work was let off at so much per score baskets, each collier having a drawer attached to him. When the colliers were hired they brought their drawers with them, & the colliers were not hired, unless bkpts.' manager approved the drawers, or unless, in case of disapproval, the colliers took drawers provided for them by the manager, & whether the drawers were brought by the colliers or provided by the manager, they were paid by the colliers out of their earnings, & they were so paid according to such agreements as they might have made with the colliers, neither bkpts. nor their manager taking any part whatever with reference to such agreements. If the manager at any time withdrew the drawers from the service of the colliers, he paid the colliers for the drawers' time, & the colliers had full power to discharge the drawers, & neither bkpts. nor their manager interfered with that power, further than that if the colliers discharged their drawers unjustly, the colliers would themselves be discharged, & the drawers as well as the colliers were liable to be discharged by the manager for transgressing the rules of the mine. The wages of the drawers were in arrear at the time of the bkpcy., & they tendered proofs before the comr. for those arrears. The comr. having rejected the proofs :—*Held :* the question depended wholly upon whether bkpts. were indebted to the drawers, & as they were not, the decision of the comr. was correct.—*Re* BYROM, *Ex p.* BALL (1853), 3 De G. M. & G. 155 ; 20 L. T. O. S. 267 ; 43 E. R. 62, L. JJ.

3135. —— Mortgagor & assignees of lease.]—Bkpts. were assignees of a lease, & the trustees refused to admit a proof by the lessor, who was also mtgor., against their joint estate :—*Held :* privity of estate remained between the mtgor., & bkpts., & the proof must be admitted.—*Re* MALDEN GIBSON & CO., *Ex p.* JAMES (1886), 55 L. T. 708 ; 3 Morr. 185, D. C.

3136. —— Assignee of equity of redemption & transferee of mortgage.]—A mtgor. assigned his equity of redemption, & the estate of the two mtgees. was transferred, so that it vested in one alone. The assignee of the equity continued to pay interest on the mtge., & when sued for arrears suffered judgment by default. He was subsequently adjudged bkpt., & the transferee of the mtge. claimed to prove against his estate for further arrears of interest :—*Held :* the proof could not be allowed, since there was no privity of contract between the assignee of the equity & the transferee of the mtge., & no personal liability on the part of the assignee of the equity of redemption to pay interest.—*Re* ERRINGTON, *Ex p.* MASON, [1894] 1 Q. B. 11 ; 69 L. T. 766 ; 10 R. 91, D. C.

3137. —— Fictitious company interposed by bankrupt.]—A corpn. consisted of only the seven signatories to its memorandum of assocn. It was formed by D. & G., two of the signatories, to cloak their identity in carrying on their financial operations, & they were the sole directors & managers of the corpn. The corpn. then contracted to buy a licence to work a quarry for a small sum, & promoted a co. to acquire the licence, & the usual contracts were entered into by means of a trustee for the co., whereby the corpn. as vendors agreed to sell the licence to the co. for £10,500 in cash, £2,000 in debentures, & £5,500 in fully-paid shares of £1 each of the co. D. & G. then caused the co. to be registered & found the seven signatories to its memorandum of assocn. & its directors, all of whom were their creatures. The co. duly adopted the contract of sale & issued to the corpn. five thousand five hundred fully-paid shares & £2,000 in debentures. D. & G. then prepared prospectuses which were issued by the co. to the public inviting subscriptions to an issue of two thousand debentures of £10 each, & as subscriptions came in the co. paid the corpn. some £9,000 cash, on account of the £10,500, which D. & G. then divided between themselves. The only shareholders of the co. were the seven signatories to its memorandum & the corpn. as holders of the five thousand five hundred shares. The contracts & prospectuses disclosed that the corpn. was promotor & vendor to the co. & was making the profit, but did not disclose the fact that D. & G. were the real promoters & vendors & were receiving the profit through the corpn. The co. went into liquidation & subsequently D. & G. became bkpt. D. had assets, G. had none. They were prosecuted for fraudulent & material misstatements in the prospectuses & convicted :—*Held :* as the corpn. was only an "alias" for D. & G., the liquidator of the co. could prove in the bkpcy. of D. for the whole of the secret cash profit that D. & G. had received.—*Re* DARBY, *Ex p.* BROUGHAM, [1911] 1 K. B. 95 ; 80 L. J. K. B. 180 ; 18 Mans. 10.

3138. Statement of account not "full, true & complete."]—If a creditor, who proves his debt by declaration under 1861 Act, s. 144, files a statement of account, which is not "full, true, & complete," his proof ought to be rejected.—*Re* TAYLOR, *Ex p.* BARNETT (1868), 4 Ch. App. 68; 19 L. T. 406; 17 W. R. 88, L. JJ.

3139. Instrument proved on not complying with foreign law—Document executed abroad—Failure to register.]—M. & his wife, who were married in Batavia, entered into a contract before the marriage, by which a sum was settled on the wife for her separate use. By the law of Batavia no marriage contract excluding a community of goods had any effect with regard to third parties until registered. The contract in question was never registered. M. & his wife subsequently came to England, where M. became bkpt., & his wife claimed to prove against his estate for the sum settled:—*Held:* the law of Batavia respecting registration did not affect the validity of the contract, but only the remedy of those claiming under it, & as all questions of priority of creditors must be determined by the law of the country where the bkpcy. took place the wife was not precluded by the non-registration of the deed from proving for the sum settled *pari passu* with the other creditors.—*Re* MELBOURN, *Ex p.* MELBOURN (1870), 6 Ch. App. 64; 40 L. J. Bcy. 25; 23 L. T. 578; 19 W. R. 83, L. JJ.

See 1914 Act, s. 42 (2).

3140. Uncertainty as to who eventually entitled to benefit.]—In a divorce suit a decree for a divorce was made, & co-resp. was ordered to pay into the registry £5,000, the amount of damages assessed by the jury. The decree was made absolute. Co-resp. being resident abroad, the order for payment could not be enforced against him, & an order was obtained from the Divorce Ct. rescinding so much of the decree as ordered payment into the registry, & ordering the £5,000 to be paid to the husband, he undertaking to pay it into the registry to abide the further order of the ct. The husband then commenced proceedings in bkpcy. against co-resp.:—*Semble:* there being a sum presently payable, & an order for its payment, the mere uncertainty as to who was ultimately to receive it, & for whose benefit it was ultimately to be applied, would not prevent its being a provable debt (MELLISH, L. J.)—*Re* MUIRHEAD, *Ex p.* MUIRHEAD (1876), 2 Ch. D. 22; 45 L. J. Bcy. 65; 34 L. T. 303; 24 W. R. 351, C. A.

Annotations:—**Distd.** *Re* Lewis, *Ex p.* Harris (1876), 2 Ch. D. 423. **Folld.** *Re* Fryer, *Ex p.* Fryer (1886), 17 Q. B. D. 718, C. A.; *Re* Sacker, *Ex p.* Sacker (1888), 22 Q. B. D. 179, C. A. **Consd.** *Re* O'Gorman, *Ex p.* Bale, [1899] 2 Q. B. 62. **Mentd.** *Re* Rayner, *Ex p.* Rayner (1877), 37 L. T. 38.

3141. Proof not bonâ fide for benefit of creditor.]—A creditor of a firm, of which one partner had become bkpt., proved against bkpt.'s estate in respect of a judgment debt. He subsequently issued writs against the firm for money due, & compromised the actions with the solvent partner, who alone had been served. The terms of the compromise included payment of a lump sum to the creditor, & the assignment to the solvent partner of all sums to be received under proof:—*Held:* the proof under the compromise was properly rejected, as not being a *bonâ fide* proof for the benefit of the creditor.—*Re* REESE, *Ex p.* BRYANT (1890), 7 Morr. 144, D. C.

3142. Voluntary part payment of debt by third party—Without debtor's knowledge.]—At the date of his bkpcy. A. owed B. some £16,500 for money advanced to him by B. on the deposit of a transfer of shares, which turned out to be a forgery. Subsequently C., who was formerly A.'s partner, whilst repudiating all liability for A.'s fraud, voluntarily paid B. £6,500 for the loss thereby sustained. This payment was made without A.'s knowledge:—*Held:* the payment was not made on account of either the debt or debtor, & B. could prove for the full amount of the debt without deducting the £6,500.—*Re* ROWE, *Ex p.* DERENBURG & Co., [1904] 2 K. B. 483; 73 L. J. K. B. 594; 91 L. T. 220; 52 W. R. 628; 48 Sol. Jo. 475; 11 Mans. 130, C. A.

Annotation:—**Mentd.** *Re* Keet, [1905] 2 K. B. 666, C. A.

3143. Proof by bankrupt's wife on covenant to discharge mortgage debt—Proof by mortgagee already admitted.]—Bkpt. charged to mtgees. certain property & conveyed to his wife & another the equity of redemption of that property & covenanted with them to discharge the mtge. debt. A proof was put in on behalf of the mtgees. & admitted to rank for dividend against the estate. Bkpt.'s wife sought to prove in the bkpcy. in respect of the covenant with her to discharge the mtge. debt:—*Held:* if bkpt.'s wife was allowed to prove in the bkpcy., it would be a case of double proof in respect of the same liability.—*Re* HOEY, *Ex p.* HOEY, (1918) 88 L. J. K. B. 273; [1918–19] B. & C. R. 49, D. C.

3144. Debt satisfied by imprisonment.]—Motion to prove a debt of upwards of £1,000 of bkpts. on a judgment obtained against them prior to the bkpcy., & upon which one of bkpts. was detained in custody from the arrest up to the time of his having obtained his certificate:—*Held:* the debt was satisfied in law by the imprisonment & discharge of bkpt. & motion refused.—*Re* ROBINSON & TARLEY (1847), 9 L. T. O. S. 412; *subsequent proceedings* (1850), 15 L. T. O. S. 178, L. C.

Annotations:—**Mentd.** Stevenson *v.* Newnham (1853), 13 C. B. 285, Ex. Ch.; *Re* Painter, *Ex p.* Painter (1894), 71 L. T. 581, D. C.

See, also, Sect. 4, *ante,* & No. 4192, *post.*

SUB-SECT. 4.—NOTICE OF REJECTION.

3145. Sufficiency of—Application for particulars.]—A trustee under a scheme of arrangement in bkpcy. rejected a proof in respect of certain bills, on the grounds (1) the acceptance, issue & negotiation of each of the bills were effected by fraud, & (2) the bills were taken with knowledge that the givers of them had no rights thereto. Appct. asked for particulars of the alleged fraud & of the creditor's knowledge:—*Held:* as to (1) the notice of rejection did not set forth sufficient grounds, & the application must be allowed, but as to (2) the grounds were sufficient, & the application must be dismissed.

The ct. will not grant applications for particulars of grounds of rejection of a proof by a trustee in bkpcy. in every case of rejection as of right. They will consider each case & see whether the trustee has properly stated his grounds of decision.—*Re* HUNTLY (MARQUIS), *Ex p.* GOLDSTEIN (1917), 87 L. J. K. B. 590; *sub nom. Re* A DEBTOR, *Ex p.* GOLDSTEIN, 62 Sol. Jo. 71; [1917] H. B. R. 270, D. C.

3146. Time for.]—P., a creditor, proved under proceedings for the liquidation by arrangement of the affairs of R., the proof being made prior to the appointment of the trustee. Subsequently to the proof being made the trustee caused P. to be summoned for examination. The course of the examination was such as to show that the trustee was not satisfied with the proof, & the registrar ordered P. to furnish further accounts. The further accounts never were furnished, although demanded in writing by the trustee.

Sect. 8.—*Rejection of proof: Sub-sects.* 4, 5 & 6. *Sect.* 9: *Sub-sects.* 1 & 2.]

After a lapse of two years, the trustee having taken no further step with respect to P.'s proof, declared a dividend, which he paid to all the creditors except P.:—*Held:* two years having elapsed without notice of rejection having been given, the trustee must be taken to have admitted the proof.—*Re* RUSSELL, *Ex p.* KEMP (1873), 42 L. J. Bcy. 26; 28 L. T. 487; 21 W. R. 450, L. J.

Annotations:—**Consd.** *Re* Armitage, *Ex p.* Good (1877), 5 Ch. D. 46. **Refd.** *Re* Tait, *Ex p.* Harper (1882), 21 Ch. D. 537, C. A.

See, also, Nos. 3075, 3076, *ante.*

SUB-SECT. 5.—APPEALS.

3147. Against rejection of proof—Jurisdiction of court—To hear appeal.]—Where a proof of a creditor's debt has been disallowed by comrs., the ct. will hear the proof.—ANON. (1676), 1 Cas. in Ch. 275; 22 E. R. 798.

Annotation:—**Refd.** *Re* Chambers, *Ex p.* Davy (1834), 4 Deac. & Ch. 322.

3148. —— —— To place proof on proceedings without remitting back to commissioners.]—Where the comrs. have not admitted a proof tendered to them, the ct. may direct it to be placed on the proceedings at once, without referring it back to the comrs., although the proof may not have been rejected, but only adjourned.—*Re* MAYOR, *Ex p.* WHITWORTH (1841), 2 Mont. D. & De G. 158, Ct. of R.

3149. —— —— To refuse application—Until costs previously incurred paid.]—Where a petition of a creditor to prove a debt had been dismissed with costs, & the creditor presented a petition in the nature of a petition to rehear on new facts, the ct. refused to hear the latter petition until he paid the costs of the former petition, which had been taxed, although there had been no actual demand on him for the payment.—*Re* JAMES, *Ex p.* MUDIE (1842), 2 Mont. D. & De G. 669, Ct. of R.

3150. —— Who may appeal—Alien enemy.]—An alien enemy, cannot be heard during war in support of a motion, to revise or vary the decision of the trustee in bkpcy. rejecting his proof, & the motion must be dismissed.—*Re* WILSON & WILSON, *Ex p.* MARUM (1915), 84 L. J. K. B. 1893; 113 L. T. 1116; [1915] H. B. R. 189.

3151. —— Who may oppose appeal—Bankrupt.]—Where, at the first meeting of the creditors of bkpt., the chairman rejects the proof tendered by a creditor for the sum at which bkpt. has entered & sworn to the debt in his statement of affairs, & the creditor appeals from such rejection, bkpt. has no *locus standi* to appear & oppose the appeal, even though he may have been served with notice of the appeal.—*Re* KNIGHT, *Ex. p.* SMITH & CO. (1884), 1 Morr. 74.

3152. —— Notice of motion—Time for.]—If a creditor desires to appeal against the rejection of his proof by the trustee, he must give notice of motion in the usual way under 1883 Rules, r. 19, & within the twenty-one days limited by r. 174. The old practice of applying to the ct., in the first instance, to fix a time & day for hearing such an application no longer obtains.—*Re* GILLESPIE, *Ex p.* MORRISON (1884), 14 Q. B. D. 385; 52 L. T. 55; 33 W. R. 751; 1 Morr. 278.

3153. —— —— Service of.]—Notice of appeal against the decision of the official receiver rejecting a proof for the purposes of voting must be served upon resps. within twenty-one days from the date of such decision, & must give resp. eight days before he is to be called upon to appear & argue the appeal.—*Re* SMITH, *Ex p.* VALENTINE (1910), 54 Sol. Jo. 215.

3154. —— What should be stated in petition—Grounds for rejection.]—On petitions in bkpcy. to be admitted to prove debts, which have been rejected by the comrs., petitioners ought to state to the ct. in the first instance the grounds of the comrs.' objection.—*Ex p.* WILSON (1787), 1 Cox, Eq. Cas. 308; 29 E. R. 1179.

3155. —— —— —— .]—A petition to enforce a claim of proof ought to state the grounds of rejection by the comrs.—*Re* ALDEBERT & CO., *Ex p.* SCHMALING (1817), Buck, 93.

3156. —— —— —— Only when grounds stated.]—In a petition, complaining of the rejection of a proof by the comrs., it is not necessary to state their grounds of rejection, unless it appears that such grounds were assigned.

The ct. will not, in the absence of evidence, assume that the comrs., in rejecting a proof, stated their reasons.—*Re* JAMES, *Ex p.* MUDIE (1842), 2 Mont. D. & De G. 490; 11 L. J. Bcy. 18; 6 Jur. 135, Ct. of R.

3157. —— Evidence.]—On an appeal from the rejection of a proof:—*Held:* it is the duty of bkpt. to assist the trustee during the bkpcy., & to attend the ct. & give evidence if so required.—*Re* FITZGERALD, *Ex p.* HOBBS, [1916] H. B. R. 157.

See, also, No. 4634, *post.*

3158. Against order of Court of Review—To admit debt rejected by commissioners—Time for appeal.]—*Held:* 1 & 2 Will. 4, c. 56, s. 32, was confined in its operation to London fiats; & where the appeal was from a decision of the Ct. of Review, on a question of proof under a country

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PART VIII. SECT. 8, SUB-SECT. 5.

3147 i. *Against rejection of proof—Jurisdiction of court*—19 *Vict. No.* 13, *s.* 4.]—*Re* KINGSLAND, *Ex p.* WARBURTON (1869), 6 W. W. & A'B. 10. —**AUS.**

r. —— *By summons.*]—Applications being made to have proofs of debt reconsidered:—*Held:* appcts. must issue a summons & take out a sitting.—*Re* CORMACK (1871), 5 I. L. T. 67.—**IR.**

s. —— *Not a trial within Bkpcy. Act,* 1883, *Sched. III.*]—BAYLY *v.* OFFICIAL ASSIGNEE OF HUMPHRIES (1886), 5 N. Z. L. R. 213.—**N.Z.**

t. —— *Within what time*—1883 *Rules—Indian Insolvency Act, s.* 40.] —An insolvent filed his schedule & entered J. as a creditor for a certain sum. J. died without having either proved or disputed this amount. A dividend was declared & paid, but no claim was sent in by J.'s exors. Subsequently they put in a claim for a much larger sum, but the official assignee disallowed this claim. More than twenty-one days later the exors. applied to the ct. to have the claim admitted. The official assignee contended that, under the above sect., English 1883 Rules applied to India & that under r. 230 the application was too late:—*Held:* the English rule did not apply to India, & the application was not barred by time.—*Re* KALIDAS KESHOWJI (1902), I. L. R. 26 Bom. 623.—**IND.**

w. *Against order admitting of proof—Within what time.*]—Appeal from an order of the county ct. sustaining a claim against an insolvent estate dismissed with costs, where proceedings were not taken within the eight days limited by stat.—*Re* MORTON'S ESTATE (1881), 2 R. & G. 341; 14 N. S. R. 341; 1 C. L. T. 664.—**CAN.**

a. —— —— *Bankruptcy Act,* 1883, *s.* 5 (9).]—On July 19, 1886, an order was made allowing a proof. On June 23, 1888, the official assignee applied under the above sub-sect. to have the order varied. No fresh materials were submitted to the ct. in support of the application:—*Held:* the application was too late.—*Re* SMITH, *Ex p.* MCGAVIN (1888), 6 N. Z. L. R. 703.—**N.Z.**

b. *Form of judgment—Admitting proof.*]—Proper form of judgment in an action establishing a right to rank on the estate of an insolvent explained. —GRANT *v.* WEST (1896), 23 A. R. 533.—**CAN.**

fiat, applt. was not limited to one month for lodging the appeal.—*Re* FIDGEON, *Ex p.* FIDGEON (1840), 4 Deac. 217, L. C.

SUB-SECT. 6.—COSTS. *See* SECT. 14, *post.*

SECT. 9.—EXPUNGING OR REDUCTION OF PROOF.

SUB-SECT. 1.—JURISDICTION OF COURT.

3159. To vary order reducing but not expunging proof.]—Where, upon an application to expunge a proof, an order has been made reducing it merely, the comr. has no power to entertain an application to vary that order upon the same evidence as was produced upon the former occasion, where the effect would be to expunge the proof altogether. The proper course is to appeal against the order to the Lords Justices.—*Re* EATON, *Ex p.* EATON (1856), 28 L. T. O. S. 178.

See 1914 Act, Sched. II., rr. 24, 26, & s. 108.

3160. Effect of 1861 Act, s. 155.]—The above sect. does not give to the ct. any additional power to expunge a proof beyond what it had under 1849 Act, but it simply gives to the ct. a large discretion as to the time when, & the manner in which, an application to expunge should be made. —*Re* ASPINWALL, *Ex p.* HANNAH (1866), 14 L. T. 295.

3161. Effect of order of Court of Review—Binding on commissioners.]—The comrs. have no jurisdiction to expunge a proof which has been placed on the proceedings, in pursuance of an order of the Ct. of Review.—*Re* MAYOR, *Ex p.* WHITWORTH (1841), 2 Mont. D. & De G. 164, Ct. of R.

SUB-SECT. 2.—WHO MAY APPLY.

3162. Another creditor who has proved.]—A creditor, who has proved a debt in a bkpcy., has an interest which entitles him to apply to expunge the proof of another creditor which has been admitted by the trustee.—*Re* STENSON, *Ex p.* MERRIMAN (1883), 25 Ch. D. 144; 53 L. J. Ch. 403; 50 L. T. 226; 32 W. R. 281, C. A.

3163. Official assignee—By desire of creditors—Or by direction of commissioners.]—The ct. will not sanction an application by the official assignee to reduce a proof, unless it is made by desire of the creditors, or by the direction of the comrs.—*Re* WYATT & THOMPSON, *Ex p.* ADAMS, *Re* WYATT & THOMPSON, *Ex p.* GROOM (1837), 3 Mont. & A. 157; 2 Deac. 265, Ct. of R.

3164. Bankrupt—With consent of all parties.]—A bkpt. applied to reduce a proof. All parties consented:—*Held:* the application was contrary to the law & practice in bkpcy., & should have been made by the assignees, but, as all parties consented, it might be granted, subject to an affidavit that there was no collusion, bkpt. paying the costs of all parties served.—*Re* POWNALL, *Ex p.* POWNALL (1836), 2 Mont. & A. 707, Ct. of R.

See 1914 Act, Sched. II., r. 26.

3165. —— Adjournment to ascertain probability of surplus.]—A bkpt. applied to reduce a proof:—*Held:* the application might be adjourned, in order that the probability of a surplus might be alleged.—*Re* PITCHFORTH, *Ex p.* PITCHFORTH (1838), 3 Deac. 487; Mont. & Ch. 96; 8 L. J. Bcy. 33, Ct. of R.

3166. —— After resolution by creditors to accept composition.]—After the creditors of a bkpt. have resolved, under 1869 Act, s. 28, to accept a composition offered by bkpt., bkpt., though undischarged, has a *locus standi* to apply to the ct. to reduce the amount of the proof of a creditor, & the mere fact that the proof has been upon the file of the proceedings in the bkpcy. for upwards of a year does not estop bkpt. from making the application.—*Re* BOND, *Ex p.* BACON (1881), 17 Ch. D. 447; 44 L. T. 834; 29 W. R. 574, C. A.

3167. —— Proof resulting in rejection of scheme of arrangement.]—A scheme of arrangement was rejected by reason of a vote given by a creditor,

PART VIII. SECT. 9, SUB-SECT. 1.

c. *When it arises.*]—*Held:* the county judge had no power to reduce a claim until it had been decided upon by the assignee, by a decision which could be appealed against.—*Re* CLEGHORN & MUNN, 2 C. L. J. 133.—**CAN.**

d. *Reduction of proof on application to expunge.*]—Pltf., a party interested, alleged in his declaration that the insolvent was not indebted to deft. in any amount & claimed that the proof be either expunged or reduced:—*Held:* pltf. was entitled to ask for a reduction of the proof in case he failed to prove that the whole debt should be expunged.—VAN NIEKERK'S TRUSTEES *v.* KLASSNIK (1917), T. P. D. 317.—**S. AF.**

e. *To set aside proof by settlement trustees—Not on petition by assignee.*]—A claim made by the trustees in a bkpt.'s marriage settlement, cannot be set aside upon a petition by the assignee, but a bill must be filed.—*Ex p.* BACON (1810), 2 Mol. 441.—**IR.**

PART VIII. SECT. 9, SUB-SECT. 2.

3162 i. *Another creditor—Must show assets will be recovered.*]—The assignee under an assignment for the benefit of creditors, decided not to contest certain creditors' claims. A creditor contested those claims for his own benefit but in the assignee's name:—*Held:* unless he could show that some asset would be recovered for the estate he would not be allowed to contest by virtue of R. S. O., c. 134, s. 12.—*Re* TAYLOR (1914), 26 O. W. R. 662.—**CAN.**

3162 ii. *Another creditor who has not proved.*]—Although, under Creditors' Relief Act, a creditor who does not come in within the period prescribed, may not be entitled to rank for a dividend, he is interested in the proper distribution of the money realised, & is, under s. 10 of that Act, entitled to contest the certificates of claim of other creditors.—BANK OF HAMILTON *v.* AITKEN (1893), 20 A. R. 616.—**CAN.**

3163 i. *Official assignee—Under debtor's petition for arrangement—Application to expunge proof without which arrangement could not have been carried.*]—A., being desirous of raising a loan for the purpose of consolidating the mtges. on his estate, employed V., a mtge. broker, to obtain the money for him on an agreement in writing that V. should receive £3 per cent. commission on the amount of the loan, if he got a firm offer. V. entered into negotiations with W. & Co., a firm of solrs. in London, who had a client willing to advance the money, on good title & proper security. V. negotiated for some time between the parties, & some of the terms were arranged, when A. proposed a larger loan than that originally sought, & the negotiations terminated. V. sued A. for £1,050, the amount of his commission, & though A. delivered a defence, he did not appear at the trial. On Jan. 11, 1895, V. obtained judgment for the full amount claimed & costs. On Jan. 12, 1895, A. presented a petition for arrangement to the Ct. of Bkpcy. in Ireland, by which he proposed to vest his estate in M., one of the official assignees, who was to act as receiver & manager over the estate, upon trust, after payment of the rent & outgoings, the costs, & a sum for maintenance to petitioner, to pay the unsecured creditors till they were paid in full. V. proved his debt, & the arrangement was carried, V.'s proof being used to carry the arrangement, at the first & second private sittings. In Ap., 1897, the first dividend was paid to the creditors, including V. In Feb., 1898, a second dividend was about to be paid, when M. applied to have V.'s proof of debt expunged, as there was no *bonâ fide* consideration for it:—*Held:* whether there was good consideration for V.'s debt or not, M. was not entitled to have it expunged, as without it the arrangement under which M. had been appointed receiver could not have been carried, & M.'s status as receiver, & his right to represent the creditor's depended on the existence of V.s, debt.—*Re* AN ARRANGING DEBTOR, *Ex p.* VAGG, [1899] 2 I. R. 383.—**IR.**

g. *Assignees.*]—Where a person petitions the Lord Chancellor to be admitted a creditor under a commission of bkpcy., & he dismisses the petition, he cannot expunge the debt—the motion for this purpose must be on the part of the assignees.—*Ex p.* MURPHY (1803), 1 Sch. & Lef. 44.—**IR.**

3164 i. *Bankrupt—Proof of fine or penalty.*]—An insolvent has no *locus standi* for the purpose of expunging the proof of a fine or penalty, if the only question is whether the person who has obtained judgment for the fine or penalty is entitled to compete with the other creditors.—CONTAT *v.* CONTAT'S TRUSTEE (1893), 10 S. C. 314.—**S. AF.**

Sect. 9.—Expunging or reduction of proof: Sub-sects. 2, 3 & 4.]

in respect of a proof for the costs of an action brought by debtor, in which judgment had been given against debtor after the receiving order :—*Held :* bkpt. had a *locus standi* to apply to expunge the proof.—*Re* BLUCK, *Ex p.* BLUCK (1887), 56 L. J. Q. B. 607 ; 57 L. T. 419 ; 35 W. R. 720 ; 4 Morr. 273.

Annotations :—**Distd.** *Re* Benoist, [1909] 2 K. B. 784. **Consd.** *Re* A Debtor (No. 68 of 1911), [1911] 2 K. B. 652, C. A. **Refd.** *Re* British Gold Fields of West Africa, [1899] 2 Ch. 7, C. A.

3168. —— Application made in name of another creditor.]—A creditor, who applied to the ct. to expunge a proof, admitted he made the application at the request of & for the benefit of debtor, & not *bonâ fide* for his own benefit :—*Held :* as debtor himself could not make such an application, the application, though nominally made in the name of a creditor, could not be granted.—*Re* TALLERMAN, *Ex p.* ROONEY (1888), 57 L. J. Q. B. 509 ; 58 L. T. 886 ; 36 W. R. 864 ; 5 Morr. 119.

3169. —— Special circumstances.]—As a general rule, a debtor has no *locus standi* to apply to expunge or reduce a proof either before his proposal for a composition or scheme has been accepted by the creditors or after it has been rejected, but the ct. may in exceptional circumstances entertain such an application.—*Re* BENOIST, [1909] 2 K. B. 784 ; 78 L. J. K. B. 1105 ; 101 L. T. 432 ; 53 Sol. Jo. 700 ; 16 Mans. 276.

Annotation :—**Refd.** *Re* Pilling, [1909] 2 K. B. 788.

3170. —— ——.]—In very special circumstances, an application by a debtor to expunge a proof, where there was no scheme in existence, was heard & dismissed on its merits.—*Re* BAKER (1907), cited [1909] 2 K. B. at p. 786.

Annotation :—**Refd.** *Re* Benoist, [1909] 2 K. B. 784.

SUB-SECT. 3.—WITHIN WHAT TIME.

3171. Effect of long delay.]—A surety had paid a debt of bkpt. after the bkpcy., with interest down to the payment, & proved for the whole amount paid, including interest subsequent to the fiat, but no dividend had been declared :—*Held :* an application to reduce the proof after seven years had elapsed, & after the death of the surety, was too late (KNIGHT BRUCE, L. J.).—*Re* ALEXANDER, *Ex p.* SANDERSON (1856), 8 De G. M. & G. 849 ; 26 L. J. Bcy. 26 ; 28 L. T. O. S. 133 ; 2 Jur. N. S. 1217 ; 5 W. R. 56 ; 44 E. R. 619, L. JJ.

Annotation :—**Refd.** *Re* Tait, *Ex p.* Harper (1882), 47 L. T. 421.

3172. No time limit.]—There is no limit to the time, within which a trustee in bkpcy. who has admitted a proof may apply to the ct. to expunge it, & it will be expunged at any time after admission if it has been originally improperly admitted.—*Re* TAIT, *Ex p.* HARPER (1882), 21 Ch. D. 537 ; 52 L. J. Ch. 117 ; 47 L. T. 421 ; 31 W. R. 152, C. A.

SUB-SECT. 4.—ON WHAT GROUNDS.

3173. Debt arising out of illegal contract—Illegal insurance.]—Insurance by an English subject upon foreign property, does not cover a loss by capture in a war afterwards taking place between England & the country of the assured, proof in bkpcy. under such a policy expunged.—*Ex p.* LEE (1806), 13 Ves. 64 ; 33 E. R. 218.

Annotation :—**Refd.** Rodriguez *v.* Speyer, [1919] A. C. 59, H. L.

See, further, Nos. 3115-3117, *ante ;* ALIENS, Vol. II., pp. 165-167 ; INSURANCE.

3174. Proof under security for more than debt.]—Proof in bkpcy. under a security for more than the debt expunged.—*Ex p.* BROWNE (1809), 15 Ves. 472 ; 33 E. R. 833.

Annotation :—**Mentd.** Ledbetter *v.* Salt (1828), 4 Bing. 623.

3175. Fraud.]—Proofs in bkpcy. expunged, & certificate recalled, being obtained by fraud.—*Ex p.* CAWTHORNE (1815), 19 Ves. 260 ; 34 E. R. 514.

3176. Death of creditor before proof.]—On petition to expunge a proof founded on an affidavit of a creditor, who died before the proof was made, the comrs. were directed to review the proof, although two dividends had been paid.—*Re* MOORHOUSE, *Ex p.* BRIDGES (1819), 4 Madd. 269 ; 56 E. R. 705.

3177. Bill bought with knowledge that drawer had stopped payment—Purchaser indebted to bankrupt—Proof for difference between amount of bill & sum due by purchaser.]—Bkpts. drew a bill for £237 upon C. for his accommodation, for which B., who knew bkpts. had stopped payment, gave C. cash, B. being indebted to bkpts. for goods sold to the amount of £136. The bill being dishonoured, B. sought to prove for the difference between £237 & £136. On a petition to expunge the proof :—*Held :* it must be expunged.—*Re* WETTON & PAYNE, *Ex p.* STONE (1822), 1 Gl. & J. 191.

3178. Proof by creditor's executor—Without order of court.]—Bkpt., where there was no *devastavit*, was the exor. of a creditor, & proved the debt under his own commission, without an order :—*Held :* the proof must be expunged, & bkpt.'s certificate, which had been carried on the proof, sent back to the comrs.—*Re* WEBSTER, *Ex p.* MARSHALL (1822), 1 Gl. & J. 163, n.

3179. Sums payable in respect of property tax—Bankrupt not accounting to government for same.]—A., B. & C. being in partnership as bankers, A. advanced money to the bank by sales of stock, & took bonds for £13,000 from B. & C. separately, conditioned for replacing £9,000 stock each. The stock was not replaced, & A. brought

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PART VIII. SECT. 9, SUB-SECT. 3.

k. *Before dividend awarded—Res judicata—Proof appearing in confirmed account.*]—A proof had been admitted by the trustees, in so far as it appeared upon the first account filed by them. The account had been confirmed by the ct., but nothing was awarded therein in respect of the proof, & the final account had not been filed :—*Held :* an exception *rei judicatæ* could not be pleaded to an action by the trustees to have the proof expunged.—BRINK'S TRUSTEES *v.* VAN REENEN (1865), 5 S. 151.—**S. AF.**

l. —— —— *Confirmation of plan of distribution.*]—The confirmation of a liquidation account, & plan of distribution, which on the face of it mentions a certain debt which has been proved by a creditor, but contains no award of dividend, does not afford the defence of *res judicata* to an action to expunge altogether the proof of debt made by such alleged creditor.—PATERSON *v.* UMZINTO SUGAR CO. (1876), Buch. 160.—**S. AF.**

PART VIII. SECT. 9, SUB-SECT. 4.

m. *Agreement not to enforce judgment—Until certain conditions fulfilled—Conditions not fulfilled.*]—A. agreed in writing with C. not to enforce a judgment about to be obtained against him by consent, until he was entitled to the payment of certain money. More than six years afterwards C., who had not become so entitled, became insolvent. A. then claimed to prove absolutely against his estate for the whole amount of the judgment & six years' interest :—*Held :* the proof of debt, being an absolute proof, was an enforcement of the judgment contrary to the agreement & ought to be expunged.—*Re* MERRY (1888), 14 V. L. R. 176.—**AUS.**

n. *Alleged alteration of bond—Lapse of time in making claim.*]—A debt will not be expunged from the file of proceedings, upon an affidavit stating that the bond by which the debt was secured had been altered by some chemical process, & that the commission was issued so far back as 1815, & three dividends had been paid, & this claim never advanced until 1827.—*Re* FRENCH, 2 Ir. L. Rec. 1st ser. 82, 105, 228.—**IR.**

3180 i. *Debt improperly proved—Separate debt—Proved against joint estate.*]

actions on the bonds & recovered judgments. A. withdrew from the bank, being then a creditor for £20,000 stock, which B. & C., by the deed of dissolution, agreed to replace by four instalments, covenanting that if they made default therein, A. might proceed on the judgments, & that he should have a lien on certain securities, both for that debt, & as an indemnity against the partnership debts, which they agreed to pay. B. & C. replaced the first instalment when due, but made default in the second. A written agreement, not under seal, was then made, that the debt should be treated as a loan of money from the first, & that the proceeds of the £15,000 stock then due, being £10,083, should be the debt, & should be repaid at a subsequent time, with legal interest. When that agreement was made, the £15,000 stock was worth only £8,437. Before any part of the £10,083 was paid, B. & C. became bkpts., & at the date of the commission, two out of the three remaining days, named in the deed of dissolution for replacing the stock, were past. While A. remained in the bank he received the full interest upon his advances, without deducting the property tax :—*Held :* the property tax allowed to A. could not be deducted from the sum to be proved by him, it not appearing that B. & C. had accounted to Govt. for it.—PARKER *v.* RAMSBOTTOM (1824), 3 B. & C. 257 ; 5 Dow. & Ry. K. B. 138 ; 3 L. J. O. S. K. B. 16 ; 107 E. R. 729.

Annotations :—**Distd.** *Re* Badnall, *Ex p.* Ellis (1827), 2 Gl. & J. 312. **Apld.** *Re* Caton, *Ex p.* Higgins (1842), 11 L. J. Bcy. 34. **Refd.** Sammon *v.* Miller (1829), 9 B. & C. 770 ; *Re* Naylor, *Ex p.* Grazebrook (1832), 2 Deac. & Ch. 186. **Mentd.** Powles *v.* Page (1846), 10 Jur. 526.

3180. Debt improperly proved—Duty to expunge.]—*Held :* it was the duty of the comrs. to expunge so much of petitioning creditor's debt as was, in their opinion, improperly proved.—*Re* DAWES, *Ex p.* NEAL (1827), 2 Gl. & J. 308.

3181. —— Double proof.]—A. drew bills to the amount of £3,000 on B., which were indorsed by C. without any consideration. All the parties became bkpts., at which time C. was indebted to A. on a distinct account in £2,000. The assignees of A. proved the debt of £2,000 under C.'s commission, & the several holders of the bills also proved the amount under C.'s commission, & received a dividend of 8*s.* in the pound :—*Held :* the assignees of C. should retain the dividend on the proof of £2,000 for the benefit of the general creditors, & the proof of the £2,000 should be expunged.—*Ex p.* MASKELYN (1787), 1 Cox, Eq. Cas. 394 ; 29 E. R. 1218, L. C.

3182. Debt discharged aliunde—Bill paid in full.]—When a party is paid *aliunde*, there is no right to expunge, it is a mere matter of convenience. There are many cases, where as between assignees & a creditor, the former may be bound by equities, so as to prevent the operation of a rule that a proof is to be expunged made on a bill paid in full (SIR G. ROSE).—*Re* HUTCHINSON, *Ex p.* DICKSON (1835), 2 Mont. & A. 99 ; 4 Deac. & Ch. 614, Ct. of R.

3183. —— Composition from joint debtor.]—Proof under the bkpcy. of one joint debtor after receiving a composition from the other expunged, the release to one being a release to both.—*Ex p.* SLATER (1801), 6 Ves. 146 ; 31 E. R. 984, L. C.

See, further, Nos. 3523 *et seq.*, *post.*

3184. Affidavit by bankrupt that debt was gaming debt—Failure of creditor to show consideration.]—A proof by exors. on a warrant of attorney had been admitted by the comrs. On a petition to expunge :—*Held :* the affidavit of bkpt., alleging generally that the consideration was a gaming debt, made up of bets or wagers in horse races, but not specifying the amount of the bets, was not sufficient, though resps. could not state the consideration.—*Re* RIDSDALE, *Ex p.* NICHOLSON (1836), 6 L. J. Bcy. 2.

3185. Failure of creditor to disclose security.]—A debt cannot be expunged, because a creditor holds a security not disclosed on proving ; so doing is an election to abandon his lien thereon.—*Re* RIDGE, *Ex p.* ROLFE (1837), 3 Mont. & A. 305 ; 2 Deac. 421 ; 6 L. J. Bcy. 84 ; 1 Jur. 266, 313, Ct. of R.

Annotation :—**Refd.** Stammers *v.* Elliott (1867), L. R. 4 Eq. 675.

3186. —— Creditor holding bankrupt's acceptances for debt proved on.]—A creditor, as an additional security for his debt, took bkpt.'s acceptances :—*Held :* it was his duty, when he proved the debt, to state that fact to the comrs., & not having done so, the proof must be expunged, with liberty for him to go again before the comrs. & tender his proof.—*Re* CLIFFE, *Ex p.* HOSSACK (1819), Buck, 390.

3187. Proof against separate estate—Because no solvent partner—Partner solvent at time of proof—Afterwards becoming insolvent.]—Where a proof has been made against the separate estate of a partner, on the ground that there is no joint estate & no solvent partner, the fact that a partner was solvent at the time it was made, is not a ground for expunging it, if he has afterwards become insolvent.—*Re* LOMAX, *Ex p.* BAUERMAN &

—Where what is in law only a separate debt has been proved on the joint estate, & a dividend received, the ct. will order the proof to be expunged.—*Re* FERRAR, *Ex p.* DAVIS (1859), 9 I. Ch. R. 289, 554 ; 12 Ir. Jur. 40.—**IR.**

3182 i. *Debt partly discharged aliunde—After proof lodged.*]—Where, in an arrangement matter, a creditor has lodged a proof of debt with the official assignee, he is entitled to be admitted to prove for the amount due at the time of lodgment, notwithstanding intervening payments by a third party.—*Re* D. (1903), 37 I. L. T. 228.—**IR.**

p. *Balance of debt proved in prior insolvency.*]—On an insolvent surrendering his estate for a second time, a claim for the value of improvements made on insolvent's land admitted in the first insolvency, was again proved in the second insolvency without any account or vouchers in support thereof. On the application of a creditor, who became such after the first insolvency, the ct. ordered the proof of debt to be expunged, with leave to substantiate the claim by action.—*Re* LE ROUX, DE KLERK *v.* ZEEMAN (1896), 13 S. C. 181.—**S. AF.**

q. *Partnership debt—Partnership dissolved before bankruptcy of one partner—No notice of dissolution to creditors.*]—The ct. will not expunge the proof against the separate estate of one of two partners, who has been declared a bkpt., although the partner was solvent, & it does not appear that there was no joint estate, the partners having previous to the bkpcy. dissolved the partnership, without giving notice of such dissolution to the creditors.—*Re* WILLIAMS (1835), 3 Ir. L. Rec. N. S. 263.—**IR.**

r. *Debts purchased by creditor—With intention of hindering realisation of property.*]—Debtor entered into a deed of assignment for the benefit of his creditors, which was duly registered. The property assigned included a life interest, as to which it was provided that it should not be sold or disposed of by the trustee "except with the consent & by the direction of a three-fourths majority in number & value of the creditors & with the consent of debtor, or failing the consent of debtor then under & subject to the approval of the ct." The "creditors" were defined by the deed as being the signatories to the schedule of creditors & all other creditors who should assent to the deed. Several of the creditors, sufficient in number to render it impossible without some of them to obtain a three-fourths majority in number of all the creditors, assigned to debtor's mother, who was herself a creditor, their debts & proofs of debt & all their interests & rights therein. The assignments were procured by debtor with the object of benefiting himself & of hindering as far as possible the sale of his life interest, & his mother intended to use any power which she might obtain by reason of them in furtherance of that object : *Held :*—the trustee of the deed was not entitled to have the assigned debts expunged or to an order restraining debtor's mother from using the proofs of debt & assignments thereof or from voting thereon, or from obstructing by means of such proofs of debt or assignments thereof the realisation of the estate by the trustee.—HOWDON *v.* COCK (1915), 20 C. L. R. 201.—**AUS.**

Sect. 9.—Expunging or reduction of proof: Sub-sects. 4, 5, 6 & 7.]

CHRISTIE (1838), 3 Deac. 476; Mont. & Ch. 569, Ct. of R.

Annotation:—**Refd.** Lodge *v.* Prichard (1863), 1 De G. J. & Sm. 610, L. JJ.

3188. Debt not due—Bankrupt's liability discharged.]—The comrs. can only expunge a proof, on the ground that the debt is not due, & it is irregular for them to state, as a ground for expunging, that bkpt.'s liability has been discharged. —*Re* MAYOR, *Ex p.* WHITWORTH (1841), 2 Mont. D. & De G. 164, Ct. of R.

3189. Entries in debtor's books.]—Bkpt. had absconded to America, & the comrs. expunged the proof of a debt, relying chiefly on the evidence afforded by the entries in bkpt.'s books:—*Held:* the proof should be restored, as evidence of that description ought not to have countervailed the oath of petitioner.—*Re* BYRON, *Ex p.* BOLER (1841), 1 Mont. D. & De G. 602; 5 Jur. 323, Ct. of R.

3190. Debt statute-barred.]—*Semble:* a proof may be expunged, if the debt was barred by stat.—*Re* BENTLEY, DEAR & RICHARDSON, *Ex p.* WILSON, *Ex p.* WYMAN (1841), 1 Mont. D. & De G. 586, Ct. of R.

Annotation:—**Mentd.** *Re* Tait, *Ex p.* Harper (1882), 21 Ch. D. 537, C. A.

3191. Instrument proved on unstamped.]—A proof will not be ordered to be expunged, merely because the instrument, on which the proof was made, required a stamp.—*Re* BYROM, *Ex p.* BYROM (1842), 3 Mont. D. & De G. 53, Ct. of R.

3192. ——.]—At the hearing of a petition to expunge a proof made by the holder of a promissory note, an objection to the proof was raised, on the ground that the note was not stamped, but the form of the note, & the case made by petitioner, appearing sufficiently upon the petition, & no notice having been served upon resp. to produce the note, the ct. refused to entertain the objection. —*Re* CLARKE, MITCHELL, PHILLIPS & SMITH, *Ex p.* CHRISTIE (1844), 8 Jur. 919.

3193. Advances made by bankers—But not as bankers.]—Two members of an iron co. carried on a distinct trade as bankers, but were not the ordinary bankers of the co. They made advances at interest to the co. for the purpose of relieving it, when it was in a state of difficulty & pressure, & without taking any security or asking for any security, & in such circumstances as to lead to the inference that the advances would not have been made, had not the bankers been partners in the iron co. On the co. becoming bkpt., & there being no evidence, except such as was furnished by the nature of the transaction itself, that the character of a banking transaction belonged to it:—*Held:* the advances, though made in fact by bankers, were not made by them in their character of bankers, & were not dealings between trade & trade, giving a right of proof against the estate of the co.; & a proof which had been admitted against the joint estate on behalf of the estate of the two partners must be expunged.—*Re* OLIVER, *Ex p.* WILLIAMS (1843), 3 Mont. D. & De G. 433, Ct. of R.

Annotations:—**Folld.** Narraway *v.* Beattie (1872), 26 L. T. 310. **Refd.** *Re* Ridgeway, *Ex p.* Clarke, *Re* Ridgeway, *Ex p.* Kaye (1892), 9 Morr. 269, C. A.

3194. Objection not raised when proof admitted.]—Where the direction of the master had not been obtained before a proof was tendered by the official manager under a bkpcy., but no objection was made on that ground to the admission of the proof before the comr., & the ct., on appeal, was satisfied that the proceeding was not disapproved of by the master:—*Held:* it was not competent to the assignees to object, on appeal from the comr.'s decision, that the master's approbation had not been obtained before the proof was tendered.—*Re* FENWICK, *Ex p.* BROWN (1849), 3 De G. & Sm. 590; 19 L. J. Bcy. 4; 13 L. T. O. S. 468; 13 Jur. 978; 64 E. R. 619.

3195. Submission entered into before bankruptcy—Whether creditor bound by award.]—Where the subject-matter of the debt claimed for proof was by consent referred to arbn., & the arbitrator awarded to the creditor 40*s.* only in respect of such debt, the creditor was allowed to prove only for the sum so awarded, & a proof for a larger amount was reduced to such sum.—*Re* DRAY, *Ex p.* PARKYNS (1860), 2 L. T. 119.

3196. Satisfaction by drawer of indorsees' claims—On bills accepted by bankrupt similar to bill proved on by another indorsee.]—The fact that the claims of several indorsees of bills of exchange, drawn upon & accepted by bkpts., have been satisfied by the drawer, affords no presumption that the claim of another indorsee of a similar bill of exchange drawn & accepted by the same parties had been satisfied in like manner.—*Re* GRANT, *Ex p.* GRAHAM (1863), 33 L. J. Bcy. 1; 9 L. T. 278; 10 Jur. N. S. 1; 12 W. R. 1, L. C.

3197. Matter one of account—Reference ordered.]—Where an action was brought by an extrix. & an order of reference made therein before the bkpcy. of deft., & pltf. afterwards abandoned the action & claimed under the bkpcy., the ct., on application of the assignees, refused to expunge the proof, but referred the matter to the official assignee, with liberty for him to raise & state any question for the opinion of the ct.—*Re* FLEET, *Ex p.* NASH (1864), 9 L. T. 695.

3198. Conditional discharge—Granted for purpose which failed.]—Certain creditors executed a deed of release to their debtor, who had been adjudicated a bkpt., for the purpose of enabling him to petition to annul the adjudication. The proceedings, however, became abortive, by reason of all the creditors not having joined in the release. Some time afterwards bkpt. applied to expunge the proofs of the creditors who had executed the release:—*Held:* as the release was given for a particular purpose, it could not be used for an object not contemplated at the time of its execution.—*Re* CAZENEAU, *Ex p.* CAZENEAU (1863), 8 L. T. 11; 9 Jur. N. S. 655, L. C.

Annotation:—**Distd.** *Re* Johnson, *Ex p.* Johnson (1864), 10 L. T. 848.

3199. Creditor wishing to sue bankrupt.]—The ct. will not order a proof to be expunged for the mere purpose of aiding the creditor to sue bkpt. in another ct., but will consider the proof made by him to be an election to come in under the bkpcy. —*Re* ASPINWALL, *Ex p.* HANNAH (1866), 14 L. T. 295.

See 1914 Act, s. 7 (1).

3200. Creditor ceasing to exist—Creditor company wound up—Rights of Crown.]—A trading firm became bkpt. in 1847, & a corpn. created by stat. proved in the bkpcy., with other creditors. In 1887 the corpn. was dissolved by an order of the ct. under Cos. Acts. Afterwards it was discovered that bkpts. had been entitled to certain railway shares, & the official receiver recovered the value of the shares, & held the proceeds as trustee in the bkpcy. Another creditor moved to expunge the proof of the dissolved corpn., claiming that the money to which the corpn. had been entitled as

a creditor, & which was then in the hands of the official receiver as trustee, was divisible among the still existing creditors. The county ct. judge having made an order expunging the proof:—*Held:* on the dissolution of the corpn. the proceeds of the shares in the hands of the official receiver as trustee in the bkpcy. had passed to the Crown as *bona vacantia*, & the Crown was entitled to the amount, & the order must be reversed.—*Re* HIGGINSON & DEAN, *Ex p.* A.-G., [1899] 1 Q. B. 325; 68 L. J. Q. B. 198; 79 L. T. 673; 47 W. R. 285; 15 T. L. R. 135; 43 Sol. Jo. 153; 5 Mans. 289, D. C.

Annotations:—**Refd.** *Re* Gurwicz, *Ex p.* Trustee (1919), 88 L. J. K. B. 740. **Mentd.** *Re* Printers & Transferrers Amalgamated Soc., [1899] 2 Ch. 184; *Re* Bond, Panes *v.* A.-G., [1901] 1 Ch. 15; *Re* Taylor's Agreement Trusts, [1904] 2 Ch. 737; Hastings Corpn. *v.* Letton, [1908] 1 K. B. 378; *Re* Ruddington Land, [1909] 1 Ch. 701.

SUB-SECT. 5.—SERVICE OF NOTICE OF MOTION TO EXPUNGE.

See 1914 Act, s. 146, 1915 Rules, rr. 26–28, 32, 90.

3201. On agent presenting proof on behalf of foreign creditor.]—A. living in America, sent over to his agent, B., an affidavit of the debt due from bkpt., & on the production of same by B.'s attorney to the comrs., a proof was allowed of the debt. A petition having been presented to expunge the debt:—*Held:* service on the agent, to whom the affidavit of debt was sent, should be deemed good service.—*Ex p.* DUNLOP (1818), 3 Madd. 279; 56 E. R. 511.

3202. On attorney appointed to receive dividends.]—One of two partners, the other being abroad, proved a debt & died:—*Held:* service of the petition to expunge the debt upon the attorney appointed to receive the dividends, should be good service.—*Re* —, *Ex p.* PEYTON (1818), Buck, 200.

3203. On drawer of bill—Proof by holder against acceptor.]—Upon an application by assignees to expunge a proof upon a bill of exchange by the holder against the acceptor, because the bill had since been paid by a third party, the drawer must be served, notwithstanding the assignees have the bill in their possession.—*Re* BAILLIE, *Ex p.* GREENWOOD (1834), 1 Mont. & A. 65; 3 Deac. & Ch. 398; 3 L. J. Bcy. 24, Ct. of R.

3204. On solicitor presenting proof on behalf of creditor outside jurisdiction—By registered post.]—Where proofs had been lodged against debtor's estate by creditors, who were resident out of the jurisdiction, *viz.*, at Edinburgh & in Western Australia, & debtor had obtained leave to move to expunge the proofs, the ct. gave leave to debtor to serve the Edinburgh creditors by sending the notices of motion by registered letter to their address in Edinburgh, & the Western Australian creditors by serving the notices of motion on the solrs. in London who had lodged their proofs.—*Re* CALVERT, *Ex p.* THE DEBTOR (1899), 80 L. T. 499; 6 Mans. 216.

SUB-SECT. 6.—WHAT EVIDENCE ADMISSIBLE AND ONUS OF PROOF.

3205. Examination of bankrupt in another commission.]—The examination of a bkpt., taken, not in his own bkpcy., but under another commission, is not, upon the death of bkpt., evidence upon a petition in his bkpcy. to expunge the debt of a creditor, but it may be used by the comrs. as a clue to direct them in the investigation of the subject upon which it has proceeded.—*Re* BROMER, *Ex p.* CAMPBELL (1814), 2 Rose, 51.

Annotations:—**Consd.** *Re* Tovey, *Ex p.* Lyne (1841), 5 Jur. 1088. **Refd.** *Re* Chambers, *Ex p.* Chambers (1835), 1 Deac. 197; *Re* Durrant, *Ex p.* Thirkill (1836), 5 L. J. Bcy. 40, Ct. of R.; *Re* Prescott, *Ex p.* Prescott (1840), 4 Jur. 852, Ct. of R.

3206. Examination of bankrupt on inquiry—Creditor not party thereto.]—An examination taken before the comrs. upon an inquiry is not evidence to expunge a creditor's proof, who was not party to the inquiry; nor is it evidence to ground an order for an inquiry as to the validity of the proof.—*Re* COLES, *Ex p.* COLES (1818), 3 Madd. 315; Buck, 242; 56 E. R. 521.

Annotations:—**Consd.** *Re* Lloyd, *Ex p.* Brown (1833), 3 L. J. Bcy. 6. **Refd.** *Re* Chambers, *Ex p.* Chambers (1835), 1 Deac. 197; *Re* Prescott, *Ex p.* Prescott (1840), 4 Jur. 852, Ct. of R.

3207. Examination of bankrupt at time proof admitted.]—On petition by assignees to expunge a proof, the examination of bkpt. before the comr., taken at the time the proof was admitted, is receivable in evidence.—*Re* CLAY, *Ex p.* FREEMAN (1835), 4 Deac. & Ch. 404.

SUB-SECT. 7.—EFFECT OF EXPUNGING PROOF.

3208. As regards dividends previously paid.]—It does not follow, as a necessary consequence of the comrs.' order to expunge a proof, that the party who has made it must refund the dividends he has received upon it.—*Re* BENTLEY, DEAR & RICHARDSON, *Ex p.* WILSON, *Ex p.* WYMAN (1841), 1 Mont. D. & De G. 586, Ct. of R.

Annotation:—**Refd.** *Re* Tait, *Ex p.* Harper (1882), 21 Ch. D. 537, C. A.

3209. ——.]—A firm of two persons, D. & Y., carrying on business as D., Y., & Co. at Liverpool, & of three persons, D. Y. & Y., carrying on business in Pernambuco, were adjudicated bkpts. in 1854 at Liverpool. The holder of a bill drawn by the Pernambuco firm on the Liverpool firm proved under the bkpcy., & received a dividend, after which receipt the Pernambuco firm also became bkpt., & the creditor proved the same debt against the estate there, & received a dividend in respect of it. In 1861 an order was made by the comr. in England that the proof in England should be expunged, unless the creditor paid to the assignees the dividend received by him at Pernambuco. That order was varied by the Lords Justices, who declared that the creditor was not entitled to any dividend in England, except the first which he had received, but without prejudice to any question as to that dividend, or as to any question under the foreign bkpcy. The assignees presented a petition praying that the creditor might be ordered to refund such first dividend:—*Held:* in the absence of all

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PART VIII. SECT. 9, SUB-SECT. 5.

s. *On assignee & creditor filing proof.*]—C. proved upon the joint estate of bkpt. partners. D., another creditor, upon an affidavit that C.'s debt was "not justly due," it being the private debt of one of the partners, applied *ex p.*, to have the proof expunged. Notice of the application was directed to be served on the assignee & upon C.—*Re* FERRAR, *Ex p.* DAVIS (1859), 9 I. Ch. R. 289.—**IR.**

t. *Reduction of debt by set-off—Notice to creditor.*]—Where insolvent seeks to reduce a proof of debt by a set-off, he must give notice as required by Rules of Ct. of Insolvency, r. 26.—*Re* HICKINBOTHAM (1879), 5 V. L. R. 101.—**AUS.**

PART VIII. SECT. 9, SUB-SECT. 6.

w. *Onus of proof.*]—In an action claiming that proof of a debt be expunged or reduced the *onus* of establishing that the affidavit proving the debt is false or incorrect is on the person so claiming. The *onus* then falls on the creditor to prove the exact amount of his claim.—VAN NIEKERK'S TRUSTEES *v.* KLASSNIK (1917), T. P. D. 317.—**S. AF.**

f. *Creditor confined to affidavit.*]—A creditor is confined, in an action to establish his contested claim, to the *quantum* & items set out in the affidavit of claim filed with the assignee.—GRANT *v.* WEST (1896), 23 A. R. 533.—**CAN.**

Sect. 9.—Expunging or reduction of proof: Sub-sects. 7, 8 & 9. Sect. 10.]

evidence to show that the law of Brazil would not have given the creditor the right to receive the dividend there, he was under no obligation as to that which he received in England, but, as he had rightfully received it, he was entitled to retain it. —*Re* DEANE & YOULE, *Ex p.* MELLOR, *Ex p.* SMITH (1862), 3 De G. F. & J. 760; 31 L. J. Bcy. 60; 6 L. T. 268; 10 W. R. 276; 45 E. R. 1073, L. JJ.

3210. ——.]—If before the expunging the creditor has received any dividend in respect of such proof, he will be allowed to retain it, as the expunging affects only the right to receive future dividends. —*Re* TAIT, *Ex p.* HARPER (1882), 21 Ch. D. 537; 52 L. J. Ch. 117; 47 L. T. 421; 31 W. R. 152, C. A.

See, further, Part XIII., Sect. 7, *post.*

SUB-SECT. 8.—APPEALS.

3211. From order expunging proof—Jurisdiction of court—To restore proof without remitting back.]—Proof restored without referring it back to the comrs., there being no further evidence to bring forward.—*Re* BYRON, *Ex p.* BOLER (1841), 1 Mont. D. & De G. 602; 5 Jur. 323, Ct. of R.

3212. —— **What matters may be raised.**]—An ordinary proof had been at first admitted in a case, where bkpt. had obtained a loan on a representation, which he knew to be false, that he was of age, without the circumstances of bkpt.'s infancy & of the fraudulent representation having been adverted to:—*Held:* the question ought not to be brought before the Ct. of Appeal in the first instance, on appeal from an order expunging the proof.—*Re* KING, *Ex p.* UNITY JOINT STOCK MUTUAL BANKING ASSOCN. (1858), 3 De G. & J. 63; 27 L. J. Bcy. 33; 31 L. T. O. S. 242; 4 Jur. N. S. 1257; 6 W. R. 640; 44 E. R. 1192, L. JJ.

Annotations:—**Consd.** Miller *v.* Blankley (1878), 38 L. T. 527, D. C. **Expld.** *Re* Jones, *Ex p.* Jones (1881), 18 Ch. D. 109, C. A. **Consd.** Leslie *v.* Sheill, [1914] 3 K. B. 607, C. A. **Refd.** Wright *v.* Leonard (1861), 11 C. B. N. S. 258; Stocks *v.* Wilson [1913], 2 K. B. 235. **Mentd.** *Re* Collie, *Ex p.* Adamson (1878), 8 Ch. D. 807, C. A.; Burton *v.* Levey (1891), 7 T. L. R. 248; Levene *v.* Brougham (1909), 25 T. L. R. 265, C. A.

3213. Effect of order restoring proof—Binding on commissioners.]—It is not competent in comrs. to refuse to carry into effect the orders of the Ct. of Review, *e.g.*, to refuse to restore a proof improperly expunged by him.—*Re* RIDGE, *Ex p.* ROLFE (1837), 3 Mont. & A. 305; 2 Deac. 421; 6 L. J. Bcy. 84; 1 Jur. 313, Ct. of R.

Annotation:—**Mentd.** Stammers *v.* Elliott (1867), L. R. 4 Eq. 675.

SUB-SECT. 9.—COSTS. *See* SECT. 14, *post.*

SECT. 10.—**AMENDMENT OR WITHDRAWAL OF PROOF.**

3214. Jurisdiction of court.]—The granting o leave to amend or withdraw a proof is not a matter of right, but is subject to the control of the ct.—*Re* SAFETY EXPLOSIVES, LTD., [1904] 1 Ch. 226; 73 L. J. Ch. 184; 90 L. T. 331; 52 W. R. 470; 11 Mans. 76, C. A.

Annotation:—**Consd.** *Re* Pawson, *Ex p.* Trustee, *Re* Pawson, *Ex p.* Bewicke (1917), 86 L. J. K. B. 1285.

3215. Whether leave required.]—Bkpt. was indebted to a money-lender for money lent, the money-lender holding a security for the debt. The creditor lodged a proof for the debt, stating the amount at which he valued the security. The proof was not made use of in voting at any meeting of creditors. The trustee having required the creditor to give up the security under 1883 Act, Sched. I., r. 12, he gave notice of withdrawal of the proof & of intention to correct the valuation by a new proof. The trustee then moved the Bkpcy. Ct. for an order for an account, & for relief under Money-lenders Act, 1900 (c. 51):—*Held:* as the proof had not been used either for purposes of voting or of claiming a dividend, the creditor was at liberty to withdraw it without the consent either of the trustee or of the ct.—*Re* ATTREE, *Ex p.* WARD, [1907] 2 K. B. 868; 77 L. J. K. B. 130; 97 L. T. 641; 23 T. L. R. 734; 51 Sol. Jo. 687; 15 Mans. 9, D. C.

3216. Whether leave will be granted—Proof made on footing of holding no security—Ignorance of existence of security.]—Where, under a bkpcy., parties have proved their debts on the footing of holding no security, they will not generally be permitted to withdraw their proof & set up a security; but ignorance of the existence of a security may be ground for granting relief to a party who has so proved.—GRUGEON *v.* GERRARD (1840) 4 Y. & C. Ex. 119; 160 E. R. 945.

PART VIII. SECT. 9, SUB-SECT. 8.

3211 i. *From order expunging proof—From Full Court of Victoria—To Privy Council.*]—A proof of debt by a creditor amounting to £50,000 was on the application of another creditor ordered by the Full Ct. to be expunged. The proving creditor applied for leave to appeal to the Privy Council:—*Held:* in the circumstances he was entitled to appeal.—*Re* YENCKEN, *Ex p.* YENCKEN & CO. (1893), 19 V. L. R. 557.—**AUS.**

a. *From final judgment of Court of Queen's Bench, Lower Canada—Not appealable to Supreme Court of Canada.*]—SEATH *v.* HAGAR (1891), 18 S. C. R. 715.—**CAN.**

PART VIII. SECT. 10.

3214 i. *Jurisdiction of court—Irregularities not affecting merits.*]—When mere irregularities, not affecting the merits of the case, take place in the reception of proofs, they may be corrected in a subsequent *ex p.* application by the arranging traders.—*Re* A. & B. (ARRANGING TRADERS) (1862), 14 Ir. Jur. 208.—**IR.**

3214 ii. —— *Costs of opposing withdrawal.*]—The registrar has power to allow any party to withdraw his claim for credits; if the withdrawal is unsuccessfully opposed, the party opposing must pay the costs.—*Re* E. R. (1874), 8 I. L. T. Jo. 178.—**IR.**

b. *Notice to trustee sufficient—Order of court not requisite.*]—A creditor who has proved his claim may withdraw his proof by giving notice to the trustee, & need not obtain an order of ct. for that purpose.—CRESSEY *v.* HAARHOFF'S TRUSTEE (1895), 12 S. C. 123; 5 C. T. R. 157.—**S. AF.**

3216 i. *Whether leave will be granted—Proof made on footing of holding no security.*]—A secured creditor proved for the balance of a mtge. debt after sale of the lands mortgaged, without stating that he had a collateral security. He had not voted in choice of a trade assignee, nor had he been paid any dividend. After proof, but before dividend declared, a sum of £22 was realised in respect of the collateral security:—*Held:* entitled to retract his proof, & to be paid the £22.—*Re* HOLMES, *Ex p.* GOOLD (1875), 9 I. L. T. 67.—**IR.**

3216 ii. —— ——.]—Where, in an arrangement matter, a creditor made his proof of debt, including a sum for which he held security, & was represented by a solr. at both sittings at which the arrangement was carried, the ct. refused leave to withdraw or amend the proof by excluding the secured debt.—*Re* O'D., *Ex p.* ROBINSON (1885), 15 L. R. Ir. 496. —**IR.**

3216 iii. —— —— *Terms of arrangement subsequently altered.*]—Where a secured creditor is induced by the offer of an arranging debtor, who proposes the payment of twenty shillings in the pound, to file a proof of debt, without valuing his security, & debtor subsequently alters his proposal by substituting two shillings & sixpence for twenty shillings, the ct. will allow the creditor to withdraw his proof of debt.—*Re* AN ARRANGING DEBTOR, [1911] 45 I. L. T. 20.—**IR.**

3218 i. —— —— *From inadvertence—If other parties not injured.*]—Where a creditor by a *bonâ fide* mistake proved for the whole debt, omitting to value a security, the ct. will allow him to withdraw his proof, so as to enable him to value his security, if such liberty will not injure the interest of any one else.—*Re* DUGGAN, *Ex p.* GREACEN, 31 I. L. T. 56.—**IR.**

3217. —— —— ——.]—Where a person proves for a debt, in ignorance that he has a lien for such debt, he will not be allowed, when he discovers his mistake, to set up his lien, & reduce his proof accordingly.—*Re* RICHARDS, *Ex p.* SPOTTISWOODE (1849), Fonbl. 20; 14 L. T. O. S. 160.

3218. —— —— **From inadvertence.**]—A secured creditor having applied for leave to withdraw or amend his proof put in from inadvertence for the full amount of the debt, & without mentioning the security:—*Held:* there was no intention to give up the security, & the proof having been put in from inadvertence, leave to amend ought to be granted.—*Re* KING, *Ex p.* MESHAM (1885), 2 Morr. 119.

Annotation:—**Mentd.** *Re* Lister, *Ex p.* Huddersfield Banking Co., [1892] 2 Ch. 417.

3219. ——————.]—Where a secured creditor has, by inadvertence or mistake, treated his security as collateral, & omitted to insert it in his proof & put a value upon it, & has proved in respect of his whole debt, the ct., on being satisfied that such omission & proof were due to inadvertence or mistake, will allow the proof to be amended by the security being inserted & a certain value put upon it. The mere fact of the creditor having voted makes no difference, provided that he did not by his vote succeed in altering the position of affairs.—*Re* LISTER & CO., LTD., *Ex p.* HUDDERSFIELD BANKING CO., LTD., [1892] 2 Ch. 417; 61 L. J. Ch. 721; 67 L. T. 180; 40 W. R. 589; 8 T. L. R. 538; 36 Sol. Jo. 488.

Annotation:—**Distd.** *Re* Piers, *Ex p.* Piers, [1898] 1 Q. B. 627, C. A.

3220. —— —— ——.]—A creditor holding a security for his debt tendered a proof against debtor's estate for the whole debt, but omitted to state in his proof the particulars of his security, its date or value. Subsequently the creditor voted in respect of his proof. The trustee having claimed the proceeds of the security under 1883 Act, Sched. I., r. 10:—*Held:* as the creditor had omitted to set out the particulars of his security through inadvertence, & not deliberately & on purpose, he ought not to lose his security, but should be allowed to withdraw his proof on terms.—*Re* BURR, *Ex p.* CLARKE (1892), 67 L. T. 232; 40 W. R. 608; 8 T. L. R. 671; 36 Sol. Jo. 628; *affd.* on another point 67 L. T. 465, C. A.

Annotations:—**Consd.** *Re* Piers, *Ex p.* Piers, [1898] 1 Q. B. 627, C. A.; *Re* Safety Explosives, [1904] 1 Ch. 226, C. A.; *Re* Pawson, *Ex p.* Trustee, *Re* Pawson, *Ex p.* Bewicke (1917), 86 L. J. K. B. 1285. **Refd.** Pearce *v.* Bullard, King, [1908] 1 Ch. 780; *Re* Maxson, *Ex p.* Trustee (1919), 88 L. J. K. B. 854.

3221. —— —— —— **Onus of proof of inadvertence.**]—A solr. proved in a co.'s winding-up for costs, without disclosing any security. He held a lien upon title deeds belonging to the co. On the sale by the liquidator of a portion of the co.'s property, the solr., who was employed for the purpose, handed over the title deeds to the purchaser, without informing the liquidator that he did so without prejudice to his lien, & retained the sum due to him from the co. & handed over the balance. The liquidator was aware that the deeds were in the solr.'s possession:—*Held:* he was not entitled to withdraw or amend his proof, as he had not proved inadvertence.—*Re* SAFETY EXPLOSIVES, LTD., [1904] 1 Ch. 226; 73 L. J. Ch. 184; 90 L. T. 321; 52 W. R. 470; 11 Mans. 76, C. A.

Annotations:—**Consd.** *Re* Pawson, *Ex p.* Trustee, *Re* Pawson, *Ex p.* Bewicke (1917), 86 L. J. K. B. 1285. **Refd.** *Re* Maxson, *Ex p.* Trustee, *Re* Maxson, *Ex p.* Laurence & Laurence, [1919] 2 K. B. 330.

3222. —— —— —— ——.]—The director of a co. holding a security for a debt due to the co. proved for the whole of the debt & voted at a meeting of creditors. The trustee claimed that by so proving & voting the security had been surrendered, & he moved for a declaration that the proceeds of sale of the security should be paid to him. The co. by cross-motion applied for liberty to amend the proof under 1914 Act, Scheds. I. (10) & II. (13), (14), (15):—*Held:* (1) the *onus* was on the creditor to show that the omission to value the security was due to inadvertence; (2) the true inference on the evidence was that the director had overlooked the security at the time he made the proof, & the proof was wrongly made by inadvertence; (3) leave should be given to amend the proof on payment of the costs of the motion.—*Re* MAXSON, *Ex p.* TRUSTEE, *Re* MAXSON, *Ex p.* LAWRENCE & LAWRENCE, LTD., [1919] 2 K. B. 330; 88 L. J. K. B. 854; 121 L. T. 616.

3223. —— —— —— **What is inadvertence.**]—One of the articles of a limited liability co. provided that the co. should have a paramount lien on all the shares not fully paid of any member for all the debts & liabilities due from such member to the co. A member of the co., who held partly paid-up shares & also fully paid-up shares, became bkpt. The co. proved in his bkpcy. for the amount due to them on his partly paid-up shares, without claiming any lien under the article, & their proof was admitted. Subsequently the co., under Cos. Act, 1862 (c. 89), s. 50, passed a resolution altering the article by omitting the words "not fully paid up," such alteration having a retrospective effect, & giving them a lien on the fully paid shares. The co. afterwards went into liquidation, & it appeared that there would be surplus assets to distribute on the fully paid-up shares. The liquidator applied in the bkpcy. that the co. might be at liberty to amend their proof, or to withdraw it & lodge a fresh one, & set up their lien on the fully paid-up shares:—*Held:* they were not entitled to do so, for it was not a case of inadvertence.—*Re* ROWE, *Ex p.* WEST COAST GOLD FIELDS, LTD., [1904] 2 K. B. 489; 73 L. J. K. B. 852; 91 L. T. 101; 52 W. R. 608; 48 Sol. Jo. 545; 11 Mans. 272.

See, further, COMPANIES.

3224. —— —— —— —— **Question of fact.**]—It is always a question of fact whether the judge is satisfied that the omission to value a security in a proof of debt has arisen from "inadvertence."—*Re* PAWSON, [1917] 2 K. B. 527; 86 L. J. K. B. 1285; 117 L. T. 315; [1917] H. B. R. 87.

3225. —— —— —— **What is omission to value —Statement that security valueless.**]—A secured creditor, who mentions his security in his proof, & states that it is worthless, does not omit to value his security within 1883 Act, Sched. 1, r. 10.

Where a creditor omits to value his security by reason of erroneous information leading him to suppose it to be worthless, there is not an omission to value the security which arises from inadvertence within 1883 Act, Sched. 1, r. 10.—*Re* PIERS, *Ex p.* PIERS, [1898] 1 Q. B. 627; 67 L. J. Q. B. 519; 78 L. T. 314; 46 W. R. 475; 14 T. L. R. 300; 42 Sol. Jo. 365; 5 Mans. 97, C. A.

3227 i. —— *Security stated in deposition—But value not deducted.*]—A proof, by a secured creditor, where there was by an oversight an omission to deduct the value of the security, allowed to be withdrawn & an amended proof put in.—*Re* FAIRBROTHER, OFFICIAL ASSIGNEE *v.* BADDELEY (1905), 25 N. Z. L. R. 546.—N.Z.

3227 ii. —— —— ——.]—Where a proof of debt is inadvertently put in without giving or deducting the value of security held by the creditor, the ct. will, if no one has been prejudiced, permit it to be withdrawn.—*Re* WINEFIELD (1885), 3 N. Z. L. R. 394.—N.Z.

Sect. 10.—*Amendment or withdrawal of proof.*]

3226. —— —— —— Omission to state readiness to give up security—Security considered valueless.]—A bkpcy. petition stated that the creditor held no security. He, in fact, held a security which he valued at nothing, & at the hearing it was stated that he was ready to give it up. The petition having been dismissed, on the ground that the readiness to give up the security ought, under 1869 Act, s. 6, to have been stated in the petition:—*Held:* this was a "formal defect," & the petition ought to be amended.—*Re* POGOSE, *Ex p.* VANDERLINDEN (1882), 20 Ch. D. 289; 51 L. J. Ch. 760; 47 L. T. 138; 30 W. R. 930, C. A.

Annotation:—**Refd.** *Re* Button, *Ex p.* Voss (1905), 74 L. J. K. B. 403, C. A.

3227. —— Security stated in deposition—But value not deducted.]—Where, by an error, the value of a debt assigned to a creditor as security was not deducted from the total of his proof against the estate, although such security was stated in the body of the deposition, & the proof was admitted without prejudice to all inquiries, both as to the amount of the proof & any securities held in respect thereof, the ct., on application being made by the creditor, directed the assignee to concur in the creditor receiving dividends on the debt, & allowed the creditor to reduce his proof by deducting the value of it.—*Re* PETERS & WARBURTON, *Ex p.* LLOYD'S BANKING CO. (1869), 17 W. R. 492.

3228. —— Proof used at first meeting—Vote of no effect.]—At the first meeting the creditors resolved to accept a composition. At the second meeting a creditor, who had proved his debt at the first meeting & had voted, but who had been advised that his proof was not in a proper form, & might affect his right to a security, which he had expressed a wish to withdraw the proof & not to vote. No objection was made, & he did not vote. The composition fell through, & the vote at the first meeting had no effect:—*Held:* the creditor was entitled to have his proof taken off the file, the costs to be paid by the creditor.—*Re* WILLIAMS, *Ex p.* WILLIAMS (1874), L. R. 18 Eq. 373; 43 L. J. Bcy. 105; 30 L. T. 404; 22 W. R. 570.

3229. —— Part of security omitted.]—*Semble:* a secured creditor, who by mistake has omitted from his proof of debt a part of his security, will not necessarily be held to have forfeited that part, but may be allowed to rectify his proof.—*Re* KER, *Ex p.* BAGSHAW (1879), 13 Ch. D. 304; 41 L. T. 743; 28 W. R. 403, C. A.

Annotation:—**Refd.** Couldery *v.* Bartrum (1881), 19 Ch. D. 394, C. A.

3230. —— —— Conditional leave given & appealed from.]—A creditor, who had proved a debt & voted in respect of it, subsequently discovered that he had omitted to state & value a certain mtge. security. He obtained leave to withdraw his proof & file an amended one upon certain conditions. Having appealed against the order, & the appeal having been dismissed, no further steps were taken by the creditor. The trustees in the bkpcy. obtained an order declaring that they were entitled to the proceeds of the mtge. security, which had been omitted from the original proof:—*Held:* the matter was not *res judicata*, &, as there had been a *bonâ fide* mistake on the part of the proving creditor in the omission of his mtge. security, he was entitled to have it rectified & to amend his proof.—*Re* GREAVES, *Ex p.* WHITTON (1880), 43 L. T. 480.

3231. —— Security increased in value after proof—Notice of intention to redeem at original valuation—Payment of assessed value—Notice putting trustee to election.]—A creditor held as security for his debt a policy of insurance on the life of bkpt. for £200. This security the creditor in his proof valued at £21. The trustee gave him written notice of his intention to redeem at that value. Shortly afterwards bkpt. died, & £200 became due on the policy. Before any further step had been taken the creditor claimed to amend his valuation & proof by increasing the value of the security to £200:—*Held:* the right of the creditor to amend his proof under 1883 Act, Sched. II., r. 13, was not put to an end by the notice:—*Semble:* the amendment could not be allowed after the trustee had paid the assessed value to the creditor, or if, the creditor had by notice put the trustee to his election whether he would redeem the security at the assessed valuation, & the trustee had elected.—*Re* SADLER, *Ex p.* NORRIS (1886), 17 Q. B. D. 728; 56 L. J. Q. B. 93; 35 W. R. 19; 2 T. L. R. 906; 3 Morr. 260, C. A.

Annotations:—**Consd.** *Re* Newton, *Ex p.* National Provincial Bank of England, [1896] 2 Q. B. 403; *Re* Fanshawe, *Ex p.* Le Marchant (1904), 74 L. J. K. B. 153.

3232. —— —— —— Tender not equivalent to payment.]—A secured creditor valued his security, which consisted of a policy of insurance for £500 upon the life of debtor, at £10. A year later debtor died, & the trustee in bkpcy. a few days afterwards tendered the assessed value of the policy, & served a written notice that he elected to redeem the security at its assessed value. The creditor refused, & applied to the ct. to amend his proof:—*Held:* such time had not elapsed, or events happened, to deprive the creditor of his right of amendment, & the tender, even though coupled with a written notice of the trustee's election to redeem at the assessed valuation, did not amount to payment.—*Re* NEWTON, *Ex p.* NATIONAL PROVINCIAL BANK OF ENGLAND, [1896] 2 Q. B. 403; 65 L. J. Q. B. 686; 45 W. R. 63; 12 T. L. R. 619; 40 Sol. Jo. 732; 3 Mans. 200; *sub nom. Re* NEWTON, *Ex p.* COLLINS, 75 L. T. 144, D. C.

Annotation:—**Consd.** *Re* Fanshawe, *Ex p.* Le Marchant, [1905] 1 K. B. 170.

3233. —— —— Whether conditional withdrawal or amendment granted.]—A creditor, who claims to hold security for part of his debt, & who makes a proof for the unsecured balance for the purpose of voting on a composition proposed by debtor, which proof is admitted for voting by the official receiver, will not, while an appeal against the decision of the official receiver is pending, be allowed, on the ground that the security has increased in value, to withdraw the proof conditionally, but leave may be given to the creditor to amend the proof by revaluing his security.—*Re* CLARK, *Ex p.* BUENOS AYRES & PACIFIC RY. CO., LTD., [1901] 1 Q. B. 655; 70 L. J. Q. B. 259; 84 L. T. 208; 49 W. R. 528; 45 Sol. Jo. 206; 8 Mans. 136.

3234. —— —— Whether creditor disentitled to amend by conduct.]—In 1895 a debtor, against whom a receiving order had been made, lodged a scheme providing for the payment of 10*s.* in the pound to his unsecured creditors, exclusive of M., whom he alleged to be fully secured. The scheme was duly accepted by the creditors. M. took no part in the proceedings, but lodged a proof, in which he assessed the value of his security, which was a mtge. subject to a jointure in favour of debtor's wife, at one-half of the amount of his debt, & proved as an unsecured creditor for the

other half. The scheme fell through in consequence of M.'s proof, which he refused to withdraw, & debtor's estate paid only 1s. in the pound. Debtor's wife died in Jan., 1903, & in 1904 M. applied to amend his proof by revaluing his security on the footing that he was fully secured :—*Held :* M. had done nothing to disentitle himself to the relief he claimed, & his application must be granted.—*Re* FANSHAWE, *Ex p.* LE MARCHANT, [1905] 1 K. B. 170 ; 74 L. J. K. B. 153 ; 92 L. T. 32 ; 53 W. R. 222 ; 49 Sol. Jo. 101 ; 12 Mans. 7.

3235. —— Security deducted in error—After proceedings terminated.]—B. & Co. were creditors of a partnership for £2,400, for which they held a security comprising joint property of the firm & also separate property of one of the partners. The joint creditors of the firm agreed to accept a composition, & B. & Co. valued their security at £800, & proved & received the composition upon the balance. Subsequently they received from their security more than £800 & interest from the date of valuation. Four years after the close of the composition debtors brought an action to redeem their security. B. & Co. claimed to retain the security on the separate property until they had received payment in full of their claim : —*Held :* (1) although B. & Co. need not have deducted the value of the separate security, yet, as the composition had been fixed, & the whole proceeding in the composition had been taken & completed upon the footing of the valuation of the compound security at £800, it was too late to upset the transaction ; (2) leave to amend the proof could not then be given, whatever might have been the case had a proper application for that purpose been made during the pendency of the composition proceedings.—COULDERY *v.* BARTRUM (1881), 19 Ch. D. 394 ; 51 L. J. Ch. 265 ; 45 L. T. 689 ; 30 W. R. 141, C. A.

Annotations :—**Folld.** Société Générale de Paris *v.* Geen (1883), 8 App. Cas. 606, H. L. **Mentd.** *Re* Button, *Ex p.* Voss (1905), 74 L. J. K. B. 403, C. A.

3236. —— Security undervalued at time of proof.]—A mtgee., who has valued his security, will, in a proper case, be allowed to amend his valuation & proof, on the ground that by mistake he had underestimated the security, notwithstanding the opposition of a subsequent mtgee.—*Re* ARDEN, *Ex p.* ARDEN (1884), 14 Q. B. D. 121 ; 33 W. R. 460 ; 2 Morr. 1 ; *sub nom.* ARDEN *v.* DEACON, 51 L. T. 712, D. C.

3237. —— Security overvalued.] — Debtor's estate was vested in the trustees under a scheme of arrangement, approved by the ct. under 1890 Act, s. 3. The net proceeds were to be applied in payment of (1) the expenses, (2) the preferential debts, & (3) a composition of 7*s.* 6*d.* in the pound on the unsecured debts in three instalments. The payment in full of the instalments at their respective dates was further secured by the joint & several promissory notes of the trustees. A creditor who had made no claim for a year, & then had overvalued his security, applied to amend his proof by revaluing his security :—*Held :* he was entitled to revalue his security, & prove for the balance.—*Re* MORTER, *Ex p.* NICHOLLS (1897), 45 W. R. 593 ; 41 Sol. Jo. 624, C. A.

3238. —— Proof by agent as principal.]—Where the creditors at the first meeting, under a petition for a liquidation pursuant to 1869 Act, s. 125, only voted an adjournment :—*Held :* a proof which had been inadvertently admitted, & in respect of which the creditor had voted for the adjournment, might be taken off the file, in circumstances showing that the party, in whose name the proof was made as the principal, was only an agent in the matter.—*Re* RUSSELL, *Ex p.* B. (1870), 22 L. T. 451.

3239. —— Evident mistake.]—In the case of evident mistake, a proof may be amended after the creditor has voted in the choice of a trustee. —*Re* FIRTH, *Ex p.* SCHOFIELD (1879), 12 Ch. D. 337 ; 40 L. T. 823 ; 27 W. R. 925 ; *sub nom. Re* FRITH, *Ex p.* SCHOFIELD, 48 L. J. Bcy. 122, C. A.

Annotations :—**Consd.** Dawson *v.* Isle, [1906] 1 Ch. 633. **Mentd.** Couldery *v.* Bartrum (1881), 19 Ch. D. 394, C. A.

3240. —— Proof rejected on technical grounds—Proof rejected on merits.]—A proof was rejected on its merits. The creditor did not appeal against the rejection, but withdrew his proof, reserving the right to present a fresh proof. He subsequently represented the rejected proof :—*Held :* although a proof rejected on technical grounds might be withdrawn & a fresh proof tendered, a proof rejected on its merits must be appealed from within the time limited by 1886 Rules, r. 230.—*Re* DEERHURST, *Ex p.* SEATON (1891), 8 Morr. 258.

Annotations :—**Consd.** *Re* Rhoades, *Ex p.* Rhoades, [1899] 1 Q. B. 905 ; *Re* Attree, *Ex p.* Ward, [1907] 2 K. B. 868.

3241. —— Position of parties altered since proof.]—Leave to amend or withdraw a proof ought not to be granted in a case, in which the position of all parties, & especially that of the liquidator, have been altered since the proof was made.—*Re* SAFETY EXPLOSIVES, LTD., [1904] 1 Ch. 226 ; 73 L. J. Ch. 184 ; 90 L. T. 331 ; 52 W. R. 470 ; 11 Mans. 76, C. A.

Annotations :—**Consd.** *Re* Pawson, *Ex p.* Trustee, *Re* Pawson, *Ex p.* Bewicke (1917), 86 L. J. K. B. 1285. **Mentd.** *Re* Maxson, *Ex p.* Trustee (1919), 88 L. J. K. B. 854.

3242. Appeal from refusal to give leave to amend—Effect of delay.]—Although the time allowed for appeal in bkpcy. matters may be extended by the ct., yet some ground must always be shown

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3236 i. —— *Security undervalued at time of proof.*]—A proof of debt valuing a security at too low a sum may be amended if the value was put on the security in ignorance, & without an opportunity of ascertaining the true value, provided there has been no subsequent election to abide by the original value.—*Re* EARP, *Ex p.* NATIONAL BANK OF NEW ZEALAND, LTD. (1891), 9 N. Z. L. R. 410.—**N.Z.**

c. —— *Proof under earlier Act—Fresh proof under new Act.*]—Applts. proved on July 3, 1869, against C. & Co. but afterwards withdrew their proof, & on Jan. 11, 1870, proved under s. 60 of the above Act :—*Held :* the Act could not apply.—*Re* CHAFFEY, MERCHANTS BANK OF CANADA *v.* DAVIDSON (1870), 30 U. C. R. 64.—**CAN.**

d. *When amendment required—Proof originally admitted as preferent.*] —A creditor, who was in fact a concurrent creditor, proved as a preferent creditor & his proof was allowed as preferent, but the trustee in his distribution account only awarded him a dividend as a concurrent creditor :—*Held :* the trustee was not bound first to apply to the ct. for an amendment of the proof of debt.—DREYFUS & Co. *v.* ESTATE NAPIER (1907), 24 S. C. 224.—**S. AF.**

e. *What amounts to withdrawal.*]—C. held a policy of insurance on the life of M., an arranging debtor, as security for his debt, & proved for his debt in the arrangement valuing his security, the unsecured balance amounting to £786. M.'s proposition to pay a composition in four instalments was accepted ; he made default in payment of the third instalment, & thereupon presented a second petition for arrangement & proposed a cash composition of 5*s.* in the pound, which was accepted. C. filed a proof for £972, in which he expressly included the amount of the first proof (£786), & credited the composition instalments paid, the balance being the price of goods supplied since the first arrangement, & with his proof filed a release or waiver, by which it was agreed that he should make no claim for the composition payable in respect of his debt, but that it should be taken in M.'s application for a certificate that the resolution had been carried into effect as regards C. M. paid the other creditors & obtained his certificate, & subsequently paid C. the composition of 5*s.* on the amount of his proof :—*Held :* the waiver or release did not amount to a withdrawal of proof by C.—MAHALM *v.* M'CULLAGH & SCOTTISH AMICABLE LIFE ASSURANCE SOCIETY (1891), 27 L. R. Ir. 431 ; 29 L. R. Ir. 496.—**IR.**

Sect. 10.—*Amendment or withdrawal of proof. Sects.* 11, 12 & 13.]

why this should be done, & notwithstanding the fact that, when a *bonâ fide* mistake has been committed in the estimation of a proof, the trustee in the bkpcy. ought not to be permitted to take a technical advantage of such mistake, where a creditor for more than a year & a half took no steps to reverse the decision of the county ct. judge, refusing to allow such creditor to amend or withdraw his proof alleged to be so wrongly estimated:—*Held:* the ct. could not permit him to reopen the case for the purpose of setting aside that decision.—*Re* TRICKS, *Ex p.* CHARLES (1885), 3 Morr. 15.

As to secured creditors generally, *see* Part IX., *post.*

SECT. 11.—SUBSTITUTION OF PROOF.

3243. Procedure — Legal assignees.]—If an assignor refuses to pay over dividends received by him to his assignee, or to give the trustee a proper authority to pay the dividends to him, the assignee may prove in his own name in substitution for his assignor, & in that case will become a creditor & be entitled to receive payment of dividends for the trustee.—*Re* FROST, *Ex p.* OFFICIAL RECEIVER, [1899] 2 Q. B. 50; 68 L. J. Q. B. 663; 80 L. T. 496; 47 W. R. 512; 43 Sol. Jo. 440; 6 Mans. 194.

3244. —— ——.]—The assignee of a proof, who desires to take the benefit thereof, after satisfying the official receiver or trustee of the validity of the assignment, should apply to the ct. to give leave to the official receiver to place a proof by him (the assignee) on the file in the place of the proof of the assignor.—*Re* ILIFF (1902), 51 W. R. 80; 18 T. L. R. 819; 46 Sol. Jo. 701.

Annotation:—**Folld.** *Re* Hills, *Ex p.* Lang (1912), 107 L. T. 95, D. C.

3245. —— **Equitable assignee.**]—An equitable assignee of a debt may substitute a proof in bkpcy. for that of the assignor in the same way as a legal assignee was allowed to substitute a proof in *Re Iliff*, No. 3244, *ante.*—*Re* HILLS, *Ex p.* LANG (1912), 107 L. T. 95, D. C.

SECT. 12.—ADMISSION AND REJECTION OF CLAIMS.

See, also, Sect. 5, *ante.*

3246. Power of court—To prevent injustice.]—If, by reason of any special circumstances, a secured creditor is prevented from realising his security before a dividend is declared by the trustee, the ct. has power to give such directions as may be proper to prevent any injustice being done.—*Re* LEE, *Ex p.* GOOD (1880), 14 Ch. D. 82; 49 L. J. Bcy. 49; 42 L. T. 450; 28 W. R. 553, C. A.

3247. Grounds for admitting claim—Creditor alien enemy.]—The right of a foreigner by contract, generally, is only suspended by a subsequent war, & may be enforced upon the restoration of peace, & an alien enemy creditor's claim admitted in bkpcy., reserving the dividend.—*Ex p.* BOUSSMAKER (1806), 13 Ves. 71; 33 E. R. 221.

Annotations:—**Consd.** Willison *v.* Patteson (1817), 1 Moore, C. P. 133; Porter *v.* Freudenberg, Kreglinger *v.* Samuel & Rosenfeld, *Re* Merten's Patents, [1915] 1 K. B. 857, C. A.; Rodriguez *v.* Speyer (1918), 119 L. T. 409, H. L. **Refd.** Daimler Co. *v.* Continental Tyre & Rubber Co., [1916] 2 A. C. 307, H. L.; Naylor, Benzon *v.* Krainische Industrie Gesellschaft, [1918] 1 K. B. 331. **Mentd.** Rombach *v.* Gent (1915), 31 T. L. R. 492; *Re* Hilckes, *Ex p.* Muhesa Rubber Plantations, [1917] 1 K. B. 48, C. A.; Speyer *v.* Rodriguez (1917), 87 L. J. K. B. 171, C. A.

See, generally, ALIENS, Vol. II., pp. 155–158.

3248. —— **Sum ordered to be paid into court—Claim pending decision of suit.**]—An account was ordered in a partnership action, & debtor was ordered to pay £2,006 into ct. Before any further proceedings debtor became bkpt. The debts proved did not exceed £300:—*Held:* a claim might be entered for the amount ordered to be paid into ct., without prejudice to the partnership suit, & the assignees should pay to the credit of the Accountant-General sufficient to pay dividends on the claim, together with any future dividends that might be declared.—*Re* PETERS, *Ex p.* FARDEN (1833), 1 Mont. & A. 219; 3 Deac. & Ch. 479, Ct. of R.

Annotations:—**Consd.** *Re* M'Neill, *Ex p.* Stutely (1841), 1 Mont. D. & De G. 646, Ct. of R. **Refd.** *Re* Gilburd, *Ex p.* Hancock (1833), 3 Deac. & Ch. 523; *Re* Ingham, *Ex p.* Trustee (1884), 52 L. T. 299.

3249. —— **Security claimed by stranger—Claim pending settlement of dispute.**]—Bkpt. was indebted to petitioners in £23,000 & had pledged with them iron to secure in part the payment of the debt. The iron had been valued, & petitioners had proved for the difference; but the iron was subsequently claimed by a third person:—*Held:* a claim could be entered for a sum equal to the value of the iron, in order that petitioners might be afterwards admitted creditors for that further sum, in case it should turn out that the person who claimed the iron was legally entitled to it.—*Re* RAIKES, *Ex p.* WILLIAMS (1835), 4 Deac. & Ch. 180, Ct. of R.

Annotation:—**Refd.** *Re* Brack, *Ex p.* Tanner (1853), 1 Bankr. & Ins. R. 156.

3250. Sub-mortgage of mortgage for uncertain amount—Claim pending ascertainment of amount due.]—A person, to whom estates are mortgaged to secure the balance due from time to time on an account current, mortgaged his interest under the mtge., & became bkpt.:—*Held:* the sub-mtgee. could have an order for sale of the original mtge. debt, without a preliminary inquiry as to its amount, but pending the inquiry, the sub-mtgee. should be permitted to enter a claim for the full

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PART VIII. SECT. 12.

f. *Object of claim.*]—The entry of a claim is for the purpose of making it a debt when evidence can be had to sustain it.—*Re* SCANLAN (1869), 3 I. L. T. Jo. 663.—**IR.**

3247 i. *Grounds for admitting claim—Other than those put forward by creditor.*]—A claim in bkpcy. will not be allowed on a ground other than that put forward by the creditor.—*Re* LITTLES (1847), 10 I. Eq. R. 275.—**IR.**

g. *Grounds for rejecting claim—Lapse of time insufficient—Unless fraud proved.*]—On an application for claims to be expunged in default of proof after a lapse of seventeen years:—*Held:* the ct. had no power to expunge the name of a creditor where no fraud was proved or alleged in regard to their claims.—*Re* DEWCURN JEWRAJ (1888), I. L. R. 12 Bom. 342.—**IND.**

h. *Grounds for dismissing objections—No evidence of service on claimant.*]—Where no evidence was filed with the assignee of service on claimant of copy of objections to a claim the objections were dismissed.—*Re* MORTON (COLLIE'S CLAIM) (1881), 2 R. & G. 174: 14 N. S. R. 174; 1 C. L. T. 664.—**CAN.**

k. *Effect of entering claim.*]—When the ct. makes a memorandum of a claim, of which, however, there is no trace on the file of proceedings, the claim will, if the trader admits that it was made, be ultimately admitted as a proof.—*Re* SCANLAN (1869), 3 I. L. T. Jo. 663.—**IR.**

l. —— *On surety of assignee—Prescription.*]—A claim filed in pursuance of Insolvent Act of 1875, s. 104, & not contested, has the effect of a judgment against the surety of the assignee in insolvency, without any further proof, & is only subject to be prescribed at the expiration of thirty years.—KENT *v.* LETOURNEUX (1905), Q. R. 14 K. B. 60.—**CAN.**

m. *Time answering to objections to claim—Discretion of court.*]—An application in 1878 under Insolvent Act of 1875 to file answers to objections to a claim filed four years before refused.—*Re* RICKARDS' ESTATE (1879), 3 R. & C. 493; 12 N. S. R. 493.—**CAN.**

amount.—*Re* WRIGHT, *Ex p.* MACKAY (1841), 1 Mont. D. & De G. 550, Ct. of R.
Annotations :—**Mentd.** *Re* Buller, *Ex p.* Wornald (1860), 2 L. T. 544 ; *Re* Richards, Humber *v.* Richards (1890), 45 Ch. D. 589.

3251. —— Proof disputed on ground that bankrupt partner of creditor—Claim pending settlement of dispute.]—Where a proof is disputed, on the ground that the party tendering it is a partner with bkpt., the ct. will admit a claim to be converted into a proof at a future day, if no partnership be then established at law.—*Re* WOODS & THOMAS, *Ex p.* CHEATHAM (1850), Fonbl. 64 ; 14 L. T. O. S. 425.

3252. In respect of what debts—Only provable debts.]—A claim cannot be admitted, where the debt is not at the time provable.—*Re* MINCHIN, *Ex p.* CARTER, *Ex p.* GIBSON (1827), 2 Gl. & J. 233, L. C.
Annotations :—**Consd.** *Re* Dixon, *Ex p.* Nanson (1874), 43 L. J. Bcy. 133. **Refd.** *Re* Dixon, *Ex p.* Gordon (1874), 10 Ch. App. 160, L. JJ. **Mentd.** *Re* Naylor, *Ex p.* Grazebrook (1832), 2 Deac. & Ch. 186, Ct. of R. ; *Re* Boothby, *Ex p.* Hall (1838), 3 Deac. 125, Ct. of R. ; *Re* Levey & Robson, *Ex p.* Topping (1863), 34 L. J. Bcy. 13 ; *Re* Motion, *Ex p.* Bass (1867), 36 L. J. Bcy. 39, L. JJ. ; Nanson *v.* Gordon (1876), 1 App. Cas. 195, H. L. ; *Re* Joseph & Bergel's Deed of Assignment, Pears *v.* Bergel (1908), 100 L. T. 74.

3253. —— —— Claim in respect of breach of trust—Subject of suit in equity.]—Pltfs. in equity claiming to be admitted as creditors under a fiat in bkpcy., in respect of a breach of trust by bkpts., which was the subject of the suit in equity, applied, on a dividend of bkpts'. estate being about to be declared, to be allowed to enter a claim upon the proceedings, & to have a fund reserved. The application was refused.—THOMPSON *v.* DERHAM, THOMPSON *v.* GOODMAN (1842), 1 Hare, 358 ; 66 E. R. 1071.
Annotations :—**Consd.** Laycock *v.* Johnson (1847), 6 Hare, 199. **Mentd.** Preston *v.* Wilson (1846), 5 Hare, 185.

3254. —— Secured debt—Only after valuation or realisation of security.]—Until a secured creditor of bkpt. or liquidating debtor has valued or realised his security, he has no debt provable, in respect of which the trustee is bound to make any reserve on declaring a dividend.—*Re* LEE, *Ex p.* GOOD (1880), 14 Ch. D. 82 ; 49 L. J. Bcy. 49 ; 42 L. T. 450 ; 28 W. R. 553, C. A.

3255. Effect of entering claim.]—Entering a claim does not differ in principle from establishing a proof, since it operates just as effectually in interrupting the payment of the creditors.—*Re* MINCHIN, *Ex p.* CARTER (1827), 2 Gl. & J. 233, L. C.
Annotations :—**Consd.** *Re* Dixon, *Ex p.* Nanson (1874), 43 L. J. Bcy. 133. **Refd.** *Re* Dixon, *Ex p.* Gordon (1874), 10 Ch. App. 160, L. JJ. **Mentd.** *Re* Naylor, *Ex p.* Grazebrook (1832), 2 Deac. & Ch. 186, Ct. of R. ; *Re* Boothby, *Ex p.* Hall (1838), 3 Deac. 125, Ct. of R. ; *Re* Levey & Robson, *Ex p.* Topping (1863), 34 L. J. Bcy. 13 ; *Re* Motion, *Ex p.* Bass (1867), 36 L. J. Bcy. 39, L. JJ. ; Nanson *v.* Gordon (1876), 1 App. Cas. 195, H. L. ; *Re* Joseph & Bergel's Deed of Assignment, Pears *v.* Bergel (1908), 100 L. T. 74.

SECT. 13.—EFFECT OF PROOF.

3256. On jurisdiction of court.]—If a creditor has proved, it gives the ct. a jurisdiction quite different from that which it is authorised to exercise, where there has been no proof.—*Re* OLIVER, *Ex p.* HILTON (1820), 1 Jac. & W. 467 ; 37 E. R. 446, L. C.
Annotation :—**Refd.** *Re* Morton, *Ex p.* Robertson (1875), L. R. 20 Eq. 733.

3257. —— Limited to extent of proof.]—A petitioning creditor fraudulently sued out a commission, & prevailed upon twelve persons to make proofs on fictitious debts, for the purpose of carrying the choice of assignees, which object was attained, in opposition to the *bonâ fide* creditors. The assignees were afterwards removed, but not till one of them had absconded with a large sum belonging to bkpt.'s estate, & when the whole fraud was discovered, the proofs were ordered to be expunged, & the dividends received on them repaid. Two of the parties, however, having become insolvent, were unable to repay the dividends, & the estate in other ways sustained considerable loss from the fraudulent proofs. The fresh assignees, who had been appointed under an order of the ct., petitioned that five of the parties, who had made such fraudulent proofs might be ordered to make good the sum abstracted by the defaulting assignee, & all the other loss which had thus been occasioned to the estate :—*Semble :* (1) as it did not appear that any of the parties contemplated the abstraction of the funds by the defaulting assignee, at the time of their respective proofs, the ct. had no jurisdiction to order them to make good the loss experienced by his default, which was only a substantive ground of charge against him, in his character of assignee ; (2) the circumstance of a party having proved a debt under a commission, merely vested in the ct. a jurisdiction to the extent of the proof.—*Re* SMITH, *Ex p.* BRAND (1836), 1 Deac. 308 ; 2 Mont. & A. 707 ; 5 L. J. Bcy. 57, Ct. of R.

3258. —— To decide collateral matters.]—Whatever it is necessary to decide collaterally to the point of proof, will give jurisdiction in bkpcy.—*Re* BRICKWOOD, *Ex p.* ROWTON (1810), 1 Rose, 15 ; 17 Ves. 426 ; 34 E. R. 165, L. C.
Annotations :—**Consd.** *Ex p.* Cowan (1819), 3 B. & Ald. 123. **Refd.** *Re* Boldero, *Ex p.* Pease (1812), 19 Ves. 25, L. C. ; *Re* Goren, *Ex p.* Cutts (1838), 3 Deac. 242, L. C.

3259. —— Over party seeking to prove—Injunction against continuing action at law.]—If a creditor, who is proceeding at law, present a petition that he may be admitted to prove, he brings himself within the jurisdiction of the Great Seal, & will be enjoined from proceeding at law.—*Ex p.* HARDENBERGH (1812), 1 Rose, 204, L. C.
Annotation :—**Refd.** *Re* Schlesinger, *Ex p.* Schlesinger (1828), 7 L. J. O. S. Ch. 27.

3260. —— —— Foreigner.]—When a foreign creditor comes in & proves his debt under an English bkpcy., & receives a dividend in respect of his debt, he thereby submits to the jurisdiction of the ct., & is as much bound by all the proceedings, & the ct. has as much authority over him, as though he were resident in England.—*Re* MORTON, *Ex p.* ROBERTSON (1875), L. R. 20 Eq. 733 ; 44 L. J. Bcy. 99 ; 23 W. R. 906 ; *sub nom. Re* MORETON, *Ex p.* ROBERTSON, 32 L. T. 697.

PART VIII. SECT 13.

o. On rights of legatee—Necessity for election—Between proof & action on devastavit.]—V. bequeathed £1,500 each to his daughters, & also an annuity of £40 each, charged on house property until they should have been provided for by the payment of the legacy, on payment of which the annuities should cease. He bequeathed the house property to his sons A. & B., whom he appointed exors., & directed that they should, within three years after his decease, invest £3,000 in stock, for the purpose of discharging the legacies to his daughters. A. & B. were traders, & did not invest the £3,000, in pursuance of the direction in the will, but paid interest at £6 per cent. on the legacies, & also the annuities to the daughters. B. died, & A. became bkpt. The daughters proved for the legacies, under a ruling of the comr., that they should elect to do so within a given time, & the house property was sold in the bkpcy., subject to the annuities :—*Held :* the daughters, by proving in the bkpcy., had not waived their right to the annuities.—GATCHELL *v.* GEOGHEGAN (1857), 6 I. Ch. R. 312.—IR.

3262 i. *On creditors right to sue—Necessity for election—Between proof & continuing action at law.*]—A person cannot come into the Ct. of Ch., & claim any benefit from a commission of bkpcy. without giving up his proceedings at law, but it is not so, where he claims no benefit, but wishes to have it set aside as an imposition on the ct.—*Re* BURGESS (1828), 1 Ir. L. Rec. 1st ser. 374.—IR.

Sect. 13.—*Effect of proof.*]

3261. On rights of landlord—Necessity for election—Between proof & distress.]—A landlord is considered in a higher degree than a common creditor, & it would be hard to preclude him from distraining where there are goods on the premises, & he must be put to his election to waive his proof or his distress.—*Ex p.* GROVE (1747), 1 Atk. 104; 26 E. R. 69, L. C.

Annotation :—**Refd.** Briggs *v.* Sowry (1841), 11 L. J. Ex. 193.

3262. On creditor's right to sue—Necessity for election—Between proof & continuing action at law.]—A man who has a debt may come in & prove his debt & afterwards he may bring an action at law, & the ct. will not absolutely stop him from bringing an action, but put him to his election, & even then allow him to assent or dissent to the certificate.—*Ex p.* GROVE (1747), 1 Atk. 104; 26 E. R. 69, L. C.

Annotation :—**Mentd.** Briggs *v.* Sowry (1841), 11 L. J. Ex. 193.

3263. —— Proof & action begun before 49 Geo. 3, c. 121, s. 14.]—Where a creditor had both proved his debt under a commission of bkpcy., & commenced an action against bkpt., before the passing of 49 Geo. 3, c. 121, s. 14 :—*Held :* that Act did not compel him to relinquish his action.—ATHERSTONE *v.* HUDDLESTON (1809), 2 Taunt. 181; 127 E. R. 1046.

3264. —— Proof & action for same debt—No dividend received.]—A creditor, who had proved, was restrained from proceeding for the same demand in the county ct., although there was no dividend.—*Re* FLOWER, *Ex p.* FLOWER (1847), De G. 503; 16 L. J. Bcy. 9; 9 L. T. O. S. 202; 11 Jur. 482, Ct. of R.

3265. —— —— Debt substantially but not actually same in amount.]—Deft. having been convicted on an indictment for a nuisance, on his being called up for judgment, an order was made by consent, respiting the judgment until a report should be made, as to the nuisance, by a referee, & ordering the costs to be taxed. The costs were taxed, but the referee refused to undertake the reference. Deft. not having on demand, paid the taxed costs, prosecutors issued a *fi. fa.*, which proved unfruitful; afterwards deft. became bkpt., & the prosecutors proved the taxed amount of costs under the bkpcy., upon which a dividend of 2*s.* 10*d.* was declared. Afterwards, deft. was called up for judgment & sentenced, & prosecutors thereupon took out a side bar rule for taxation, & the *allocatur* was given for a sum including the amount formerly taxed, with a small addition for the costs of the last bringing up for judgment. Deft. & his bail not having paid those costs, a motion was made to attach him, & to estreat the recognisances :—*Held :* as against deft., the rule must be discharged, the proof in bkpcy. having been made for substantially the same sum as that in the last *allocatur*.—R. *v.* HILLS (1853), 2 E. & B. 176; 22 L. J. Q. B. 322; 21 L. T. O. S. 101; 17 J. P. 647; 17 Jur. 714; 1 C. L. R. 575; 6 Cox, C. C. 174; 118 E. R. 735.

3266. —— —— Balance due on composition—Rights reserved in event of instalments being in arrears—No arrears at date of bankruptcy.]—A mtgee. agreed to accept a composition by instalments in respect of the mtge. debt, upon condition that if any instalment should be unpaid for ten days after it became due, the mtgee. should be remitted to his original rights & remedies. He proved under the bkpcy. of the mtgor. for the amount remaining due upon the composition, no instalment being then in arrear :—*Held :* he had made his election to come in under the bkpcy., & could not take advantage of the condition to increase his proof upon default being made in paying an instalment subsequent to such proof.—*Re* COLLIER & COLLIER, *Ex p.* SMITH (1853), 1 Bankr. & Ins. R. 61.

3267. —— —— Proof on judgment for master's wages—Action in rem against ship—Ship having changed hands.]—A master having sued for his wages at common law & recovered judgment, which judgment remains unsatisfied in consequence of deft.'s bkpcy., & having further proved his debt under deft.'s bkpcy., is entitled to sue the ship in the Admlty. Ct., notwithstanding the ship

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3264 i. —— *Proof & action for same debt—Stay of proceedings.*]—Deft. having been adjudicated, & pltf. having proved for the amount of bills of exchange, he commenced an action on the bills. In Nov., 1867, a defence was filed, & in Jan., 1868, deft. obtained a certificate of conformity :—*Held :* the proceedings should be stayed.—LEESON *v.* OUTHWAITE (1868), 2 I. L. T. Jo. 353.—**IR.**

3264 ii. —— —— *Dividend received—Discharge suspended.*]—A firm proved their debt, & opposed bkpt.'s final discharge, which was suspended. The firm received a dividend, &, during his suspension, sued bkpt. for their debt, giving credit for the dividend :—*Held :* the firm had elected to come in under the adjudication & action stayed.—GRAVE *v.* BURTON, 1 J. R. 181.—**N.Z.**

3264 iii. —— —— —— *Discharge refused.*]—A creditor, who has proved a debt under a liquidation under Debtor & Creditor Act, 1875, & received a dividend, is not barred from suing for the balance where the order of discharge has been refused.—*Re* HERBERTSON *v.* BLACKETT, 2 J. R. N. S. 166.—**N.Z.**

3264 iv. —— —— —— —— *Certificate not obtained.*]—A creditor, though he proves a debt, & is paid a dividend, may, if bkpt. has not obtained his certificate, proceed with an action to recover the same debt. After bkpt. has obtained his certificate, the ct. will not restrain the creditor from proceeding with the action, but will leave bkpt. to apply to the ct. in which the proceedings are pending.—*Re* PURDES & OUTWAITHE (1868), 2 I. R. Eq. 264; 2 I. L. T. Jo. 266.—**IR.**

3264 v. —— —— *Debt contracted by fraud.*]—Pltf. sued deft., an insolvent, who had obtained his discharge under a composition, for a debt alleged to have been contracted in such circumstances that the imprisonment of debtor for enforcing payment was permitted :—*Held :* pltfs. had not precluded themselves from enforcing the claim by having proved it in the ordinary way, & not as a debt contracted by fraud, or by having taken notes made by deft. & his sureties for the composition, & received payment of one of them.—MCMASTER *v.* KING (1878), 3 A. R. 106.—**CAN.**

p. —— *Right to prove on promissory notes made by husband & wife—& levy execution on wife's property.*]—F. conveyed real estate to O., who then conveyed to the wife of F. Afterwards F. became an insolvent & the transaction was declared void as against his assignee, who sold the property to defts. Pending the proceeding pltf. had obtained execution on a judgment against F.'s wife, on promissory notes made by her & F. under which the sheriff, after the sale by the assignee, sold all her interest in the property to pltf., who proved his claim on the notes & received a dividend in the insolvency :—*Held :* he was not estopped from asserting that the property was exigible under his execution against F.'s wife.—BEEMER *v.* OLIVER (1884), 10 A. R. 656.—**CAN.**

q. —— *Whether entitled to prove against estate of surety for composition—& against estate of principal debtor.*]—The principal debtor & his cautioner under a composition arrangement were sequestrated without having paid the composition, & the creditors claimed on the estate of debtor for their original debts, & on the estate of the cautioner for the amount of the composition :—*Held :* the creditors had not abandoned or forfeited their right to claim on the cautioner's estate for the composition debt by claiming on debtor's estate for the full debt.—THOMSON & CRAIG *v.* LATTA (1863), 35 Sc. Jur. 545.—**SCOT.**

r. —— —— ——.]—V. became security for payment of a composition by an arranging trader. When two instalments had been paid, the case was turned into bkpcy. The creditors proved against the estate of the principal for their first bills, giving credit for the instalments paid. V. then became bkpt. The creditors were not allowed to prove on his estate for two sets of unpaid bills, they having made their election.—*Re* SHEEHAN & FREHAN'S ESTATE (1863), 16 Ir. Jur. 198.—**IR.**

has changed hands.—THE BENGAL (1859), Sw. 468 ; 5 Jur. N. S. 1085.

Annotations :—**Folld.** The John & Mary (1859), 5 Jur. N. S. 1085. **Apld.** Nelson *v.* Couch (1863), 15 C. B. N. S. 99. **Refd.** The Mali Ivo (1869), L. R. 2 A. & E. 356 ; The Cella (1888), 57 L. J. P. 43.

3268. —— —— Proof by indorsee of bill—Action by drawer on paying indorsee.]—The drawer of a bill of exchange, who has paid the amount to an indorsee after a fiat in bkpcy. issued against the acceptor, may sue the latter upon the bill, before he has obtained his certificate, notwithstanding the indorsee has proved under the fiat.—WALKER *v.* PILBEAM (1847), 4 C. B. 229 ; 9 L. T. O. S. 55 ; 136 E. R. 493.

3269. —— —— —— ——.]—The drawer of a bill of exchange who has paid the amount to the holder, after a commission of bkpcy. issued against the acceptor, may sue the acceptor before he has obtained his certificate, & arrest him upon the bill, notwithstanding the holder has proved the bill under the commission.—MEAD *v.* BRAHAM (1814), 3 M. & S. 91 ; 105 E. R. 545.

Annotations :—**Folld.** Dally *v.* Wolferston (1823), 3 Dow. & Ry. K. B. 269. **Distd.** Boydell *v.* Champneys (1837), 2 M. & W. 433. **Folld.** Walker *v.* Pilbeam (1847), 4 C. B. 229.

3270. —— Right to prove joint debt under commission against one partner—And sue all partners for same debt.]—Separate commissions of bkpcy. were issued against three of four partners, to which they conformed & passed their examination. An order was made for allowing the joint creditors to prove their debts under the commission of one of the three, under which commission pltfs. proved their joint debt, & afterwards sued all the partners for same debt, & arrested one of the other two, under whose commission they had not proved :—*Held :* he was not entitled to be discharged out of custody.—YOUNG *v.* HUNTER (1812), 16 East, 252 ; 104 E. R. 1084.

Annotation :—**Refd.** *Re* Mackenzie, *Ex p.* Bolton (1816), Buck, 7, L. C.

3271. —— —— & sue other partners.]—*Held :* 49 Geo. 3, c. 121, s. 14 did not prevent a creditor, who proved a joint debt under a commission against one partner, from suing the others.—HEATH *v.* HALL (1812), 4 Taunt. 326 ; 128 E. R. 355.

Annotation :—**Refd.** *Re* Mackenzie, *Ex p.* Bolton (1816), Buck, 7, L. C.

3272. —— Right to prove for debt due to retiring partner by continuing partner—& sue in regard to partnership debts subsequently paid by retiring partner.]—A. & B. having dissolved partnership, an award was made between them, by which B. was directed to pay A. a sum certain, & to pay several partnership debts. B. gave a warrant of attorney for securing the money awarded, with a stipulation in the defeasance that, if A. should be called upon to pay any of the partnership debts, he should be at liberty to enter up judgment. B. became bkpt., & A. proved his private debt under the commission, & received a dividend thereon. A. was afterwards sued for a partnership debt, & entered into an arrangement with the creditor to pay it by instalments, & then entered up judgment, & took out execution on the warrant of attorney, before B. had obtained his certificate :—*Held :* A. was not deprived of his remedy by 49 Geo. 3, c. 121, s. 3 & 14.—DALLY *v.* WOLFERSTON (1823), 3 Dow. & Ry. K. B. 269 ; 1 L. J. O. S. K. B. 246.

3273. —— Right to prove on bills accepted by one partner—& sue other partners.]—One of the members of a foreign firm resident in England, bought goods on account of the firm, for which he gave his own acceptances. Before the maturity of the bills, the acceptor became bkpt., & the drawer, or those to whom he had indorsed them, proved for the amount against the acceptor's estate, & received dividends :—*Held :* the vendor of the goods, to whom the bills had been returned, had done nothing to prejudice his right to have recourse against the other members of the firm for the unpaid balance, & the mere fact of the vendor's having dealt with the resident partner, made out the invoices to him individually, & drawn upon him alone, though aware that he was a member of a firm, & that the goods were to be shipped for the firm, made no difference.—BOTTOMLEY *v.* NUTTALL (1858), 5 C. B. N. S. 122 ; 28 L. J. C. P. 110 ; 32 L. T. O. S. 222 ; 5 Jur. N. S. 315 ; 141 E. R. 48.

Annotations :—**Refd.** Keay *v.* Fenwick (1876), 1 C. P. D. 745, C. A. ; Scarf *v.* Jardine (1882), 7 App. Cas. 345, H. L. **Mentd.** Mears *v.* Western Canada Pulp & Paper Co., [1905] 2 Ch. 353, C. A.

3274. —— Proof not defence to action for same debt.]—The proof of a debt under a commission cannot be pleaded in bar to an action at law brought for the same debt.—HARLEY *v.* GREENWOOD (1821), 5 B. & Ald. 95 ; 106 E. R. 1128.

Annotations :—**Consd.** *Re* Schlesinger, *Ex p.* Schlesinger, *Ex p.* Edwards (1828), 7 L. J. O. S. Ch. 27, L. C. **Folld.** Spencer & Hewitt *v.* Demett (1866), L. R. 1 Exch. 123. **Refd.** Bridget *v.* Mills (1826), 12 Moore, C. P. 92 ; Woodward *v.* Meredith (1844), 13 L. J. Q. B. 322 ; Ipstones Park Iron Ore Co. *v.* Pattinson (1864), 2 H. & C. 828. **Mentd.** Ransford *v.* Barrett (1839), 8 L. J. Ex. 254 ; Geikie *v.* Hewson (1842), 4 Man. & G. 618.

3275. —— ——.]—It is not a good equitable plea in bar to an action, that deft. has been adjudicated bkpt., & that pltf. has proved his cause of action under the bkpcy.—SPENCER & HEWITT *v.* DEMETT (1866), L. R. 1 Exch. 123 ; 4 H. & C. 127 ; 35 L. J. Ex. 73 ; 13 L. T. 677 ; 12 Jur. N. S. 194 ; 14 W. R. 310.

3276. —— Where two distinct debts.]—Where a party has clearly distinct demands on bkpt., he may sue for one & come under the commission for the other, but not if they are only different securities for the same debt.—*Ex p.* CRINSOZ (1783), 1 Bro. C. C. 270 ; 28 E. R. 1122.

3277. —— —— 49 Geo. 3, c. 121, s. 14.]—By the above sect. a person having two debts cannot come in under the commission for one & proceed at law for the other.—*Ex p.* HARDENBERGH (1812), 1 Rose, 204, L. C.

Annotation :—**Consd.** *Re* Schlesinger, *Ex p.* Schlesinger, *Ex p.* Edwards (1828), 7 L. J. O. S. Ch. 27, L. C.

3278. —— —— Action by party alleged to be trustee for creditor proving.]—A person to whom several debts were due from a bkpt., arising out of separate sales of goods, proved some of the debts under the commission ; another person, who was suggested to be a trustee for him, sued at law upon a note which bkpt. had given for other part of the goods sold. The ct. refused to interfere in a summary way to stay proceedings on the bail-bond in such action.—HOWELL *v.* GOLLEDGE (1813), 5 Taunt. 174 ; 128 E. R. 653.

3274 i. —— *Proof not defence to action for same debt—In another province.*]—Deft.'s estate was sequestrated as insolvent in G. Pltf. made proof on the estate there situate of a debt incurred by deft. in C. :—*Held :* such sequestration & proof were no bar to an action instituted by pltf. in C. for the debt.—ALEXANDER & CO. *v.* LIONI (1875), Buch. 79.—**S. AF.**

3283 i. —— *Where two distinct debts—Both debts due at time of proof.*]—A docket of bkpcy. was struck against deft. & a commission issued, at which time deft. was indebted to pltf. for goods sold & on a promissory note. Pltf. having abandoned an action, which he had commenced before the striking of the docket for the amount of the goods, proved under commission for the amount claimed, & afterwards arrested deft. on the promissory note, for which he continued in custody :—*Held :* this was not the case of the splitting of a single simple contract, & proceeding at law for one moiety & proving for the other, & a motion to have deft. discharged out of custody must be refused.—CHRISTY *v.* NEWELL (1831), Alc. & N. 28.—**IR.**

Sect. 13.—*Effect of proof.*]

3279. —— —— Proof on bill in hands of creditor —Action on bill discounted by creditor & dishonoured.]—Two parcels of goods were sold at different times, & paid for by bills. The purchaser afterwards becoming bkpt., the vendors proved under the commission, for the amount of the first parcel, they then holding the bill given in payment for same. The bill for the other parcel having been negotiated by them prior to the bkpcy., & being then outstanding was afterwards dishonoured :—*Held :* the vendors were not precluded by 49 Geo. 3, c. 121, s. 14, from suing bkpt. for the amount of the last parcel of goods.—WATSON *v.* MEDEX (1817), 1 B. & Ald. 121 ; 106 E. R. 45.

Annotations :—**Refd.** Harley *v.* Greenwood (1821), 5 B. & Ald. 95 ; *Re* Schlesinger, *Ex p.* Schlesinger, *Ex p.* Edwards (1828), 7 L. J. O. S. Ch. 27 ; *Re* Newton, *Ex p.* Newton (1841), 11 L. J. Bcy. 7, Ct. of R.

3280. —— —— —— ——.]—A creditor for goods sold may prove on a bill for part of the debt, & proceed at law on a bill for the remainder, which he has negotiated before the bkpcy., & taken up after the proof.—*Re* SLY, *Ex p.* SLY (1826), 2 Gl. & J. 163.

Annotations :—**Folld.** *Re* Newton, *Ex p.* Newton (1841), 11 L. J. Bcy. 7, Ct. of R. **Refd.** *Re* Schlesinger, *Ex p.* Schlesinger, *Ex p.* Edwards (1828), 7 L. J. O. S. Ch. 27, L. C.

3281. —— —— —— ——.]—Two parcels of goods were sold at different times, & paid for by two distinct bills the purchaser afterwards becoming bkpt., the vendor proved under the commission for the amount of the first parcel, being then the holder of the bill given in payment for same. The bill for the other parcel was outstanding in the hands of a party, to whom it had been negotiated prior to the bkpcy., but who had given notice of its dishonour :—*Held :* the vendor was not precluded, under 6 Geo. 4, c. 16, s. 59, from bringing an action against bkpt. for the amount of the last parcel of goods, & he would not have been precluded, even if he had been the holder of the second bill at the time of his so proving for the amount of the first parcel of goods.—*Re* SCHLESINGER, *Ex p.* EDWARDS (1828), 1 Mont. & M. 116 ; 7 L. J. O. S. Ch. 27, L. C ; *revsg.* S. C. *sub nom. Re* SCHLESINGER, *Ex p.* SCHLESINGER, 2 Gl. & J. 392.

Annotation :—**Expld.** Elder *v.* Beaumont (1857), 8 E. & B. 353.

3282. —— ——Limits of application of 49 Geo. 3, c. 121, s. 14.]—Declaration upon four bills of exchange. Plea in bar that deft. was indebted to pltfs. in large sums of money for goods sold, & that, for securing to pltfs. the several sums of money, deft., before his bkpcy., accepted a bill of exchange drawn by pltfs., for & in payment of one of the several sums of money in which he was so indebted, & that he had accepted each of the several bills of exchange for which the action was brought, in payment of one other of the several sums of money in which he so stood indebted. The plea then stated that deft. had duly become bkpt., that the bills of exchange mentioned in the declaration were provable under the commission, & that pltfs. being creditors of deft. for the amount of the money comprised in all the several bills, proved the amount of one bill only under the commission, & thereby made their election to take the benefit of the commission, not only with respect to the debt so proved, but also as to the bills & debts mentioned in the declaration :—*Held :* the election of the creditor to take the benefit of the commission, was confined by the above sect. to the debt actually proved, & did not extend to distinct debts *ejusdem generis* due at the same time, & the plea could not be supported.—HARLEY *v.* GREENWOOD (1821), 5 B. & Ald. 95 ; 106 E. R. 1128.

Annotations :—**Folld.** Bridget *v.* Mills (1826), 12 Moore, C. P. 92. **Consd.** *Re* Schlesinger, *Ex p.* Schlesinger, *Ex p.* Edwards (1828), 7 L. J. O. S. Ch. 27, L. C. **Apprvd.** Ipstones Park Iron Ore Co. *v.* Pattinson (1864), 2 H. & C. 828. **Refd.** Woodward *v.* Meredith (1844), 13 L. J. Q. B. 322 ; Spencer & Hewitt *v.* Demett (1866), L. R. 1 Exch. 123. **Mentd.** Ransford *v.* Barrett (1839), 8 L. J. Ex. 254 ; Geikie *v.* Hewson & Martin (1842), 4 Man. & G. 618.

3283. —— —— Both debts due at time of proof.]—If a creditor prove one debt under a commission of bkpcy., he is not thereby precluded from suing upon another, although it were due at the time of his proving the first.—BRIDGET *v.* MILLS (1826), 4 Bing. 18 ; 12 Moore, C. P. 92 ; 130 E. R. 674.

Annotation :—**Folld.** *Re* Schlesinger, *Ex p.* Schlesinger, *Ex p.* Edwards (1828), 7 L. J. O. S. Ch. 27, L. C.

3284. —— —— Separate bill transactions.]—Bkpt. & R. had various bill transactions with each other, which were entered in a regular debtor & creditor account current. R. proved on four of the bills credited in the account for the sum of £800, & afterwards brought an action against bkpt., to recover the amount of four other bills, amounting to £620, which were also included & credited in the account current, & which were returned dishonoured to R., after he had proved for the £800 :—*Held :* the £800 & £620 must be considered as distinct & separate debts, & the proof for the one did not prevent the creditor from suing bkpt. for the other.—*Re* NEWTON, *Ex p.* NEWTON (1841), 2 Mont. D. & De G. 422 ; 11 L. J. Bcy. 7 ; 6 Jur. 68, Ct. of R.

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s. *On right to sign judgment.*]—A writ was served on deft. by pltf. on Feb. 12, & on the 15th a debtor's summons, & on the 18th deft. filed a declaration of insolvency, notice of which was given to pltf.'s attorney. On Mar. 1 pltf. filed a petition for adjudication against deft., & subsequently a proof of debts, on which deft. was adjudicated a bkpt. At the meeting for the appointing of a trade assignee pltf. & his agent alone proved & voted. The meeting for final examinations adjourned *sine die*. On Dec. 6 a petition of appeal was presented against the refusal of the ct. to pass a final examination, & on Dec. 17 a case by way of answer was filed ; on Dec. 19 judgment was marked, & subsequently deft. was arrested. The Exch. Ct. set aside the judgment & discharged deft.—GIROND *v.* BURKE (1863), 8 I. L. T. Jo. 450.—**IR.**

t. *On right to enforce judgment.*]—A judgment debtor who had been adjudicated bkpt., & whose final examination was adjourned *sine die*, was arrested for a judgment debt which had been proved in bkpcy. by the creditor. The ct., on motion, ordered his discharge out of custody.—JOHNSTON *v.* GERMAINE (1872), 6 I. L. T. 121.—**IR.**

w. *On rights of mortgagee.*] — A mtgee. proved under the arrangement clauses. The case was turned into bkpcy. :—*Held :* such proof was not an abandonment of his right as mtgee., but an establishment of that right, the mortgaged property having been valued, & credit given for its worth.—*Re* WILSON (1861), 14 Ir. Jur. 328.—**IR.**

3285 i. *On right to levy execution—For costs of unsuccessful action by insolvent —No dividend received.*]—Pltf. filed his bill on Mar. 14, 1874. On the 31st an attachment in insolvency was issued by deft. against pltf. The decree dismissed pltf.'s bill with costs, in Oct., 1874. Deft. proved against the estate for the costs of the suit, but did not take his dividend, & took no further steps to recover his claim until after the order for discharge of pltf., when he issued execution :—*Held :* the proving against the estate for the costs, when the claim was not legally provable, did not operate as an estoppel *in pais*. — STEVENSON *v.* SEXSMITH (1880), 8 P. R. 286.—**CAN.**

3285 ii. —— *Who may take objection.*]—Pltf., a judgment creditor of deft., proved his claim before the assignee under Insolvent Act ; afterwards, & before deft. obtained his discharge, pltf. issued execution on his judgment, & levied upon property which insolvent had not included in his schedule of assets :—*Held :* whether the property belonged to deft. at the time of his insolvency, or was the property of a third person, he had no right to apply to set aside the execution, as in either case he could have no right to it.—JONES *v.* DES BRISAY (1871), N. B. Dig. 714.—CAN.

3285. On right to levy execution—On bankrupt's property in hands of trustee.]—A creditor who has proved will, upon a petition by the assignees, be restrained from issuing execution against the property of bkpt. in the possession of the assignees. —*Re* CHAMBERS & SON, *Ex p.* BERNASCONI (1828), 2 Gl. & J. 381.

3286. —— Jurisdiction against execution creditor not proving.]—The ct. has not, by 6 Geo. 4, c. 16, s. 108, jurisdiction against an execution creditor, who does not prove.—*Re* WHITEHEAD, *Ex p.* BOTCHERLEY (1828), 2 Gl. & J. 367.

3287. —— For costs—Proof for debt before judgment.]—Where deft. in an action has become bkpt., after verdict & before judgment, & pltf. has proved for the debt., but has not been permitted to prove for the costs, the ct. will, upon summary application, under 6 Geo. 4, c. 16, s. 59, stay proceedings by *sci. fa.* in the action for the recovery of the costs.—WOODWARD *v.* MEREDITH (1844), 2 Dow. & L. 135; 13 L. J. Q. B. 322; 3 L. T. O. S. 207; 8 Jur. 1136.

Annotation:—**Refd.** Thomson *v.* Harding (1857), 3 C. B. N. S. 254.

3288. On rights of sureties—For bond given for part of debt proved.]—On Feb. 1 pltfs. commenced an action against A. & B. to recover the amount of a bill of exchange for £468 1*s.* 9*d.*, & also a large sum for goods sold & delivered, money paid, & money due upon an account stated. They afterwards filed an affidavit in the Ct. of Bkpcy. under Judgments Act, 1838 (c. 110), s. 8, alleging A. & B. to be indebted to them in £468 1*s.* 9*d.*, for which sum A. & B. on Feb. 11 gave a bond with sureties pursuant to the Act. On Mar. 21 pltfs. signed judgment against A. & B., against whom a fiat in bkpcy. had issued, for £1,332 19*s.* 6*d.*, which included the £468 1*s.* 9*d.* On Apr. 5 pltfs. proved their debt under the fiat, excluding the amount of the bill of exchange, in respect of which the bond had been entered into, & on Apr. 12 they lodged a *ca. sa.* against A. & B., & on May 30 commenced actions against the sureties upon the bond:—*Held:* the proof under the fiat was an election to relinquish the action against A. & B., &, the principal debtors being thus entitled to be discharged if rendered pursuant to the condition of the bond, the sureties were entitled to summary relief on motion.—GEIKIE *v.* HEWSON (1842), 4 Man. & G. 618; 5 Scott, N. R. 484; 134 E. R. 254.

3289. On party undertaking to get bankrupt to refer dispute.]—A., an attorney, in order to get possession of papers belonging to B., in the hands of C., B.'s former attorney, who had a lien upon them for the amount of his bill then in dispute, undertook that B. should enter into an unqualified reference, not revocable, etc. B. having become subsequently bkpt. for the second time, & without paying 15*s.* in the pound:—*Held:* the proof of the debt under the commission was not an election by C. under 49 Geo. 3, c. 121, s. 14, so as to dispense with the reference, & A. was liable, pursuant to his undertaking, to procure B.'s signature to an agreement of reference, & to find security for the performance of the award to the satisfaction of the master.—*Ex p.* HUGHES (1822), 5 B. & Ald. 482; 106 E. R. 1267.

3290. On creditor's right to question validity of commission.]—An assignee, who has proved his debt, & against whom an action is directed to be brought to try his right to property of bkpt. alleged to have been fraudulently delivered to him, cannot dispute the validity of the commission; if he does, it is at the hazard of his proof. —*Re* GREEN, *Ex p.* JEEKS (1813), 1 Rose, 393, L. C.

3291. How far equivalent to payment.]—It has been argued that proof is payment. Certainly the debt is gone, but it is only extinguished *sub modo.* (SIR J. ROSE).—*Re* MARCH, *Ex p.* GONNE (1837), 3 Mont. & A. 166; *sub nom. Re* MARSH, *Ex p.* GONNE, 6 L. J. Bcy. 57, Ct. of R.

3292. —— Discharge of lien — Solicitor.]—A solr., who had papers in his hands relating to bkpt.'s estate, upon which he claimed a lien for his bill of costs, came in under the commission, & proved for the amount of his bill of costs:—*Held:* such proof was equivalent to payment, & the solr. had, by proving under the commission for the amount of his bill of costs, relinquished his lien upon the papers in his hands belonging to bkpt.—*Re* TARLETON, *Ex p.* HORNBY (1819), Buck, 351.

Annotations:—**Distd.** *Re* Firth, *Ex p.* Schofield (1879), 12 Ch. D. 337, C. A. **Consd.** *Re* West Coast Gold Fields, Rowe's Trustee's Claim, [1906] 1 Ch. 1, C. A. **Refd.** Stammers *v.* Elliott (1867), L. R. 4 Eq. 675.

3293. —— —— Unpaid vendor.]—X. bought hops of T., on a custom known in the hop trade as W.O., *i.e.*, the hops were to wait the order of X. in T.'s warehouse, & to be charged for warehouse room & insurance. X. paid for the hops by bills of exchange, which were dishonoured at maturity. X. afterwards registered a deed of composition, which was assented to & executed by T. to the full amount of his debt in respect of the dishonoured bills:—*Held:* T.'s assent & execution of the deed operated as a proof in bkpcy., & as an abandonment of his lien for unpaid purchase-money.—*Re* OXLEY, *Ex p.* TURNBULL (1868), 19 L. T. 463; 17 W. R. 200.

3294. —— No personal remedy against bankrupt.]—Proof against bkpt.'s estate is payment, in the sense that the party making proof can not afterwards have a personal remedy against bkpt.—EWART *v.* LATTA (1865), 4 Macq. 983, H. L.

3295. —— Discharge of debt—Position of bankrupt on annulment of bankruptcy.]—A partner in a bkpt. firm was indebted to the estate of testatrix, & was also entitled to a legacy from, & was one of the residuary legatees of, the same testatrix. A receiver appointed in a suit for administration of

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3291 i. *How far equivalent to payment —Discharge of lien—Bailee.*]—S. stored fish with defts., which he afterwards sold to R., giving him a memorandum headed "R. bought of S." signed by the latter. R. paid half in cash, & gave S. a note for the balance, which was indorsed by defts., & retired by them at maturity. R., after the sale, became insolvent, & pltf., his assignee, produced at the first meeting of creditors a statement of assets, the first item of which was "236 bbls. mackerel stored at B. Bros.," defts. One of defts. attended the meeting & saw the statement, remarking to those present that he was not aware of any fish of R.'s stored with them, but he gave no such intimation to the assignee or inspector, &, long after, defts. made a claim on the estate for the amount of the note, stating that they held no security, & a dividend was paid them. The assignee having brought an action of trover for the fish:—*Held:* as defts. had knowledge that the fish sued for were included by insolvent in the statement of his assets, to which statement they made no objection, but proved against the estate for the whole amount of insolvent's note, & received a dividend thereon, they could not claim the fish or set up a claim for lien thereon.—TROOP *v.* HART (1882), 7 S. C. R. 512; 2 C. L. T. 251.—**CAN.**

3293 i. —— *Right of stoppage in transitu — Unpaid vendor.*]—Where goods are forwarded to the order of bkpt. prior to his bkpcy., the right of the unpaid vendor to stoppage *in transitu* is not forfeited in consequence of his lodging a proof of debt & receiving a dividend out of bkpt.'s estate for the value of the goods, if at the time that he does so he is unaware of the fact that the goods had not been delivered to bkpt.—*Re* DALEY, *Ex p.* OFFICIAL ASSIGNEE (1900), 19 N. Z. L. R. 379.—**N.Z.**

3296 i. —— *Calls on shares.*]—*Semble:* proof under a bkpcy. was not equivalent to payment of calls, so as to satisfy 8 Vict. c. 16, s. 18, which made payment of calls a condition precedent to the right to transfer shares.—TURNER *v.* DUBLIN & BELFAST JUNCTION RY. CO. (1853), 3 I. Ch. R. 526; 6 Ir. Jur. 225.—**IR.**

Sect. 13.—*Effect of proof.* *Sect.* 14.]

her estate proved the debt & received a dividend : —*Held :* the effect of the proof was to discharge the debt & entitle bkpt., whose bkpcy. had been annulled, to his legacy.—ARMSTRONG *v.* ARMSTRONG (1871), L. R. 12 Eq. 614 ; 25 L. T. 199 ; 19 W. R. 971.

Annotations :—**Apprvd.** *Re* Watson, Turner *v.* Watson, [1896] 1 Ch. 925. **Folld.** *Re* Sewell, White *v.* Sewell, [1909] 1 Ch. 806. **Mentd.** Joseph *v.* Goode, Fisher *v.* Goode (1875), 23 W. R. 225.

3296. —— **Calls on shares.**]—Where the holder of partly paid shares in a limited co., incorporated under Cos. Acts, becomes bkpt., & the co. proves in the bkpcy. for the amount remaining unpaid or uncalled on his shares, & receives a dividend of less than 20*s.* in the pound, the trustee is not entitled to rank as a holder of fully paid shares in the distribution of the surplus assets of the co. in a subsequent liquidation. Proof does not amount to payment for this purpose :—*Semble :* if after proof by the co. the trustee were to sell the shares to a purchaser, the liability of the purchaser would be the amount remaining unpaid on the shares with the benefit of any further dividends under the proof, & the right to that benefit would properly be recognised by the co. in the certificate given to the purchaser.—*Re* WEST COAST GOLD FIELDS, ROWE'S TRUSTEE'S CLAIM, [1906] 1 Ch. 1 ; 75 L. J. Ch. 23 ; 93 L. T. 609 ; 54 W. R. 116 ; 22 T. L. R. 39 ; 50 Sol. Jo. 43 ; 12 Mans. 415, C. A.

Annotation :—**Refd.** *Re* Peruvian Ry. Construction Co., [1915] 2 Ch. 144.

SECT. 14.—COSTS.

3297. Jurisdiction of court—Costs of expunging fictitious proof.]—The Ct. of Review has no jurisdiction to order persons who have proved fictitious debts to pay the costs incurred before the comr. in expunging them.—*Re* SMITH, *Ex p.* BRAND (1836), 1 Deac. 308 ; 2 Mont. & A. 707 ; 5 L. J. Bcy. 57, Ct. of R.

See 1914 Act, Sched. II., r. 6, 1915 Rules, r. 96.

3298. —— **To order creditor resident abroad to give security—In appeal from rejection.**]—The ct. has no jurisdiction to order a creditor resident abroad, who is appealing from the rejection of his proof by the trustee, to give security for the costs of such appeal.—*Re* VANDERHAEGE, *Ex p.* IZARD (1887), 20 Q. B. D. 146 ; 58 L. T. 236 ; 36 W. R. 525 ; 5 Morr. 27.

Annotations :—**Consd.** *Re* Howe Machine Co., Fontaine's Case (1889), 41 Ch. D. 118, C. A. ; *Re* Semenza, *Ex p.* Paget, [1894] 1 Q. B. 15, C. A.

3299. —— —— ——.]—The ct. has jurisdiction to order a foreign creditor resident abroad, who appeals against the rejection of his proof by the trustee, to give security for the costs of the appeal, but will not order such security to be given as a matter of course, but only in extreme cases, as, for instance, where the claim is shadowy & very unlikely to succeed.—*Re* SEMENZA, *Ex p.* PAGET, [1894] 1 Q. B. 15 ; 63 L. J. Q. B. 278 ; 69 L. T. 703 ; 42 W. R. 241 ; 38 Sol. Jo. 60 ; 1 Mans. 18 ; 9 R. 156, C. A.

Annotations :—**Distd.** *Re* Pretoria Pietersburg Ry. Co., [1904] 2 Ch. 359. **Apld.** *Re* Pilling, *Ex p.* Chapman (1906), 94 L. T. 682.

3300. —— —— **On application to expunge proof.**]—The jurisdiction to order an appct. resident abroad to give security for costs ought only to be exercised in extreme cases, &, in the absence of any evidence of inability to pay, an order ought to be refused.

A., a creditor resident abroad, served a notice of motion on C., another creditor, asking that his proof should be expunged or reduced. An application by C., that A. might be ordered to give security for costs, was dismissed, no sufficient reason having been shown why such an order should be made.—*Re* PILLING, *Ex p.* CHAPMAN (1906), 94 L. T. 682 ; 50 Sol. Jo. 466.

3301. Of commissioner—Whether payable by unsuccessful applicant to expunge debt.]—On an unsuccessful application to the comr. to expunge a debt under 6 Geo. 4, c. 16, s. 60, appct. may be ordered to pay the comr.'s & solr.'s fees, & sums paid for the use of the room, etc.—*Re* HOLT, *Ex p.* KIRKALDY (1834), 1 Mont. & A. 642, Ct. of R.

3302. Of assignees or trustee—In petition for liberty to prove—Whether payable by petitioner.]—An exor. appropriated a legacy, which he held in trust, & became bkpt. A petition was presented by the *cestuis que trust*, for liberty to prove the amount of the legacy against the estate of bkpt. : —*Held :* the assignees were not entitled to get their costs of the petition from petitioners.—*Re* NEWMAN, *Ex p.* HEALD (1843), 12 L. J. Bcy. 37.

3303. —— —— —— .]—On a petition by an exor., who had become bkpt., for liberty to prove a debt against his own estate, in the character of exor. :—*Held :* the assignees were not entitled to get their costs of the petition from petitioner. —*Re* HALFORD, *Ex p.* SNOWLTON (1843), 12 L. J. Bcy. 37.

3304. —— —— ——.]—On a petition for liberty to prove a debt against the estate of a bkpt., on behalf of a person of unsound mind :—*Held :* the assignees were not entitled to get their

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a. *Equivalent to making claim within* 1883 *Act, s.* 143.]—*Re* MCGREGOR, *Ex p.* MCGREGOR (1888), 7 N. Z. L. R. 241.—**N.Z.**

b. *Equivalent to bringing action—Interrupts prescription.*]—Proving a debt is equivalent to bringing an action & is a judicial interpellation sufficient to interrupt prescription in terms of the exceptions in Act 6 of 1861, s. 2.—NAUDE'S EXECUTOR *v.* MARITZ (HALL & NAUDE'S TRUSTEE) (1902), 19 S. C. 171.—**S. AF.**

c. *Amount agreed by creditor & official assignee—Whether succeeding official assignee bound.*]—A creditor filed a proof of debt. The official assignee & the creditor agreed upon an amount different from that in the proof, but neither that proof nor any amended proof was indorsed by the assignee as either allowed or disallowed or filed :—*Held :* the adjustment was nugatory & not binding upon a succeeding official assignee.—*Re* BAYLDON, *Ex p.* BANK OF AUSTRALASIA (1875), 1 V. L. R. 10.—**AUS.**

d. *In colonial bankruptcy—On right to receive dividends in Scottish sequestration.*]—A co. carrying on business in Glasgow & Sydney became insolvent, & a commission of bkpcy. issued against them in Australia. Six weeks afterwards they were sequestrated in Scotland. Both processes of distribution proceeded concurrently with the full consent of all parties, the assets of bkpts. in Australia being managed by the assignee under the commission of bkpcy., & the estates in Scotland being managed by the trustee. A creditor, who had obtained payment of 7*s.* 6*d.* per pound under the Australian commission, claimed to rank in Scotland for his full debt, without deduction of the sum received by him in Australia. The trustee refused the claim, & declared an equalising dividend of 7*s.* 6*d.* per pound out of the funds in Scotland in favour of the creditors who had not recovered in Australia. The ct. dismissed an appeal against a judgment of the Sheriff sustaining this deliverance.—STEWART *v.* AULD (1851), 13 Dunl. (Ct. of Sess.) 1337.—**SCOT.**

PART VIII. SECT. 14.

3297 i. *Jurisdiction of court—Costs of contesting claim.*]—The county ct. judge had power to award costs under Insolvent Act of 1875, s. 95, against the assignee on his contestation of a claim filed against the estate.—TAIT *v.* DOWLING (1880), 20 N. B. R. 265.—**CAN.**

3302 i. *Of assignees or trustee—Adjournment into court—Whether additional costs payable by creditor.*]—Where a proof is adjourned into ct. the additional costs must be borne by the creditors as costs of proof. The costs of the assignees will be allowed unless there are special reasons to the contrary.—*Re* COLTSMAN (1894), 28 I. L. T. 108.—**IR.**

costs of the petition from petitioner.—*Re* BISHTON, *Ex p.* BUCKNALL (1843), 12 L. J. Bcy. 42.

3305. —— —— ——.]—A petition by bkpt., as exor., & by two legatees, that an account might be taken of what was due from bkpt. to the estate, & for liberty to prove the debt when ascertained, was served on the assignees, who appeared to consent to the petition & asked that petitioners should pay their costs:—*Held:* as they had appeared unnecessarily, they could not be paid their costs out of the assets of testator, but might take them out of the general estate.—*Re* BRIDGMAN & DRYLAND, *Ex p.* BRIDGMAN (1842), 2 Mont. D. & De G. 692; 11 L. J. Bcy. 50; 6 Jur. 956, Ct. of R.

3306. —— —— **Without deducting security—Whether costs allowed out of estate.**]—Circumstances in which the assignees were allowed their costs out of the estate of opposing a petition by creditors to be admitted to prove without deducting their security.—*Re* BENTLEY, *Ex p.* WILSON (1838), 2 Jur. 67, Ct. of R.

3307. —— **On application to expunge proof—Whether payable by creditor—Proof expunged for irregularity.**]—A., B., C. & D. contracted a debt with W. for goods supplied to them on their joint account. A., B. & C. became bkpt., & W. proved under their commission, stating in his deposition that A., B. & C. only, without noticing D., were jointly indebted to him. Afterwards he sued & recovered the amount of his debt against D., the solvent partner:—*Held:* in consequence of the informality of his proof, W. must pay the costs of the application of the assignee to expunge it.—*Re* THACKERAY, *Ex p.* ADAMS (1834), 3 Deac. & Ch. 623.

3308. —— **In appeal against admission of proof—Whether payable by trustee personally—No guarantee from creditors.**]—A trustee had failed to obtain a guarantee from the creditors before appealing against an order of the county ct. judge, admitting a proof:—*Held:* he must pay the costs of appeal personally.—*Re* MALDEN, GIBSON & Co., *Ex p.* JAMES (1886), 55 L. T. 708; 3 Morr. 185, D. C.

3309. —— —— —— **Trustee removed before hearing of appeal.**]—A trustee appealed against the admission of a proof, but was removed before the hearing of the appeal:—*Held:* (1) he had no *locus standi;* (2) the appeal having been dismissed, because no creditor adopted it, resp. was entitled to his costs out of the deposit, but no personal order could be made against the trustee.—*Re* POOLEY, *Ex p.* SHEARD (No. 2) (1880), 16 Ch. D. 110; 44 L. T. 260, C. A.

Annotations:—**Refd.** Pooley's Trustee in Bankruptcy *v.* Whetham (1884), 28 Ch. D. 38, C. A. **Mentd.** *Re* Genese, *Ex p.* Kearsley (1886), 17 Q. B. D. 1.

3310. —— **In appeal from order amending proof—Trustee served with notice of appeal—Whether entitled to costs of appearance.**]—A trustee in bkpcy., who is served with notice of an appeal from an order allowing a creditor to amend his proof, & who appears & only asks for his costs, will not be allowed his costs of appearance.—*Re* ARDEN, *Ex p.* ARDEN (1884), 14 Q. B. D. 121; 33 W. R. 460; 2 Morr. 1; *sub nom.* ARDEN *v.* DEACON, 51 L. T. 712, D. C.

3311. Of secured creditor petitioning to prove without deducting security—Whether costs allowed out of estate—Or out of proceeds of security.]—Circumstances, in which secured creditors petitioning successfully to be allowed to prove without deducting security were allowed their costs, not out of bkpt.'s general estate, but out of the proceeds of the security.—*Re* BENTLEY, *Ex p.* WILSON (1838), 2 Jur. 67, Ct. of R.

3312. Of creditor seeking to prove.]—The general rule is, that costs of proof are to be paid by the creditor seeking to establish the claim.—*Re* SPARKE & BRIDGES, *Ex p.* DAY (1863), 9 L. T. 350.

3313. —— **Unnecessary petition.**]—Where a petition to prove is unnecessary petitioner is liable to costs.—*Re* PARKIN, *Ex p.* RODGERS (1832), 1 Deac. & Ch. 38, Ct. of R.

3314. Of creditor appealing against rejection of proof—Whether entitled to costs.]—A creditor, whose debt has been disallowed by the master, & allowed by the ct. upon petition, is not entitled to costs.—WATKINS *v.* MAULE (1821), Jac. 105; 37 E. R. 790; *subsequent proceedings* (1823), 1 L. J. O. S. Ch. 82.

See 1914 Act, Sched. II., r. 6, 1915 Rules, r. 96.

3307 i. —— *On application to expunge proof—Made by creditors.*]—It is the duty of the assignees to take care that a separate debt be not proved on the joint estate; & where creditors perform the duty which the assignees ought to have performed, the assignees will get no costs.—*Re* FERRAR, *Ex p.* DAVIS (1859), 9 I. Ch. R. 554; 12 Ir. Jur. 40. —**IR.**

e. —— *Creditor withdrawing proof—Liability for costs incurred prior to withdrawal.*]—A creditor who withdraws his proof remains liable to be placed on a contribution account for a *pro ratâ* share of all costs lawfully & *bonâ fide* incurred by the trustee previous to receiving notice of withdrawal.—CRESSEY *v.* HAARHOFF'S TRUSTEE (1895), 12 S. C. 123; 5 C. T. R. 157.—**S. AF.**

f. —— *Claim by creditor out of the jurisdiction—Security for costs.*]—A claimant on an Irish bkpt.'s estate residing out of the jurisdiction of the Irish Bkpcy. Ct., who comes in to establish a claim which the assignees are warranted in resisting, is not bound to give security for costs which the assignees must incur in resisting it.—*Re* RING (1869), 3 I. R. Eq. 507; 3 I. L. T. Jo. 350.—**IR.**

g. *Of unsuccessful application to amend.*]—Where, in an arrangement matter, a creditor made his proof of debt, including a sum for which he held security, & was represented by a solr. at both sittings at which the arrangement was carried, & the ct. refused leave to withdraw or amend the proof by excluding the secured debt, costs of opposing the motion were given both to the opposing creditors & to arranging debtor.—*Re* O'D., *Ex p.* ROBINSON (1885), 15 L. R. Ir. 496. —**IR.**

h. *Of creditor—On summons to admit claim—Claim settled.*]—On a summons calling upon debtor to either admit or deny a claim debtor appeared & asked for further time, which was granted. Before the time expired, the creditor settled with the trader; debtor promised, but afterwards refused, to pay the costs of the proceedings; an application for an order upon debtor to pay the costs was refused with costs.—*Re* WALLACE (1845), 1 O. S. 585.—**CAN.**

j. *Of creditor proving claim—Discretion of court.*]—The question of allowing costs of proof is in all cases a matter for the discretion of the judge.—*Re* O'B. (A DEBTOR), [1917] 2 I. R. 626.—**IR.**

k. —— *Claims disputed—Costs of hearing.*]—Where creditors merely come into the office to prove their demands, they are not allowed the costs of the hearing afterwards; but it will be otherwise if a question arises, & it is necessary to bring them to the final hearing.—MADDEN *v.* O'CALLAGHAN (1818), 2 Mol. 522.—**IR.**

l. —— *Wife claiming for money lent.*]—*Re* DANGERFIELD, 13 C. L. J. N. S. 2.—**CAN.**

m. —— *Amount of claim unascertained before action—Set-off.*]—In an action for a declaration to rank for a sum to be ascertained for goods supplied, the claim was disputed:—*Held:* pltfs. entitled to general costs of action, less costs of deft.'s set-off. —SMITH *v.* HARKNESS (1903), 20 W. R. 171.—**CAN.**

n. —— *Witness coming from abroad—Assignee acting reasonably.*]—Where proving a claim required a witness from abroad, & much time was occupied in proving it, no costs were allowed, as the assignee had not acted unreasonably, nor put the creditor to unnecessary expense.—*Re* ARCHIBALD, WOODBURY, CLAIMANT (1909), 6 E. L. R. 455.—**CAN.**

o. —— *Creditor aiding bankrupt to abscond—No costs allowed.*]—A creditor who gave bkpt. the means of leaving the country will not, although his charge be taken as proved, be allowed his costs.—*Re* TATE & Co. (1868), 2 I. L. T. Jo. 284.—**IR.**

p. *Of creditor objecting to proof—Whether costs allowed.*]—A creditor, volunteering to aid the assignee in objecting to a proof, will not be allowed any costs.—*Re* AGNEW, 1 Ir. Jur. 252.—**IR.**

3315. —— ——.]—When the comrs. have exercised their judgment with respect to a proof of debt, & have refused to admit it, the successful petitioner against their decision is not entitled to costs, it being a general rule that costs cannot be so given when comrs. exercise their jurisdiction. —*Re* HUDSON, *Ex p.* MILLINGTON (1833), 1 Mont. & A. 114, Ct. of R.

3316. —— —— **Proof admitted in part.**]—A creditor tendered a proof for £3,500, which the comrs. rejected *in toto*. After presenting a petition against their decision, an order was made by consent that he should prove for £500 :—*Held :* the creditor should not be granted costs out of the estate, but each party should pay his own costs.—*Re* BIGGS, *Ex p.* WATERHOUSE (1833), 3 Deac. & Ch. 108.

3317. —— —— **Creditor successful on same evidence as tendered in court below.**]—The costs of a petition to prove must be paid by the creditor if he adduces new evidence. If he succeeds on evidence which was tendered before the comrs. & rejected :—*Semble :* he may be entitled to costs. —*Re* PRICE, *Ex p.* PRICE (1833), 1 Mont. & A. 51 ; 3 L. J. Bcy. 2.

3318. —— —— **Clear indisputable right established.**]—The rule of not allowing costs to a party appealing against the judgment of the comrs., will be relaxed in favour of a petitioner establishing a clear & indisputable right of proof which the comrs. had rejected.—*Re* WEST, *Ex p.* HOOPER (1834), 1 Mont. & A. 395 ; 3 Deac. & Ch. 655 ; 3 L. J. Bcy. 88, Ct. of R.

3319. —— **Whether costs allowed out of estate—Proof improperly rejected.**]—The comrs. having improperly rejected a proof, because the claim was merged in a felony, petitioner was allowed costs out of the estate.—*Re* ——, *Ex p.* BIRKS (1827), 2 Mont. & A. 208, n.

Annotation :—**Consd.** *Re* Elliott, *Ex p.* Jermyn (1837), 6 L. J. Bcy. 41, Ct. of R.

3320. —— —— ——.]—The assignees wrongly made a reduction in petitioner's proof, on the ground that the prices charged for goods supplied to bkpt. were too high :—*Held :* the costs of petitioner, in the circumstances, should be paid out of the estate.—*Re* LEECH, *Ex p.* REAY (1833), 3 Deac. & Ch. 175, Ct. of R.

3321. —— **Whether payable by trustee personally—Proof improperly rejected—Trustee acting under directions of committee of inspection.**]—A trustee in bkpcy. rejected a proof tendered in respect of a debt for which judgment had been entered against bkpt. in the Q. B. Div. under a judge's order by consent, on the ground that the order had not been filed as required by Debtors Act (c. 62), s. 27, so that the judgment was void. The trustee in rejecting the proof acted under the directions of the committee of inspection :—*Held :* the decision of the trustee must be reversed with costs, to be paid by him personally, & the fact that he had acted under the directions of the committee of inspection did not affect his liability. —*Re* SMITH, *Ex p.* BROWN (1886), 17 Q. B. D. 488 ; 3 Morr. 202, C. A.

Annotation :—**Mentd.** Gowan *v.* Wright (1886), 18 Q. B. D. 201, C. A.

See, generally, Part VII., Sect. 5, sub-sect. 2, B. (*a*), *ante.*

3322. —— **Whether payable by official receiver personally.**]—*Held :* 1915 Rules, r. 263, provided that the official receiver should in no case be personally liable for costs in relation to an appeal from his decision rejecting any proof, wholly or in part.—*Re* HUNTLY (MARQUIS), *Ex p.* GOLDSTEIN (1917), 87 L. J. K. B. 735 ; 117 L. T. 792 ; [1917] H. B. R. 209, D. C.

See, generally, Part VI., Sect. 6, *ante.*

3323. Of creditor petitioning to have proof expunged—Reference to commissioners to allow costs.]—Where certain creditors had succeeded in expunging various proofs, which had been improperly made under the fiat, the ct. referred it to the comrs. to allow them such costs as they should think reasonable.—*Re* HAWORTH, *Ex p.* MARGERISON (1839), 4 Deac. 80, Ct. of R.

3324. Of creditor opposing petition to expunge—Whether costs allowed out of estate.]—Upon petition to expunge a proof on grounds not taken before the comr., resp. will have his costs out of the estate.—*Re* HOUGHTON & WATTS, *Ex p.* ELLIS (1833), Mont. & B. 249 ; 2 L. J. Bcy. 95, Ct. of R. ; *revsd.* on another point, *sub nom. Re* HOUGHTON & WATTS, *Ex p.* ROBINSON (1833), 1 Mont. & A. 18, L. C.

Annotation :—**Mentd.** *Re* Bentley, *Ex p.* Vere (1835), 2 Mont. & A. 123, Ct. of R.

3325. —— —— **Petition by debtor.**]—A debtor, after a receiving order had been made & while the consideration of a scheme was pending, made an unsuccessful application to expunge a creditor's proof, & was ordered to pay the costs. The proposal for the scheme failed, & debtor was adjudicated bkpt. The creditor applied for an order to be allowed the costs out of the estate :—*Held :* the costs, not being provable in the bkpcy., were not payable out of the estate, but remained a debt enforceable against bkpt. after his discharge.—*Re* PILLING, [1909] 2 K. B. 788 ; 78 L. J. K. B. 1107 ; 101 L. T. 433 ; 25 T. L. R. 809 ; 16 Mans. 280.

3326. Of creditor succeeding in having expunged proof restored—Costs of petition & proceedings before commissioners.]—Where the comrs. expunged a proof, on the application of the assignees, & the creditor afterwards succeeded on a petition to have it restored, the ct. gave him the costs of the petition as well as of the proceedings before the comrs., making it an exception to the general rule that costs are not given against the

3323 i. *Of creditors petitioning to have proof expunged.*]—It is the duty of the assignees to take care that a separate proof be not proved on a joint estate ; & where creditors perform the duty which the assignees ought to have performed the creditors will get their costs.—*Re* FERRAR, *Ex p.* DAVIS (1859), 9 I. Ch. R. 554 ; 5 Ir. Jur. 40.—**IR.**

3323 ii. —— *Not a preferential claim.*]—Where neither the creditors of a person who has assigned for benefit of creditors nor his assignee are voluntary parties to the contestation of a claim against the estate they ought not to be penalised by directing that the costs of the contestants should be a preferential claim.—UNION BANK *v.* BATES (1914), 28 W. L. R. 602 ; 6 W. W. R. 1170 ; 18 D. L. R. 269 ; 24 Man. L. R. 619.—**CAN.**

3324 i. *Of creditor opposing petition to expunge—Acting bonâ fide.*]—A creditor whose proof is expunged will get his costs, if his conduct has been *bonâ fide* & he has been in no respect to blame in the matter.—*Re* FERRAR, *Ex p.* DAVIS (1859), 9 I. Ch. R. 554 ; 12 Ir. Jur. 40.—**IR.**

q. *Of proof—Whether costs abide the event.*]—If nothing is said as to costs, they will abide the event.—*Re* EDWARDS & SON, *Ex p.* TOMLINS (1885), 11 V. L. R. 304.—**AUS.**

r. *Of unsuccessful appeal—Against order refusing to expunge proof.*]—Where, upon motion, by the insolvent to expunge a proof of debt, the ct. below dismissed it with costs, to be paid by the insolvent, upon appeal, such order was affirmed & appeal dismissed with costs.—*Re* HICKINBOTHAM (1879), 5 V. L. R. 101.—**AUS.**

s. *Incurred by proof not properly prepared—Adjourned meeting.*]—When a creditor's proof is not properly prepared & another meeting is necessary, he must pay a portion of the costs incurred.—*Re* AGNEW (1856), 8 Ir. Jur. 252.—**IR.**

decision of the comrs.—*Re* MOORE, *Ex p.* BROOKS (1835), 4 Deac. & Ch. 209 ; 4 L. J. Bcy. 57.

3327. —— Whether costs allowed out of estate.]—A party may in some cases be entitled to costs out of the estate, although he presents a petition, or opposes one, in resistance of an order of the comrs., *e.g.*, a creditor who has succeeded in an appeal against an order expunging his proof.—*Re* BENTLEY, DEAR & RICHARDSON, *Ex p.* WILSON, *Ex p.* WYMAN (1841), 1 Mont. D &. De G. 586, Ct. of R.

Annotation :—**Mentd.** *Re* Tait, *Ex p.* Harper (1882), 21 Ch. D. 537, C. A.

3328. Of bankrupt—Appearing on petition for liberty to prove—Whether entitled to costs.]—A bkpt. trustee, guilty of a breach of trust, is not entitled to his costs of appearing on a petition, by the *cestuis que trust*, for liberty to prove against his estate.—*Re* OSBALDISTON, *Ex p.* HARRIS (1842), 11 L. J. Bcy. 16.

3329. —— Served with notice of appeal from rejection of proof—Whether entitled to costs of appearance.]—Where a bkpt. is served with notice of an appeal by a creditor, whose proof has been rejected :—*Semble :* bkpt. will be entitled to his costs of appearing.—*Re* KNIGHT, *Ex p.* SMITH & Co. (1884), 1 Morr. 74.

3330. Taxation of costs—When refused.]—Bkpt.'s father carried in two separate proofs against the estate for £3,000, which were respectively rejected by the trustee to the extent of £2,000, & on the application of another creditor were subsequently expunged in the county ct. The creditor appealed, but while the appeals were pending, a compromise was entered into, according to the terms of which it was agreed that the claim of the creditor should be reduced to the sum of £1,380 & that all costs should be paid by the trustee. On application to the county ct. judge for an order for taxation in accordance with the terms of the compromise, it was refused :—*Held :* the proper course was to come to the ct. for its consent to the arrangement, & the refusal of the county ct. judge to grant an order for taxation in the circumstances was right.—*Re* GREEN, *Ex p.* EDMUNDS (1885), 53 L. T. 967 ; 2 Morr. 294, D. C.

Part IX.—Secured Creditors.

SECT. 1.—JURISDICTION OF COURT.

3331. To determine priority of lien.]—Bkpt. deposited with A. the title-deeds of premises which he had previously mortgaged to R. & Co. After the bkpcy. it was agreed between R. & Co., A., & the assignees, that the assignees should sell the premises, & apply the proceeds in payment of R. & Co. & A. Upon a petition by the solr. of bkpt., claiming a lien by deposit of the title-deeds of the premises prior to A. :—*Held :* there was no jurisdiction in bkpcy. to determine the priority of lien between A. & petitioner, & A. was not precluded from objecting to the jurisdiction by filing affidavits as to the merits.—*Re* DOWNING, *Ex p.* ALLISON (1822), 1 Gl. & J. 210.

Annotations :—**Folld.** *Re* Robinson, *Ex p.* Royds (1833), 3 Deac. & Ch. 294. **Mentd.** *Re* Mills, *Ex p.* Reid (1832), 1 Deac. & Ch. 250, Ct. of R.

3332. To decide all questions in regard to securities—& as to debt due.]—Two partners, A. & B., dissolved partnership, on the terms that A. should make over all his interest in the partnership property to B., & should be indemnified by him against all the debts. One of the partnership debts was due to a banking co., who held, as security, property of the partnership, & also separate property of A. A. agreed to make over all his interest in the securities in the hands of the bank to B. to enable him to pay the debts of the partnership. B. afterwards executed a deed of composition with his creditors, which was registered under 1861 Act, by which it was agreed that the creditors holding securities should only be entitled to a composition on the balance due to them, after giving credit for the value of their securities. A. filed a bill against the bank & B., praying relief against the bank for neglect in realising their securities, & praying for a declaration that if the bank resorted to his separate property, which, he stated, was not intended to be made over to B., he was entitled to have the loss sustained by him made good out of the fund raised under the deed of composition. Two of the creditors, parties to the deed, applied to the Ct. of Bkpcy. for an order declaring the rights of all parties in the securities, & to restrain A. from taking any proceedings in law or equity with respect to them :—*Held :* the ct. had jurisdiction to decide all questions relating to the securities & the debt due to the bank, but the ct. would not stay the suit in Ch. as it prayed relief against the bank & B., which could not be obtained under the deed.—*Re* TAYLOR & RUMBOLL, *Ex p.* RUMBOLL (1871), 6 Ch. App. 842 ; 40 L. J. Bcy. 82 ; 25 L. T. 253 ; 19 W. R. 1102, L. JJ.

Annotations :—**Folld.** *Re* Dixon, *Ex p.* Gordon (1873), 8 Ch. App. 557, n. **Consd.** Megrath *v.* Gray, Gray *v.* Megrath (1874), L. R. 9 C. P. 216. **Mentd.** Graham *v.* Winterson (1873), L. R. 16 Eq. 243.

3333. To appoint receiver & restrain trustee from obtaining possession—Court of Chancery.]—S., having created an equitable mtge. in favour of pltfs. of his share in the assets of a partnership, subsequently became bkpt. To a bill filed by pltfs. against the trustee under S.'s bkpcy., praying for the appointment of a receiver of the property, subject to the mtge., & that deft. might be restrained from obtaining possession thereof, a demurrer for want of jurisdiction was overruled.—COULTHURST *v.* SMITH (1873), 29 L. T. 714, C. A.

Annotation :—**Folld.** Jenney *v.* Bell (1876), 2 Ch. D. 547.

In regard to realisation of security.]—*See* Sect. 4, sub-sect. 4, *post.*

See, further, Part I., *ante.*

PART IX. SECT. 1.

3332 i. *To decide all questions as to securities—Insolvency outside jurisdiction.*]—The Supreme Ct. has jurisdiction to determine whether, prior to his foreign debtor's insolvency in a foreign jurisdiction, the creditor had acquired any hypothec over property of debtor within the jurisdiction.—NORDEN *v.* SOLOMON (1847), 2 M. 375, 393.—**S. AF.**

3332 ii. *S. P. Re* JUSTITIA, NORDEN *v.* CLARKE (1846), 3 M. 178.—**S. AF.**

3332 iii. —— *To state for what amount secured debt is proved.*]—The duty of the presiding officer is a judicial one : in case of a secured debt he should state plainly for what amount such debt is proved as a concurrent one.—ASPELING *v.* HOFFMAN'S TRUSTEE (1917), T. P. D. 305.—**S. AF.**

a. *To decide validity of mortgage—So far as requisite on question of proof.*]—L. gave D. his attorney, a mtge. to secure the costs of two specific actions. L. became insolvent. D. put a value on the mtge. & applied to prove for the balance of his costs under 5 Vict. No. 17, s. 29 :—*Held :* the Chief Comr. had jurisdiction to decide the validity of the mtge., so far as was necessary to the question of admitting D.'s proof.—*Ex p.* DAVIDSON (LITTLE'S INSOLVENCY) (1881), 2 N. S. W. L. R. 276.—**AUS.**

b. —— *Whether consideration sufficient.*]—Where a mtge. petition was presented in a bkpcy. matter, & the assignee prayed that it might be referred to the comrs. to report the circumstances, he having reason to doubt that there was any consideration really given for it, the ct. referred it.—*Re* HOVER (1820), 2 Mol. 451.—**IR.**

SECT. 2.—**WHAT CONSTITUTES A CREDITOR A "SECURED CREDITOR."**

See, now, 1914 Act, ss. 7 (2), 167.

3334. Garnishee order—Rule nisi served on garnishee before bankruptcy.]—P. sent an auctioneer goods for sale for ready money, not to be removed until payment. The auctioneer sold them on those terms, stated in the conditions of sale, & received part of the price from some of the purchasers, but H., who had purchased part, took them away without payment, & without the consent of the auctioneer or of P. H. refused to pay, offering to set off a debt due to him from P., but that was declined. H. having obtained judgment against P., obtained an order to attach the price of the goods remaining in the auctioneer's hands under C. L. P. Act, 1854, s. 61, which was served on the garnishee. On the same day, but after the service, P. became bkpt., & his assignees claimed the money from the garnishee:—*Held:* the effect of s. 62 was that the service bound the debt so as to render the judgment creditor a creditor having security for his debt, within 1849 Act, s. 184, but did not give a lien, so as to bring him within the exception in that sect., & the judgment creditor could not prevail against the assignees.—HOLMES *v.* TUTTON (1855), 5 E. & B. 65; 24 L. J. Q. B. 346; 25 L. T. O. S. 177; 1 Jur. N. S. 975; 3 C. L. R. 1343; 119 E. R. 405.

Annotations:—**Consd.** Turner *v.* Jones (1857), 1 H. & N. 878. **Apld.** Tilbury *v.* Brown (1860), 30 L. J. Q. B. 46; Wood *v.* Dunn (1865), L. R. 1 Q. B. 77. **Consd.** Wood *v.* Dunn (1866), L. R. 2 Q. B. 73, Ex. Ch.; Emanuel *v.* Bridger (1874), L. R. 9 Q. B. 286. **Distd.** *Re* Keyworth, *Ex p.* Tate (1874), 43 L. J. Bcy. 55. **Consd.** Lowe *v.* Blakemore (1875), L. R. 10 Q. B. 485; *Re* Watt, *Ex p.* Joselyne (1878), 8 Ch. D. 327, C. A. **Refd.** Newman *v.* Rook (1858), 4 C. B. N. S. 434; European Bank *v.* Fox (1866), 15 L. T. 288; Stevens *v.* Phelips (1875), 10 Ch. App. 417, L. JJ. **Mentd.** Murray *v.* Arnold (1862), 3 B. & S. 287; Hopkins *v.* Clarke (1864), 4 B. & S. 836; *Re* Adams, *Ex p.* Greenway (1873), 29 L. T. 75; *Re* Stanhope Silkstone Collieries Co. (1879), 40 L. T. 204, C. A.; Manley *v.* Berkett, [1912] 2 K. B. 329.

3335. —— ——.]—Pltf., on Mar. 24, obtained judgment against deft. for £310. On Apr. 2 he obtained a garnishee order under C. L. P. Act, 1854, s. 61, by which all debts due from the garnishees were ordered to be attached to answer the judgment debt. By the same order the garnishees were to show cause on Apr. 12 why they should not pay to pltf. the debt due from them to deft. The rule *nisi* was served on the garnishees on Apr. 2. On the 5th the judgment debtor presented his petition for liquidation by arrangement or composition with his creditors under 1869 Act. On Apr. 10 a receiver was appointed, who on the part of the general creditors claimed the amount of the debt, which the garnishees on the 12th admitted:—*Held:* pltf. was a secured creditor within 1869 Act, s. 12, & was entitled to have the money admitted by the garnishees to be due.—LOWE *v.* BLAKEMORE (1875), L. R. 10 Q. B. 485; 44 L. J. Q. B. 155; 33 L. T. 473; 23 W. R. 856.

Annotations:—**Consd.** Barnfather *v.* Barrow, Barrow, Page, & Draper (1877), 37 L. T. 231. **Mentd.** *Re* Watt, *Ex p.* Joselyne (1878), 8 Ch. D. 327, C. A.

3336. —— ——.]—A judgment creditor, who, before the filing of a liquidation petition by his debtor, has obtained a garnishee order *nisi* attaching debts due to debtor, is a secured creditor within 1869 Act, ss. 12, 16, & is entitled to the attached debts as against the trustee, even though they did not become actually payable until after the commencement of the liquidation.—*Re* WATT, *Ex p.* JOSELYNE (1878), 8 Ch. D. 327; 47 L. J. Bcy. 91; 38 L. T. 661; 26 W. R. 645, C. A.

Annotations:—**Consd.** Butler *v.* Wearing (1885), 3 Morr. 5. I should probably be inclined to hold that *Re Watt, Ex p. Joselyne*, was not well decided upon the recent authorities (MANISTY, J.). *Re* Hutchinson, *Ex p.* Hutchinson (1885), 16 Q. B. D. 515, D. C. **Consd. & Expld.** Norton *v.* Yates, [1906] 1 K. B. 112. **Refd.** Sinnott *v.* Bowden (1912), 81 L. J. Ch. 832. **Mentd.** Hamer *v.* Giles, Giles *v.* Hamer (1879), 11 Ch. D. 942; *Re* Curtoys, *Ex p.* Pillers (1880), 50 L. J. Ch. 691, C. A.; *Re* Hoare, *Ex p.* Nelson (1880), 14 Ch. D. 41, C. A.; Chatterton *v.* Watney (1881), 17 Ch. D. 259, C. A.; Geisse *v.* Taylor, [1905] 2 K. B. 658, D. C.

—— **Rule nisi served on garnishee before winding up of company.**]—*See* COMPANIES.

3337. —— **Bankruptcy before payment by garnishee—Or execution levied.**]—If a judgment creditor obtain an order under C. L. P. Act, 1854, s. 61, attaching a debt due to the judgment debtor, &, subsequently, another order under s. 63, directing the garnishees to pay the amount attached to the judgment creditor, or that execution may issue against them, & the judgment debtor become bkpt. before payment by the garnishees or execution levied on them, the judgment creditor cannot avail himself any longer of the order, but must share equally with the other creditors, as he is only in the situation of a creditor having security under 1849 Act, s. 184, & not within the exception to that sect. as a creditor having a mtge. or lien.—TILBURY *v.* BROWN (1860),

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PART IX. SECT. 2.

c. *Mortgage of movables—Goods not delivered.*]—A general mtge. of movables, notarially executed & registered, without delivery of the goods bound thereby, gives the holder a preference against the concurrent creditors on the insolvency of debtor.—FRANCIS *v.* SAVAGE (1882), 1 S. A. R. 33. —**S. AF.**

d. *Mortgage bond—Cause of debt wrongly stated.*]—A mtge. bond stated the cause of debt to be money lent. The original cause of debt was for goods sold, but a promissory note was given for the debt, & the bond was passed in settlement of the note & an amount of £5 odd for money lent:—*Held:* the cause of debt was sufficiently described; so long as the bond stood the security existed, & the debt was rightly admitted as preferent.—PIENAAR & FRANKEL *v.* FOURIE'S TRUSTEES (1913), C. P. D. 227.—**S. AF.**

e. *Equitable mortgage.*]—Pltf. advanced money, repayment of which was secured to him by conveyances, none of which amounted to a legal mtge:—*Held:* the conveyances constituted an equitable charge, to which the trustee in insolvency must give effect as preferential debts.—FIELDEN *v.* BOONE (TRUSTEE) (1875), 6 Nfld. L.R. 100.—**NFLD.**

f. —— *of lease.*]—Pltf. & F. were joint owners of unregistered leases *in longum tempus*. The title deeds being in pltf.'s possession. F. verbally agreed that pltf. should hold his, F.'s, half share in the leases as security for a debt due by F. Pursuant thereto F. gave pltf. irrevocable power of attorney *in rem suam*. No cession was indorsed on the titles. Thereafter F. died, & his estate was sequestrated:—*Held:* pltf. had a preference for the amount of the pledge.—SMITH *v.* FARRELLY'S TRUSTEE (1904), T. S. 949.—**S. AF.**

g. *Conveyance of farm to tenant in trust for creditors.*]—S., tenant of a farm, executed a deed in favour of applt. The deed contained a conveyance of his whole estate, including leases, in favour of applt. "as trustee & in trust, & as my comr., but hereinafter called trustee." It conferred powers of management & sale, including powers to act, transact, & manage with regard to the farm & the lease thereof, & the crop, stock & implements of husbandry & others thereon, & also to give up or renounce the lease on such terms as the trustee should think right. The deed also conferred power to sue & defend actions, to pay preferable debts & expenses of the trust, & to pay the debts of "my whole just & lawful creditors as at the date hereof," with other powers usual in a trust deed for creditors. S.'s estates were afterwards sequestrated, & applt. lodged a claim for £898 16*s.* 7*d.*, with a relative account of his intromissions, as factor & comr. for S., & as trustee upon his estate, acting under the trust deed. The trustee in the sequestration sustained the claim to the extent of £775 11*s.* 4*d.*, but only to an ordinary ranking, rejecting the claim of a preference, on the ground that claimant never held the sequestrated estates in security & that any payment by him for seed & labour for crop did not entitle him to a preferable ranking:—*Held:* applt. was not entitled to a preference.—MESS (SIME'S TRUSTEE) *v.* HAY (1898), 6 S. L. T. 207, H. L.—**SCOT.**

h. *Assignment of land to secure wages due—Creditor ignorant of debtor's insolvency at time of assignment.*]—CASSERLEY *v.* HUGHES (1905), 5 O. W. R. 599; 6 O. W. R. 70.—**CAN.**

30 L. J. Q. B. 46 ; 3 L. T. 380 ; 6 Jur. N. S. 1151 ; 9 W. R. 147.

Annotations :—**Distd.** Murray *v.* Arnold (1862), 32 L. J. Q. B. 11. **Consd.** Wood *v.* Dunn (1866), L. R. 2 Q. B. 73, Ex. Ch. ; Emanuel *v.* Bridger (1874), L. R. 9 Q. B. 286. **Refd.** European Bank *v.* Fox (1866), 15 L. T. 288 ; Lowe *v.* Blakemore (1875), L. R. 10 Q. B. 485.

3338. —— Assignment for benefit of creditors before payment by garnishee.]—Declaration, for a debt due from deft. to S., by pltfs. as trustees under a deed for the benefit of the creditors of S. under 1861 Act, all the requirements of which had been complied with so as to vest the debt in pltfs. Plea, that the judgment creditor of S. had obtained an order, attaching deft.'s debt & calling on him to show cause why he should not pay it to the judgment creditor, that deft. having no notice of the trust deed had no cause to show, & an order was made upon him to pay the debt to the judgment creditor, that this order was, before deft. had any notice of the trust deed, served upon him, & deft., in compliance with the order, & to avoid & because he could not otherwise have avoided execution, paid the debt to the judgment creditor. Replication, that the trust deed was registered under 1861 Act, before payment by deft. to the judgment creditor :—*Held :* though the payment by deft. to the judgment creditor was made after the registration of the deed, the plea must be taken to mean, either that deft. paid without notice of the deed, or, if with notice, that it was in such circumstances that he was unable to get the order set aside before he was compelled to pay to save execution being actually levied, &, in either case, the payment was a protection to deft., the garnishee, as made under an order of a ct. of competent authority.

Semble, pltfs.' remedy was against the judgment creditor for money received to their use, as he was in the position of a person having security for his debt, but not a lien, within 1849 Act, s. 184.—WOOD *v.* DUNN (1866), L. R. 2 Q. B. 73 ; 7 B. & S. 94 ; 36 L. J. Q. B. 27 ; 15 L. T. 411 ; 15 W. R. 180, Ex. Ch.

Annotations :—**Consd.** European Bank *v.* Fox (1866), 15 L. T. 288 ; Turnbull *v.* Robertson (1878), 47 L. J. Q. B. 294 ; Ranson *v.* Platt, [1911] 2 K. B. 291, C. A. **Mentd.** London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239, H. L. ; Barnfather *v.* Barrow, Barrow, Page, & Draper (1877), 37 L. T. 231 ; Cronmire *v.* MacColla (1893), 9 T. L. R. 549, C. A. ; Martin *v.* Nadel, [1906] 2 K. B. 26, C. A. ; Ponsford, Baker *v.* Union of London & Smith's Bank, [1906] 2 Ch. 444, C. A.

3339. —— Bankruptcy before order for payment.]—A creditor of a liquidating debtor, who, before the presentation of the petition, has obtained a garnishee order affecting money accruing due to his debtor, but who has not obtained any order for payment by the garnishee, is not a secured creditor within 1869 Act.—*Re* ADAMS, *Ex p.* GREENWAY (1873), L. R. 16 Eq. 619 ; 42 L. J. Bcy. 110 ; 29 L. T. 75 ; 21 W. R. 866.

Annotations :—**Dbtd.** Lowe *v.* Blakemore (1875), L. R. 10 Q. B. 485. **N.F.** *Re* London Cotton Mills Co., *Re* Brander (1876), 25 W. R. 109 ; *Re* Watt, *Ex p.* Joselyne (1878), 8 Ch. D. 327, C. A. In *Re Adams, Ex p. Greenway*, the Chief Judge was going contrary to the considered opinion of the Ct. of Q. B. in *Holmes* v. *Tutton* (THESIGER, L.J.).

3340. —— Made absolute before bankruptcy.]—An attachment under C. L. P. Act, 1854, ss. 61–63, being a seizure by way of execution for a debt due from a specific person named in the garnishee order, resembles an actual seizure by a sheriff, & a garnishee order absolute is a security on the property of the judgment debtor within 1869 Act, s. 12, & if he afterwards becomes bkpt. the execution creditor is a creditor holding security.

A creditor, who has obtained & made absolute a garnishee order before the bkpcy. of his debtor, is a creditor holding "a charge" on bkpt.'s estate, as a security for a debt due to him, within 1869 Act, s. 16 (5).—EMANUEL *v.* BRIDGER (1874), L. R. 9 Q. B. 286 ; 43 L. J. Q. B. 96 ; 30 L. T. 194 ; 22 W. R. 404.

Annotations :—**Consd.** Lowe *v.* Blakemore (1875), L. R. 10 Q. B. 485 ; Stevens *v.* Phelips (1875), 10 Ch. App. 417, L. JJ. **Folld.** *Re* London Cotton Mills Co., *Re* Brander (1876), 25 W. R. 109. **Consd.** *Re* Watt, *Ex p.* Joselyne (1878), 8 Ch. D. 327, C. A. **Distd.** Chatterton *v.* Watney (1881), 16 Ch. D. 378. **Refd.** Barnfather *v.* Barrow, Barrow, Page, & Draper (1877), 37 L. T. 231 ; Geisse *v.* Taylor (1905), 93 L. T. 534.

3341. —— Receiving order before payment by garnishee—Payment postponed under agreement.]—On Aug. 2, 1889, a judgment creditor of debtor obtained a garnishee order *nisi* attaching a debt due from applts. to debtor to answer the judgment debt. On Aug. 8, an application to make the garnishee order absolute came on for hearing, when the clerk to applts. agreed with the solr. of the judgment creditor to consent to an absolute order, the solr. undertaking not to enforce the order by execution before Oct. 5, & the clerk undertaking on behalf of applts. that they would in the meantime hold the money on behalf of the judgment creditor & at his disposal, & would hand

k. *Letter of lien over stock-in-trade.*]—Insolvent in debt to a bank had given a promissory note for the full amount of the debt due. He also gave, by way of collateral security for the promissory note & for any future advances, a letter of lien over his stock-in-trade, etc., & undertook at the time to execute, whenever called upon to do so, an assignment of his business :—*Held :* with regard to the amount of the debt secured by the letter of hypothecation, the bank was entitled to rank as preferential creditor.—*Re* SUMMERS (1896), I. L. R. 23 Calc. 592.—**IND.**

l. *Order to consignees of goods—For advances to consignor.*]—Pltf. advanced money to a co., which was practically bkpt., on the security of a scow load of lumber. The first receipt of the co. was as follows :—"Received from pltf. $650 on agreement that scow of lumber now ready be sent to his order & that this loan shall be first claim on same." A further advance being made the co. gave the following receipt :—"Received from pltf. $200, being advance made on scow load of lumber coming in first from mill." The lumber was delivered to the P. Co. & the following order was given on that co. :—"Please pay to the order of pltf. $850 to be deducted from the amount for lumber now on scow at your wharf." The question being whether pltf. was entitled to the $850 in preference to the other creditors :—*Held :* the $850 should be paid to pltf.—HOWE *v.* REEVE (1906), 3 W. L. R. 555.—**CAN.**

m. *Warehouse receipt — Taken by creditor with knowledge of debtor's insolvency.*]—No privilege is acquired by a bank on goods in a warehouse receipt, given as security for a loan to insolvent, of whose insolvency it is aware.—BANQUE NATIONALE *v.* BOYER (1911), Q. R. 20 K. B. 341.—**CAN.**

n. *Power of company to deduct from dividends debts due by shareholder.*]—A member of a co. in liquidation was indebted to the co. By its articles of assocn. power was given to the directors to deduct from the dividend payable to any member all money that might be due by him to the co., & also to decline to register a transfer of shares by any member indebted to the co. :—*Held :* the co.'s debt was not a "secured debt" within Insolvency Act, 1890 (No. 1102), s. 37.—*Re* LITTLE (1892), 18 V. L. R. 777.—**AUS.**

o. *Security given to creditor against contingent liability — As surety to debtor.*]—A creditor guaranteed a debt of debtor's & took security over some of debtor's property against the contingent liability under the guarantee :—*Held :* this did not constitute the creditor a "secured creditor" within 1898 Act, s. 7.—*Re* GARTON, *Ex p.* KILGOUR (1908), 8 S. R. N. S. W. 315.—**AUS.**

p. *Assignment of judgment—For costs due to solicitor—For debt due to third party.*]—G. recovered a judgment against D., & afterwards, though insolvent, assigned it by two assignments to his solr., one for costs due him by G., & the other for a debt due to R. by G. Afterwards, C. obtained a judgment against G., & attached the debt so due to him by D. D. paid the money due to G. to the sheriff, under an execution issued at the instance of the assignee of G. :—*Held :* the solr. of G. must be restricted to the costs incurred by him in the action brought by G. against D., & R. must stand as an ordinary creditor.—DAVIDSON *v.* DOUGLAS (1868), 15 Gr. 347.—**CAN.**

q. —— *On bond & warrant to confess judgment.*]—B. having passed his bond & warrant to confess judgment thereon to trustees, was discharged as an insolvent under 3 Geo. 4, c. 124, returning them for the amount in his schedule.

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it over to him on Oct. 5, then next. On Sept. 6, a receiving order was made against debtor, upon which he was adjudicated bkpt., but on Oct. 5, applts. sent a cheque for the money to the judgment creditor. Applts. having been ordered to pay the amount over again to the trustee :—*Held :* as the attachment had not been completed by receipt of the debt before the receiving order, the judgment creditor by the operation of 1883 Act, s. 45, lost his security & the right of the trustee to receive the debt could not be ousted by the arrangement between the clerk & the solr.—*Re* TREHEARNE, *Ex p.* EALING LOCAL BOARD (1890), 60 L. J. Q. B. 50 ; 63 L. T. 798 ; 39 W. R. 116 ; 7 T. L. R. 16 ; 7 Morr. 261, C. A.

Annotation :—**Consd.** *Re* National United Investment Corpn., [1901] 1 Ch. 950.

See, further, cases in Part XX., Sect. 3, *post.*

3342. Foreign attachment in Mayor's Court, London—Perfected by judgment—Bankruptcy before judgment actually signed.]—A writ of foreign attachment in the Mayor's Ct. subsequently perfected by judgment, gives the issuing creditor a security within 1869 Act, s. 12, although debtor may have filed a liquidation petition before judgment is actually signed.—*Re* LONDON COTTON MILLS CO., LTD., *Re* BRANDER (1876), 25 W. R. 109.

Annotation :—**N.F.** Levy *v.* Lovell (1880), 14 Ch. D. 234, C. A.

3343. —— & payment thereunder—Garnishee order before bankruptcy immaterial.]—A creditor, who obtains a foreign attachment in the Mayor's Ct., is not a creditor holding security within 1869 Act, s. 12, at all events until he is paid under the attachment, &, although he has obtained & served his garnishee order prior to debtor's act of bkpcy., he will have no right as against the trustee to the debt attached.—BARNFATHER *v.* BARROW, BARROW, PAGE, & DRAPER (1877), 37 L. T. 231.

3344. —— Bankruptcy before judgment.]—A creditor, who has served a writ of foreign attachment in an action in the Mayor's Ct., but has not obtained judgment in the action before the commencement of the bkpcy. or liquidation of his debtor, is not a creditor holding security within 1869 Act, s. 12.—LEVY *v.* LOVELL (1880), 14 Ch. D. 234 ; 49 L. J. Ch. 305 ; 42 L. T. 242 ; 28 W. R. 602, C. A.

Annotations :—**Folld.** *Re* Price, *Ex p.* Sear (1881), 17 Ch. D. 74, C. A. **Refd.** *Re* Hoare, *Ex p.* Nelson (1880), 14 Ch. D. 41, C. A. **Mentd.** *Re* Curtoys, *Ex p.* Pillers (1881), 17 Ch. D. 653, C. A.

3345. Attachment in Tolzey Court of Bristol.]—An attachment of the goods of deft., in an action of debt in the Tolzey Ct. of Bristol, is only a process to compel the appearance of deft., & does not make pltf. a secured creditor within 1869 Act. s. 16 (1).

The effect of an attachment in the Tolzey Ct. is the same as that of a foreign attachment under the custom of the Mayor's Ct. of London.—*Re* PRICE, *Ex p.* SEAR (1881), 17 Ch. D. 74 ; 51 L. J. Ch. 448 ; 44 L. T. 887, C. A.

3346. Attachment of property in Jersey—Bankruptcy after judicial act.]—Property attached in Jersey, being by the laws of that island vested in the creditor attaching, upon confirmation by the ct. of the island :—*Held :* the creditors attaching were entitled to hold the property attached & to prove for the residue, where the act of bkpcy. was subsequent to the completion of the judicial act, whether on the same or any other day, but where the act of bkpcy. was previous, they could not hold against the assignees.—*Ex p.* D'OBREE, *Ex p.* LE MESURIER (1803), 8 Ves. 82 ; 32 E. R. 283, L. C.

3347. Seizure of goods under writ of elegit.]—Under a writ of *elegit* the sheriff is entitled to seize debtor's goods at once, before the holding of the inquisition, & from the time of the seizure the creditor becomes a secured creditor within 1869 Act, s. 16 (5).—*Re* GOURLAY, *Ex p.* ABBOTT (1880), 15 Ch. D. 447 ; 50 L. J. Ch. 80 ; 43 L. T. 417 ; 29 W. R. 143, C. A.

Annotations :—**Expld.** *Re* Bannister, *Ex p.* Vale (1881), 18 Ch. D. 137, C. A. **Distd.** *Re* Chinn, *Ex p.* Sulger (1881), 17 Ch. D. 839. **Refd.** Hough *v.* Windus (1884), 12 Q. B. D. 224, C. A. **Mentd.** *Re* Curtoys, *Ex p.* Pillers (1881), 17 Ch. D. 653, C. A. ; *Re* Hutchinson, *Ex p.* Hutchinson (1885), 16 Q. B. D. 515.

3348. Delivery of writ of fieri facias to sheriff—No seizure before composition.]—A judgment creditor delivered a writ of *fi. fa.* to the sheriff before debtor filed a liquidation petition, but no seizure was made until after the creditors had resolved to accept a composition, the resolutions had been registered, & debtor had paid the amount of the composition to a trustee :—*Held :* the execution creditor was not a creditor holding a security.—*Re* BALBIRNIE, *Ex p.* JAMESON (1876), 3 Ch. D. 488 ; 35 L. T. 533 ; *sub nom. Re* BALBIRNIE, *Ex p.* BALBIRNIE, 45 L. J. Bcy. 156, C. A.

Annotation :—**Consd.** *Re* McColla, *Ex p.* McLaren (1881), 16 Ch. D. 534, C. A.

See 1914 Act, s. 16 (13).

See, further, SLATER *v.* PINDER, and other cases in Part XX., Sect. 10, *post.*

Judgment was afterwards entered on the warrant by them, & assigned to new trustees on the old trusts, by a deed to which B. was a party :—*Held :* this was in the nature of a new obligation, & that the judgment was an available security.—BALL *v.* BALL (1847), 11 I. Eq. R. 370.—**IR.**

r. —— ——.]—*Re* PERRIN (1842), 4 I. Eq. R. 362 ; 2 Dr. & War. 147 ; 1 Cow. & L. 567.—IR.

s. *Cession of action pro tanto by bond-holder for amount paid by surety.*]—O. passed a bond over property in favour of F., for payment of £12,000 by instalments ; by the terms of the bond upon failure of payment of any one instalment the whole bond became due. P. & Co. guaranteed the payment of the first £4,000. O. failed to pay more than £1,000, whereupon P. & Co. paid £3,000, receiving from F. cession of action *pro tanto* against O. O.'s estate having been sequestrated, F. proved for £8,000, & P. & Co. proved for £3,000. On realisation of the property for £5,110, the trustee of O. awarded the whole of that sum to F. :—*Held :* an application by P. & Co. for an order amending the trustee's account by awarding them £3,000 in preference to F. should be dismissed.—FARTHING *v.* PIETERS & Co. (1913), C. P. D. 771. —**S. AF.**

3347 i. *Seizure of goods in execution.*]—Where execution has been levied by seizure, the creditor has a security for his debt.—*Re* KENNEDY, *Ex p.* TATTERSON (1892), 18 V. L. R. 688.—**AUS.**

t. *Charging order.*]—The solr. for deft. in an action for possession, in which deft. obtained judgment for costs, obtained a charging order for his costs upon the judgment, with liberty to issue execution against pltf. At the date of the charging order pltf. had obtained the protection of the Ct. of Bkpcy., & subsequently carried an arrangement to pay 7*s.* in the pound. The solr. claimed to be entitled to be paid his costs in full :—*Held :* the solr. was only entitled to prove in the arrangement & to get a composition on the amount of his costs.—*Re* J., (ARRANGING DEBTOR) (1910), 45 I. L. T. 143.—**IR.**

a. *Bill of sale over goods in order & disposition of bankrupt—After demand of possession—Treated as valid by assignees.*]—B., the holder of a registered bill of sale on the furniture in W.'s hotel, demanded possession on Feb. 2 from W., who said that his affairs were in the hands of his solrs., without whose consent he could do nothing in the matter, & it was then arranged that they should meet at the solr.'s office on Feb. 5. Meantime, on Feb. 3, W. left the country, & on attending at the office of the solrs., as had been arranged, B. was advised by them to take possession, which he did forthwith. Meetings of W.'s creditors were subsequently held, at which his solrs. treated in terms B.'s bill of sale as a valid security. On Mar. 9 W. was adjudged bkpt. on the act of bkpcy. committed in leaving the country on Feb. 3, & the ct., by the order of adjudication, on petitioner's application, sanctioned the making of arrangements with B. by the official assignees for carrying on the hotel business. B. continued in possession, believing, & being so informed by petitioning creditor's solrs., that his bill of sale was valid, & that he would be paid out of the proceeds of the sale

3349. Payment of money into court by bankrupt.]—In an action by shareholders against the directors of a co. for the recovery of money alleged to have been wrongfully distributed by the directors, A., one of defts., admitted in his answer the receipt of a sum of money, & he was ordered to pay that sum into ct. A. became bkpt.:—*Held:* money paid into ct. under an interlocutory order of a ct. of equity was not within 6 Geo. 4, c. 16, s. 108.—HITCHENS *v.* CONGREVE (1831), Mont. 225; *sub nom.* HICHENS *v.* CONGREVE, 4 Sim. 420; 58 E. R. 157.

Annotations:—**Refd.** Murray *v.* Arnold (1862), 3 B. & S. 287. **Mentd.** Gluckstein *v.* Barnes, [1900] A. C. 240, H. L.

3350. —— 1849 Act, s. 184.]—After issue joined & notice of trial given in an action on a bill of exchange, deft. obtained a judge's order for a commission to examine witnesses abroad, on payment into ct. of a portion of pltf.'s claim. The money was paid in, but the commission was not acted on. Deft. having subsequently become bkpt., & assignees appointed, pltf. obtained leave to proceed with the action, which was tried, & deft. not appearing, a verdict was given for pltf.:—*Held:* pltf. was entitled to the money which had been paid into ct., & he was not deprived of his right by 1849 Act, s. 184.—MURRAY *v.* ARNOLD (1862), 3 B. & S. 287; 1 New Rep. 90; 32 L. J. Q. B. 11; 7 L. T. 385; 9 Jur. N. S. 461; 11 W. R. 147; 122 E. R. 109.

Annotations:—**Refd.** Lowe *v.* Blakemore (1875), L. R. 10 Q. B. 485; Mycock *v.* Yorkshire Banking Co. (1879), 41 L. T. 92. **Mentd.** O'Brien *v.* Brodie (1866), 4 H. & C. 544; Culverhouse *v.* Wickens (1868), L. R. 3 C. P. 295.

3351. —— 1869 Act, s. 16 (5).]—An action upon an overdue bill of exchange for £1,200 was brought against the acceptors. Defts. obtained leave to appear & defend the action, upon paying into ct. £880 to abide the event. An order was afterwards made referring the matter in dispute to arbn. Before any award was made defts. filed a liquidation petition. The trustee claimed the £880 for distribution among the creditors generally, & obtained an order from the county ct. restraining further proceedings in the arbn.:—*Held:* pltf. in the action was, at the commencement of the liquidation, a secured creditor, & an inquiry must be directed in the Ct. of Bkpcy. to ascertain to how much of the £880 he was entitled.—*Re* KEYWORTH, *Ex p.* BANNER (1874), 9 Ch. App. 379; 30 L. T. 620; *sub nom. Re* KEYWORTH, *Ex p.* TATE, 43 L. J. Bcy. 102, L. J.

Annotations:—**Folld.** Tomlinson *v.* Hampson (1894), 38 Sol. Jo. 401. **Refd.** *Re* Ford, *Ex p.* Trustee, [1900] 2 Q. B. 211. **Mentd.** The Cella (1888), 13 P. D. 82, C. A.

3352. —— 1883 Act, s. 168.]—Where deft. under R. S. C., Ord. 22, r. 6, pays money into ct. in satisfaction of pltf.'s claim with a denial of liability, & becomes bkpt. before the trial, & the trustee declines to be made a party to the action, pltf. is a secured creditor to the extent to which his proof in the bkpcy. for the amount claimed by him in the action is admitted by the trustee. If the proof when admitted is less than the sum so paid in, pltf. is a secured creditor only for the amount so admitted, & the trustee is entitled to the balance of the sum in ct.—*Re* GORDON, *Ex p.* NAVALCHAND, [1897] 2 Q. B. 516; 66 L. J. Q. B. 768; 46 W. R. 31; 4 Mans. 141.

Annotation:—**Refd.** *Re* Ford, *Ex p.* Trustee, [1900] 2 Q. B. 211.

3353. —— ——.]—Money paid into ct. as a condition for leave to defend under R. S. C. Ord. 14, r. 6, must be treated as money paid in to abide the event, & is a security to pltf. for the sum for which he may obtain judgment at the trial. In the event of deft. becoming bkpt. before the action has been tried, the money does not pass to the trustee, but must remain in ct. until the event has been decided, either by trial of the action or by adjudication upon a proof by pltf. in the bkpcy.—*Re* FORD, *Ex p.* TRUSTEE, [1900] 2 Q. B. 211; 82 L. T. 625; 48 W. R. 688; 16 T. L. R. 399; 44 Sol. Jo. 488; *sub nom. Re* FORD, *Ex p.* MACLISTER, 69 L. J. Q. B. 690; 7 Mans. 281.

3354. —— —— Payment into court to abide event.]—An order was made in a county ct. that deft. should pay to a receiver a sum of money to abide the judgment or order of the ct. in the action. After payment under the order, a bkpcy. petition was presented against deft., & a day or two later pltf. recovered judgment for the amount paid in:—*Held:* (1) the official receiver had no title to the money, which did not form part of debtor's estate; (2) where money was paid into ct. to abide the event of an action the money must be considered as protected from the date of its payment in.—TOMLINSON *v.* HAMPSON (1894), 38 Sol. Jo. 401.

Annotation:—**Refd.** *Re* Ford, *Ex p.* Trustee, [1900] 2 Q. B. 211.

3355. —— 1914 Act, s. 7.]—In an action for work done, deft. paid £65 into ct. on June 16, 1905. Pltf. gave notice of trial, but took no further step in the action. On Nov. 26, 1909, a receiving order was made against deft., but the bkpcy. was subsequently annulled upon the acceptance by the creditors of a scheme of arrangement. Some years after that, deft. took out a summons with a view to dismissal of the action for want of prosecution:—*Held:* pltf. was a secured creditor, & as nothing had happened in the bkpcy. to deprive him of the right to have the money in ct. appropriated to meet his claim, an issue should be directed to try whether at the time of payment into ct. any sum was due by deft. to pltf. in respect of the matter in question.—DESSAU *v.* ROWLEY, [1916] W. N. 238, C. A.

See also, cases in Part XX., Sect. 13, *post.*

3356. Writ of sequestration.]—On Oct. 30, 1862, a *sequestrari facias*, at the instance of deft., a judgment creditor of G., issued to the Bishop of W., & on the 31st, at nine thirty-eight a.m. was lodged at the office of the bishop's registrar. On Nov. 1 a sequestration issued, which was published on the 2nd. On Oct. 31, G. petitioned for adjudication of bkpcy. against himself, & his petition was filed on the same day at twelve-twenty-five p.m., on Nov. 17 pltf. was appointed creditor's assignee, & on Jan. 9, 1863, applied for a sequestration, which issued on the 10th, & was published on the 18th:—*Held:* deft. was not "a creditor having security for his debt" within 1849 Act, s. 184.—HOPKINS *v.* CLARKE (1864), 4 B. & S. 836; 3 New Rep. 459; 33 L. J. Q. B.

Under that impression he made payments for gas & rent, in respect of which the ct. declared him a salvage creditor on the proceeds to be received out of the premises. In the same way he was induced to bid for the hotel himself, on the understanding with the solrs. for the assignees that he would have to advance only a certain sum over the amount due to him, & for which he would get credit as against the purchase money, but creditors having objected that the amount so bid was insufficient, the hotel & furniture were, with his consent, sold to another person, under an order of the ct. directing "the hotel premises" to be put up for sale by auction as a "going concern," & B. was treated as a necessary party to the deed of conveyance & giving up of possession to the purchaser. B. having claimed to be declared entitled to payment, out of the purchase money, of the amount due on foot of the bill of sale, which was resisted by the assignees, relying on the order & disposition clause of 1857 Act:—*Held:* independently of the doctrine of estoppel *in pais*, the assignees were precluded from disputing B.'s right to rank as a secured creditor.—*Re* WALSHE, *Ex p.* BRUNKER (1878), 12 I. L. T. 87.—IR.

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93; 9 L. T. 715; 28 J. P. 183; 10 Jur. N. S. 439; 12 W. R. 370; 122 E. R. 673; *affd.* 5 B. & S. 753, Ex. Ch.

3357. —— Served on debtor to bankrupt or trustee for him.]—The mere issuing of a writ of sequestration against deft. & the service of it on a debtor to him, or a trustee of a fund for him, without anything further being done to render the sequestration effectual against the debt or fund, is not enough to make pltf. a secured creditor of deft. within 1869 Act.—*Re* HOARE, *Ex p.* NELSON (1880), 14 Ch. D. 41; 49 L. J. Bcy. 44; 42 L. T. 389; 28 W. R. 554, C. A.

Annotations:—**Distd.** *Re* Hastings, *Ex p.* Brown (1892), 61 L. J. Q. B. 654. **Refd.** *Re* Slade, Slade *v.* Hulme (1881), 18 Ch. D. 653. **Mentd.** Hulbert & Crowe *v.* Cathcart, [1894] 1 Q. B. 244.

3358. —— Followed by seizure of debtor's property.]—A writ of sequestration had been issued out of the Ch. Div. to enforce payment into ct., under which debtor's property, both real & personal, was seized. Before sale debtor was adjudicated bkpt. upon the petition of other creditors, & the county ct. judge granted an injunction, under 1883 Act, s. 10, restraining the sale:—*Held:* the sequestrator was a creditor within s. 9 (1); but he was not a secured creditor within the proviso in s. 9 (2), & the ct. had jurisdiction to restrain the sale.—*Re* HASTINGS, *Ex p.* BROWN (1892), 61 L. J. Q. B. 654; 67 L. T. 234; 8 T. L. R. 683; 36 Sol. Jo. 733; 9 Morr. 234.

Annotation:—**Mentd.** *Re* Pollard, *Ex p.* Pollard, [1903] 2 K. B. 41, C. A.

3359. —— 1883 Act, s. 9 (2).]—An order of sequestration directing money to be paid into ct. to the credit of the sequestrator's account does not, when complied with, create a charge on the property sequestered, & the trustee of the person against whom the sequestration order was made has a good title.—*Re* POLLARD, *Ex p.* POLLARD, [1903] 2 K. B. 41; 72 L. J. K. B. 509; 88 L. T. 652; 51 W. R. 483; 47 Sol. Jo. 492; 10 Mans. 152, C. A.

3360. Appointment of receiver—Judgment debt—Mortgage debt.]—A judgment creditor became the transferee of a legal mtge. of leaseholds belonging to the judgment debtor. He then commenced an action in the Ch. Div., claiming an account & payment of what was due to him on both mtge. & judgment, or a sale of the property & payment out of the proceeds, & the appointment of a receiver. On the same day he obtained *ex p.* an order extending over eight days, appointing an *interim* receiver of the rents, without security. On the eighth day he obtained, on notice, an order absolute for the appointment of the same person to be receiver of the rents, upon his giving security, On the same day debtor filed a liquidation petition, & a receiver of his property was appointed by the Ct. of Bkpcy. It did not appear which receiver was appointed first. The receiver in the action never gave security. The creditor had not sued out an *elegit*:—*Held:* the appointment of the receiver in the action was such a delivery in execution by lawful authority of the mortgaged lands, within 27 & 28 Vict. c. 112, s. 1, as to render the judgment creditor a secured creditor, within 1869 Act, & he was entitled to hold the lands as a security for his judgment debt as well as for his mtge. debt, although he had not sued out an *elegit*, as the appointment of the receiver operated as an immediate delivery of the land in execution.—*Re* WATKINS, *Ex p.* EVANS (1879), 13 Ch. D. 252; 49 L. J. Bcy. 7; 41 L. T. 565; 28 W. R. 127, C. A.

Annotations:—**Consd.** Smart *v.* Flood (1883), 49 L. T. 467. **Refd.** *Re* Pope (1886), 17 Q. B. D. 743, C. A.; *Re* Potts, *Ex p.* Taylor, [1893] 1 Q. B. 648, C. A. **Mentd.** *Re* Whiteley, Whiteley *v.* Learoyd (1887), 56 L. T. 846; *Re* Shephard, Atkens *v.* Shephard (1889), 43 Ch. D. 131, C. A.; Cadogan *v.* Lyric Theatre, [1894] 3 Ch. 338, C. A.; Thompson *v.* Gill, [1903] 1 K. B. 760, C. A.; Ridout *v.* Fowler, [1904] 1 Ch. 658; R. *v.* Selfe, [1908] 2 K. B. 121, D. C.; Ashburton *v.* Nocton, [1915] 1 Ch. 274, C. A.

3361. —— Bankruptcy before goods sold.]—A judgment creditor, having issued a writ of *fi. fa.* obtained an order appointing a receiver of debtor's goods. While the goods were unsold debtor filed his petition, & was adjudged bkpt.:—*Held:* the order appointing a receiver of debtor's goods did not constitute the execution creditor a secured creditor.—*Re* DICKENSON, *Ex p.* CHARRINGTON & Co. (1888), 22 Q. B. D. 187; 58 L. J. Q. B. 1; 60 L. T. 138; 37 W. R. 130; 5 T. L. R. 82; 6 Morr. 1, C. A.

Annotations:—**Distd.** Mason & Barry *v.* La Société Industrielle et Commerciale des Métaux (1889), 5 T. L. R. 582, C. A. **Consd.** Levasseur *v.* Mason & Barry (1890), 63 L. T. 700; *Re* Hastings, *Ex p.* Brown (1892), 61 L. J. Q. B. 654; *Re* Potts, *Ex p.* Taylor, [1893] 1 Q. B. 648, C. A.; *Re* Pearce, *Ex p.* Official Receiver, The Trustee, [1919] 1 K. B. 354, C. A. **Refd.** *Re* Tillett, *Ex p.* Kingscote (1889), 5 T. L. R. 269; *Re* Anglesey, De Galve *v.* Gardner, [1903] 2 Ch. 727. **Mentd.** *Re* Detmold, Detmold *v.* Detmold (1889), 58 L. J. Ch. 495.

3362. —— Execution restrained.] — Debtor had purchased a business, payment to be made by instalments. The instalments being in arrear, the vendor recovered judgment, but an order was made restraining him from issuing execution without leave, & appointing a receiver:—*Held:* the order appointing a receiver did not make the vendor a secured creditor.—*Re* TILLETT, *Ex p.* KINGSCOTE (1889), 60 L. T. 575; 5 T. L. R. 269; 6 Morr. 70.

Annotations:—**Consd.** *Re* Potts, *Ex p.* Taylor, [1893] 1 Q. B. 648. **Refd.** *Re* Neal, *Ex p.* Trustee (1914), 83 L. J. K. B. 1118.

3363. —— Rights under will—Notice to executors — Bankruptcy before payment.]—A judgment creditor obtained an order appointing a receiver to receive debtor's share of the residue of real & personal estate, to which he was entitled under a will. Notice of the order was served upon the exors. Before any payment had been made to the receiver, debtor was adjudicated a bkpt.:—*Held:* the judgment creditor was not a secured creditor.—*Re* POTTS, *Ex p.* TAYLOR, [1893] 1 Q. B.

b. *Decree of judicial separation—Judgment for alimony.*]—A judicial separation was obtained in terms of a voluntary deed. A division of the community subsisting between the parties was ordered, & judgment for the wife for certain arrear alimony due under the agreement, & the payment of future alimony. Thereafter the husband became insolvent:—*Held:* the wife was entitled to be ranked as a preferent creditor in so far as her half of the common estate was concerned, but only as a concurrent debtor in respect of all claims to alimony.—LUZMOOR *v.* LUZMOOR (1905), T. H. 74.—**S. AF.**

c. —— —— *Registered before assignment.*]—The precedence given to an assignment for the general benefit of creditors by R. S. O. 1887, c. 124, s. 9, over "all judgments & all executions not completely executed by payment" does not extend to a judgment for alimony registered under R. S. O. 1887, c. 44, s. 30, against the lands of defendant prior to the registration of an assignment by him, & pltf. in such a judgment is not obliged to rank with the other creditors of deft.—ABRAHAM *v.* ABRAHAM (1891), 19 O. R. 256; 18 A. R. 436.—**CAN.**

d. *Judgment on mechanic's lien—Registered after registration of assignments.*]—A creditor claimed to rank in full on the estate of insolvent, for costs of a judgment recovered by him in proceedings to realise a mechanic's lien, registered by him after the execution & registration of the assignment:—*Held:* at the date of the registration of the lien there was nothing to which it could attach, & he was entitled to rank as a simple contract creditor only.—*Re* ARCHIBALD (1909), 6 E. L. R. 454.—**CAN.**

e. *Promissory note—In hands of payee.*]—The promissory note of a debtor is not a security within Insolvency Act, 1871 (No. 379), for payment of the amount due upon it.—*Re* COHEN (1889), 15 V. L. R. 664.—**AUS.**

648 ; 62 L. J. Q. B. 392 ; 69 L. T. 74 ; 41 W. R. 337 ; 9 T. L. R. 308 ; 37 Sol. Jo. 306 ; 10 Morr. 52 ; 4 R. 305, C. A.

Annotations :—**Consd.** *Re* Gershon & Levy, *Ex p.* Coote *v.* Richards, *Ex p.* Westcott, [1915] 2 K. B. 527 ; Singer *v.* Fry (1915), 84 L. J. K. B. 2025. **Apld.** *Re* Pearce, *Ex p.* The Official Receiver, The Trustee, [1919] 1 K. B. 354, C. A. **Refd.** Croshaw *v.* Lyndhurst Ship Co., [1897] 2 Ch. 154 ; *Re* Anglesey, De Galve *v.* Gardner, [1903] 2 Ch. 727. **Mentd.** Minter *v.* Kent, Sussex & General Land Soc. (1895), 14 R. 236, C. A. ; Tilling *v.* Blythe (1899), 47 W. R. 273, C. A. ; Ridout *v.* Fowler, [1904] 1 Ch. 658 ; Ideal Bedding Co. *v.* Holland, [1907] 2 Ch. 157 ; *Re* Beaumont, Woods *v.* Beaumont (1910), 79 L. J. Ch. 744.

3364. —— Equitable execution over assets in England—Subsequent bankruptcy in Scotland.]—A receivership order obtained by a judgment creditor by way of equitable execution over assets situated in England, although it does not make the creditor a "secured creditor" within 1883 Act, ss. 9, 168, prevents a judgment debtor from assigning the assets claimed, & they do not vest in the trustee appointed in a subsequent bkpcy. in Scotland under Scottish 1856 Act.—SINGER & Co. *v.* FRY (1915), 84 L. J. K. B. 2025 ; 113 L. T. 552 ; [1915] H. B. R. 115.

3365. —— —— Order to retain profits.]—Two judgment creditors on an application for leave to proceed obtained an order dated Dec. 23, 1915, for the appointment of a receiver of the profits of an hotel, which provided that the receiver should "retain the balance of the profits to be applied in discharge of the debt & costs due to pltfs. as & when may be hereafter ordered." By a further order, dated Mar. 22, 1916, the receiver was to be at liberty to accumulate the balance of the profits to form a fund out of which the judgment creditors might be paid their debts & costs. On Mar. 12, 1918, a receiving order was made against debtor, who was adjudicated bkpt. on May 8, & on July 11 the receiver paid the money in his hands into ct. pursuant to an order :—*Held :* the orders of Dec. 23, 1915, & Mar. 22, 1916, did not constitute the pltfs. secured creditors, nor did they create in favour of the creditors a "mtge., charge, or lien on the property of debtor as a security for a debt" due to them respectively from debtor within 1914 Act, s. 167, & the fund in ct. belonged to the trustee & not to the judgment creditors.—*Re* PEARCE, *Ex p.* THE OFFICIAL RECEIVER, THE TRUSTEE, [1919] 1 K. B. 354 ; 88 L. J. K. B. 367 ; 120 L. T. 334 ; [1918–19] B. & C. R. 131, C. A.

See, generally, EXECUTION.

3366. Deposit of goods with authority to sell—With authority to apply proceeds in repayment.]—Deposit of goods, with authority to sell, & to apply the proceeds in liquidating an existing account, makes the depositee a secured creditor, but a mere authority to sell, although it gives a right to set off, is insufficient.—*Re* ROSE, *Ex p.* HASLUCK & GARRARD (1894), 1 Mans. 218 ; 10 R. 262, D. C.

3367. Creditor taking assignment to secure advances of materials to builder.]—A. by articles was to build houses. B. furnished him with materials, & took an assignment of the articles for his security, but before the assignment A. was a bkpt. :—*Held :* B. had a special equity, in as much as by what he advanced A. was enabled to perform his agreement to the common benefit of the creditors, & B. should have all the money he advanced after he had a specific interest in the articles, but as to what he gave credit for before, he trusted as another creditor.—LANGTON *v.* HALL (1715), 2 Eq. Cas. Abr. 108 ; 22 E. R. 92.

3368. Creditor purchasing goods on credit on eve of bankruptcy.]—A creditor obtaining goods from his debtor, on credit, just before he breaks, shall not prove for the residue without giving up the goods.—*Re* LEWIS & POTTER, *Ex p.* SMITH (1789), 3 Bro. C. C. 46 ; 29 E. R. 400, L. C.

Annotation :—**Refd.** *Re* Elder, *Ex p.* Alexander (1832), 1 L. J. Bcy. 90, Ct. of R.

3369. Unpaid vendor—Holding documents of title to goods.]—*Re* COLES, *Ex p.* TWINING, No. 3450, *post.*

3370. Judgment that shares held in trust for bankrupt—Lien on all shares for shareholders' debts—Company not bound to recognise trusts.]—Upon the hearing of a bkpcy. petition presented by a limited co. it appeared that debtor had obtained judgment against one of the registered shareholders of the co., declaring that he was a trustee of some of his shares for debtor. The articles of assocn. of the co. provided that the co. should "have a first & paramount lien on all shares for all money due to the co. from the registered holder thereof, or other the persons for the time being entitled thereto as against the co." :—*Held :* as the co. were not bound to recognise trusts of their shares, debtor was not a person "entitled to the shares as against the co,," &, they had no lien upon the shares for the debt due to them from him, & were not "secured creditors" of debtor within 1883 Act.—*Re* PERKINS, *Ex p.* MEXICAN SANTA BARBARA MINING CO. (1890), 24 Q. B. D. 613 ; 59 L. J. Q. B. 226 ; 38 W. R. 710 ; 6 T. L. R. 203 ; 2 Meg. 197 ; 7 Morr. 32, C. A.

Annotation :—**Refd.** Mackereth *v.* Wigan Coal & Iron Co., [1916] 2 Ch. 293.

3371. Deposit of bills of exchange—Whether as pledge or purchase.]—Where a person takes a bill without the name of the party from whom he receives it, it may be either as a pledge or a purchase according to the agreement of the parties, & if it be taken as a pledge, it must be sold, but if it be taken as a purchase, it liquidates the debt to the full amount of the bill.—ANON. (1789), 1 Cooke's Bankrupt Laws, 7th ed., p. 139, L. C.

3371 i. *Deposit of promissory notes.*]—Pledged promissory notes, held by a creditor, remain the property of the pledgor & insolvent, & the creditor is bound to place a value on them & to deliver them up to the trustee.—MALTZ'S TRUSTEE *v.* NATIONAL BANK OF SOUTH AFRICA, LTD. (1916), C. P. D. 430.—**S. AF.**

g. ——.]—P. made a composition with his creditors, & two of the instalments were payable by promissory notes of P., L., M., & J. A deed was made between P. of the one part & L., M., & J. of the other part, by which, in consideration of L. & M. & J. agreeing to secure the payment of the promissory notes, P. charged his stock-in-trade, etc., with the payment thereof, & covenanted to indemnify the sureties. J. & B. were creditors of P., & took the promissory notes, & B., who was indebted to J., handed over his promissory notes, unindorsed, to J. in payment of his debt :—*Held :* as to the promissory notes given to J. for his own debt, he was not a specialty creditor, but as to that which B. had handed to him he was a specialty creditor.—CALDWELL *v.* PARKER (1869), 3 I. L. T. Jo. 446.—**IR.**

h. *Guarantee—By person other than debtor.*]—A guarantee given by a third person to pltf. for a debt owing by deft. to pltf. does not constitute a preferable security.—GREEN & Co. *v.* FROMING (1906), 23 S. C. 600 ; 16 C. T. R. 875.—**S. AF.**

j. —— ——.]—A letter of guarantee given to a creditor, a banker, by third persons to cover an overdraft of the insolvent, is not a security required to be valued by the creditor when proving.—MALTZ'S TRUSTEE *v.* NATIONAL BANK OF SOUTH AFRICA, LTD. (1916), C. P. D. 430 ; J. D. R. 324.—**S. AF.**

k. *Payment by surety by indorsement —Claim to stand in place of preferred creditor.*]—E., being embarrassed, in June, 1857, assigned his goods, lands, etc., to trustees, giving preference to certain creditors. Afterwards, wishing to resume business, he proposed that the personal estate should be reconveyed to him, & time given under certain conditions for payment of the debts, the lands being conveyed to two creditors in trust for all. This was agreed to by the trustees & most of the creditors, & reconveyances executed. Pltfs. were indorsers on paper of E. held by M., a creditor preferred in the first assignment. M. refused to reconvey, unless pltfs. renewed their

Sect. 2.—*What constitutes a creditor a "secured creditor."*]

3372. —— Whether as pledge or payment.]—A. having purchased goods from B., gave him an order on C., the banker of A., to pay B. a bill to the amount of the goods. C. gave to B. a draft on D. in London payable three months after date to the order of B. A., C., & D. became bkpt. :—*Held :* B. must be considered as holding the bills as a pledge.—*Ex p.* DICKSON (1789), 2 Cox, Eq. Cas. 194 ; 30 E. R. 90, L. C.

Annotation :—**Refd.** *Ex p.* Blackburne (1804), 10 Ves. 204, L. C.

3373. —— Whether as pledge or for collection—Question of fact.]—C., previous to his bkpcy., agreed to deposit with L. bills at long dates, which bills L. was to receive when due or otherwise dispose of in the course of business, in consideration whereof L. undertook to accept & pay C.'s bills at three months, charging him with interest on advances & receiving commission, the surplus, if any, to remain to C.'s account :—*Held :* (1) it was a question of fact whether bills were indorsed to L. as his own or merely for collection, & the indorsement of itself was not inconsistent with the remedies in respect of a mere deposit ; (2) in the circumstances a deposit was not intended.—*Ex p.* TWOGOOD (1812), 19 Ves. 229 ; 34 E. R. 503, L. C.

Annotation :—**Consd.** *Re* Frith, *Ex p.* Schofield (1879), 48 L. J. Bcy. 122, C. A.

3374. —— Security for other bills outstanding.]—H. & Co. drew bills on P. & Co., who accepted them for valuable consideration. H. & Co. indorsed them to A. without consideration, & A. discounted them with W. & Co. H. & Co. & A. became bkpt., & P. & Co. executed a creditor's deed. W. & Co. proved against H. & Co. & A. & came in under P. & Co.'s deed. By those means W. & Co. received 13*s.* 4*d.* in the pound, & the assignees of H. & Co. tendered W. & Co. the balance of 6*s.* 8*d.* in the pound if they would deliver up the bills. W. & Co. refused to give up the bills, on the ground that they had discounted a bill for A., drawn by him & accepted by S., without having the names of H. & Co. or P. & Co. thereon, & they claimed to hold the first bills as security for payment of the bill drawn on S. :—*Held :* they were so entitled. —*Re* HUTCHINSON, *Ex p.* DICKSON (1835), 2 Mont. & A. 99 ; 4 Deac. & Ch. 614, Ct. of R.

3375. —— "Pending discount."]—Bills of exchange indorsed by a customer to his banker in order that they may be discounted, & held by the banker "pending discount," *i.e.*, pending inquiries as to the solvency of the acceptors, the banker meanwhile making some advances to the customer on the credit of the bills, are not securities which the banker, in proving in the customer's bkpcy. for the amount due to him by the customer, is bound to value. The banker is entitled to prove for the full amount due to him, & also to recover what he can from the other parties to the bills, provided that he does not receive in the whole more than 20*s.* in the pound.—*Re* FIRTH, *Ex p.* SCHOFIELD (1879), 12 Ch. D. 337 ; 40 L. T. 823 ; 27 W. R. 925 ; *sub nom. Re* FRITH, *Ex p.* SCHOFIELD, 48 L. J. Bcy. 122, C. A.

Annotations :—**Refd.** Couldery *v.* Bartrum (1881), 19 Ch. D. 394, C. A. **Mentd.** Dawson *v.* Isle, [1906] 1 Ch. 633.

3376. Deposit of lease—Containing covenant against assignment without licence.]—On an application by a creditor, for an order that leasehold premises, of which he claimed to be equitable mtgee. by deposit of the lease, might be sold, & that he might prove for the residue of his debt, it was objected that the lease contained a covenant against assigning without licence from the lessor, & that no such licence had been obtained :—*Held :* the objection must be overruled, as the lessor might have waived the forfeiture, & petitioner had a right, as against the assignee, to avail himself of the advantage which he had by possession of the lease.—*Re* BAGLEHOLE & REDGRAVE, *Ex p.* BAGLEHOLE (1813), 1 Rose, 432, L. C.

3377. Deposit of wharfinger's warrants—Whether credit must be given for judgment obtained against wharfinger for misrepresentation.]—Debtor deposited wharfinger's warrants as security for advances. The goods described therein turned out to be valueless. An action by the creditor against the wharfingers for misrepresentation was settled for an agreed sum :—*Held :* the creditor was not a secured creditor, & could prove the full amount of his claim without giving credit for the amount received in the action.—*Re* SEAGER, *Ex p.* GLYN & Co. (1891), 8 Morr. 213.

3378. Debenture holder without notice of fraud—In formation of company by insolvent trader.]—In Dec., 1902, S., an insolvent trader, through the agency of N., sold & transferred his business &

liability to him on the paper then overdue, which they did, & M. then signed the reconveyances. Pltfs. had afterwards to pay the notes held by M., whereupon they filed their bill, claiming to stand in the place of M. as preferred creditors under the original assignment :—*Held :* they could not claim such priority, or the priority provided for them by the first assignment, but must rank *pari passu* with the other creditors.—LAWSON *v.* MOFFATT (1863), 10 Gr. 328.—**CAN.**

l. *Contract for purchase of immovable property—Bankruptcy of vendor—After sale but before transfer of property.*]—The purchaser of immovable property sold but not transferred before the insolvency of the vendor has merely a personal claim against the vendor's estate for damage sustained by him owing to the non-fulfilment of the vendor's undertaking to transfer, & for restitution of the price paid, & is only entitled to prove as a concurrent creditor for such claim.—HARRIS *v.* BUISSINNE'S TRUSTEE, 2 Men. 105, 113.—**S. AF.**

m. *S. P.* MOIR *v.* WOOD (1891), 4 S. A. R. 52.—**S. AF.**

n. —— —— *Purchaser let into possession before completion—Money spent on improvements.*]—A. sold land to B. Declarations of purchaser & seller were passed. B. paid the purchase price of the land & entered into possession. He remained in possession for two years, spending considerable sums in improvements. A. then surrendered his estate without having passed transfer of the land to B. :—*Held :* B. was not entitled to any preference in respect of the land or its proceeds. — KELLAR'S TRUSTEE *v.* EDMEADES (1884), 3 S. C. 25.—**S. AF.**

o. *S. P.* ORMOND'S TRUSTEES *v.* HOFMEYR (1885), 4 S. C. 43.—**S. AF.**

p. *S. P.* NOTHNAGET'S TRUSTEES *v.* EKSTERN (1916), C. P. D. 386.—**S. AF.**

q. *Vendor's lien.*]—A person who has, prior to the insolvency, sold land to insolvent but has not given transfer, is a creditor who holds a preferable security or lien for so much of the purchase price as was still unpaid at the date of the sequestration.—*Re* PEREL (1906), 23 S. C. 574.—**S. AF.**

r. *S. P.* ANSLEY & Co. *v.* FISHER'S TRUSTEES (1913), E. D. L. 25.—**S. AF.**

s. *Builder retaining possession of buildings—Claim for cost of work.*]—An unpaid builder, who had recovered judgment for the amount unpaid on buildings erected for the owner, & was in possession of same :—*Held :* bound to give up possession to the owner's trustees, but was entitled, under Law 13 of 1895, s. 62, to put a value upon the security so held.—SMOOKLER'S TRUSTEES *v.* GOLOMBICK (1905), T. H. 221.—**S. AF.**

t. *Lien for labour bestowed on books—By independent bookkeeper.*]—An independent bookkeeper has a lien on books on which he has bestowed his time & labour & the trustee must elect whether he will reserve the full effect of the security to the bookkeeper. —SPURRIER *v.* COXWELL (1914), C. P. D. 83.—**S. AF.**

u. *Antenuptial settlement.*] — An antenuptial contract provided "that S. hereby settles upon & agrees to pay to N. £400, which shall be a special charge upon all his assets until fully paid" :—*Held :* N. not entitled to a preference on the claim for £400 arising out of the antenuptial contract upon the insolvent estate of her husband S.—FRATER & ELLIOTT *v.* SMILES (1913), C. P. D. 623.—**S. AF.**

book debts, & also the business of M., which he had contracted to purchase, & a large quantity of stock bought on credit not in the ordinary course of business, for £35,539 to a co., which he promoted for that purpose. The purchase-money was paid, as to £400 in cash, as to £10,000 in 100 debentures of £100 each of the co., & as to the balance in fully paid-up shares of the co. The debentures, at the request of N., were issued as follows:—Seven to B., fifteen to Z., thirty to N., thirty to M., & eighteen to S. The fully paid-up shares for the balance of the purchase-money were allotted to S., who had been appointed chairman of the board of directors. The debentures issued to N. were the remuneration for his services to S. in the matter, & B. & Z. were cash creditors of S. The first acting directors of the co. & N. were the mere instruments of S. in carrying through the transaction, which divested S. of substantially the whole of his property, & left him with trade creditors to a large amount & some cash creditors totally unprovided for. M.'s business was genuine, & he acted in good faith & without notice of any fraud. He accepted the £400 in cash & his debentures as payment for his business, & there were some *bonâ fide* shareholders of the co. Within three months S. was adjudicated bkpt.:—*Held:* M.'s debentures were a charge upon the property of S. in the hands of the trustee so far as the assets of the co. might prove insufficient to satisfy same.—*Re* SLOBODINSKY, *Ex p.* MOORE, [1903] 2 K. B. 517; 72 L. J. K. B. 883; 89 L. T. 190; 52 W. R. 156; 19 T. L. R. 616, 651; 47 Sol. Jo. 710; 10 Mans. 341.

Annotations:—**Refd.** *Re* Goldburg, *Ex p.* Silverstone, [1912] 1 K. B. 384; *Re* Hart, *Ex p.* Green, [1912] 3 K. B. 6, C. A. **Mentd.** Gonville's Trustee *v.* Patent Caramel Co., Gonville's Trustee *v.* Gonville, Jarvis, [1912] 1 K. B. 599.

3379. Creditor retaining shares of ships sold—Shares registered in own name.]—*Qu.:* whether defts. were in strictness secured creditors in respect of their vendors' lien for the unpaid purchase-money of shares in ships, which shares had been sold by them to pltf. but still remained registered in their names & had never been transferred by them, & whether those were secured debts.—PEARCE *v.* BULLARD, KING & Co., [1908] 1 Ch. 780; 77 L. J. Ch. 340; 98 L. T. 527; 24 T. L. R. 353; 52 Sol. Jo. 301; 15 Mans. 88.

Annotation:—**Refd.** *Re* Pearce, [1909] 2 Ch. 492, C. A.

3380. Creditor holding securities in which debtor might claim to share as surety—In respect of sums already paid under guarantee.]—On the advance of £400 by a bank to one of their customers whose overdrafts were already secured by the deposit of certain shares a surety executed a charge on certain money & guaranteed repayment of the sum advanced. Other persons also gave separate guarantees to the bank & deposited securities with them in respect of the customer's accounts & overdrafts. The surety having paid off the £400 guarantee brought an action, which was dismissed with costs, against the bank to have assigned to him a proportion of the shares deposited with the bank. The bank issued a bkpcy. notice against him in respect of the costs, & a receiving order, from which the surety appealed, was made against him on a bkpcy. petition founded on the notice:—*Held:* assuming the bank might in future hold money applicable to the discharge of the indebtedness they were not secured creditors within 1914 Act, s. 167, & were entitled to a receiving order.—*Re* DEBTOR (No. 8 OF 1919), *Ex p.* DEBTOR (1919), 88 L. J. K. B. 1248; [1918–19] B. & C. R. 221, D. C.

3381. Respondentia bond.]—A. became bound as surety with B. in a *respondentia* bond, upon a ship bound to the East Indies, conditioned to be void upon payment, within thirty days after arrival in the Thames, or at the end of thirty-six calendar months, or upon an utter loss. B. assigned all his goods on board the ship to A. upon trust, in the first place to pay a debt owing from himself to A. & in the next place to pay off all the debts for which he had become surety on the *respondentia* bond. Before the time specified in the bond A. became bkpt., & the assignees received a sum of money on account of the proceeds of the goods:—*Held:* after deducting the amount of A.'s private debt, the residue of the proceeds, & all future receipts, should be divided among the *respondentia* creditors only.—*Re* LEE, *Ex p.* CARSTAIRS (1811), 1 Rose, 130, L. C.

3382. Accountant's lien.]—*Semble:* An accountant has, as against the assignees, a lien on books intrusted to him for examination & arrangement by a bkpt. before the bkpcy.—*Re* HILL, *Ex p.* SOUTHALL (1848), 17 L. J. Bcy. 21; 12 Jur. 576.

See, further, Part VII., Sect. 6, sub-sect. 2, C., *ante.*

a. *Claim in Scottish sequestration—On English bond granted without valuable consideration.*]—*Held:* the bond-holder could not compete with onerous creditors.—WILLIAMSON *v.* TAYLOR (1845), 8 Dunl. (Ct. of Sess.) 156.—**SCOT.**

b. *Order to third party to hold money for benefit of creditor.*]—N. gave D., his creditor, an order authorising M., who owed him money, to hold it for D.'s benefit. D. obtained an interdict restraining M. from parting with the money & took judgment against N. On N.'s becoming insolvent:—*Held:* D. had no preference.—DREFUS & Co. *v.* NAPIER'S ESTATE (1907), 24 S. C. 224.—**S. AF.**

c. ———.]—T.'s insured premises were destroyed by fire. Prior to an adjustment under the policy T. gave orders upon the insurance co. in favour of creditors. T. was adjudicated bkpt.:—*Held:* the creditors who had obtained the orders became secured creditors for the amount of their respective orders on the insurance money.—*Re* THOMAS'S ESTATE (1910), 29 N. Z. L. R. 510.—**N.Z.**

d. *Right to dividend from estates of bankrupt surety.*]—Pltfs. supplied debtor with goods on a guarantee. The guarantor made an assignment for the benefit of creditors, & debtor assigned in like manner a few days after. Pltfs. proved their claim for the full amount on the guarantor's estate, & stated that they held as security their claim against debtor's estate, but did not value it. The guarantor's assignee refused to pay a dividend to pltfs. until they had valued their security on debtor's estate:—*Held:* the original personal claim could fairly be regarded as in the nature of a security, which pltfs. were bound to value.—WYLD *v.* CLARKSON (1886), 12 O. R. 589.—**CAN.**

e. *Receipt for loan—By auctioneers on account of proceeds of sale—Advance within sixty days of debtor's bankruptcy.*]—The tenant of a farm arranged with auctioneers to conduct a displenishing sale of the stock & cropping of the farm on Oct. 26, 1900. At the date of the sale, the tenant owed the auctioneers £244, part being alleged to be an advance of £200 made by the auctioneers to the tenant on Sept. 26, 1900. On Oct. 19, 1900, a receipt, which was ante-dated Sept. 26, 1900, had been granted by the tenant to the auctioneers in the following terms:—"Received from" [the auctioneers] "the sum of £200 to account of my displenishing sale":—*Held:* the receipt having been granted within sixty days of the tenant's bkpcy. & in the knowledge that he was insolvent, was invalid to entitle the auctioneers to a preference as secured creditors to that amount on the tenant's estate.—CRAIG'S TRUSTEE *v.* MACDONALD, FRASER & Co. (1902), 39 Sc. L. R. 773.—**SCOT.**

f. *Property vested in trustees by will on trust for sale—Debt due to estate by beneficiaries.*]—Under their father's will two sons were to receive a share of the proceeds of land to be sold on the death of his widow. They owed testator a debt which, by the will, was to be paid in five yearly instalments. The sons assigned for the benefit of their creditors:—*Held:* the exors. being also trustees of the land, of the proceeds of which the sons were to receive shares when sold, held security for the debt due to the estate.—TILLIE *v.* SPRINGER (1892), 21 O. R. 585.—**CAN.**

g. *Property vested in official assignees & trustee—To secure composition.*]—*Held:* creditors under arrangement not in the position of secured creditors.—*Re* GUILFOYLE (1885), 15 L. R. Ir. 238.—**IR.**

SECT. 3.—GENERAL POSITION OF SECURED CREDITOR.

3383. Remedies available.]—If a secured creditor wants to prove, he must do one of three things: he may give up his security altogether & prove for the full amount, or he may get his security valued & prove for the difference, or he may sell & realise his security, & then prove for the difference. If, without doing either of the latter two things, he proves for the full amount, as he cannot prove for the full amount & receive a dividend except on the theory of giving up the security, he shows by that an intention to give up his security; &, if he so proves & receives a dividend or votes, he shows pretty conclusively that he has finally elected to give up his security & take his dividend; in other words, having two funds to resort to, bkpt.'s general estate, so as to get a dividend on the whole amount of his debt, or his security, he elects to take bkpt.'s estate, & in that way gives up his security. It is not forfeiture, it is election; but the petitioning creditor gets nothing, unless he proves. There is no obligation on the petitioning creditor to prove; he may make the man a bkpt., & then he may be satisfied as far as he is concerned, & leave other creditors to prove; he does not elect simply by making a man a bkpt. It is a new doctrine of forfeiture to be brought into bkpcy. law, if petitioning creditor is to lose his security without getting anything out of the bkpt.'s estate; it is no longer election, it is forfeiture, & forfeiture must be discovered in some Act of Parliament or sect. of an Act of Parliament, & there is no such sect. to be found (JESSEL, M.R.).—MOOR *v.* ANGLO-ITALIAN BANK (1879), 10 Ch. D. 681; 40 L. T. 620; 27 W. R. 652.

PART IX. SECT. 3.

h. *In general.*]—A cession of securities by a debtor to a creditor to enable the creditor to apply the proceeds to the extinction of the debt (securities for any balance after such extinction to be receded), vests in the creditor absolutely all right & title in the securities, subject only to an equitable right in favour of the trustees of debtor's insolvent estate of compelling the creditor to account with them for the sums received & to retransfer securities for any balance after extinction of the debt.—SUTHERLAND *v.* ELLIOTT BROTHERS (1842), 2 M. 349, 367.—**S. AF.**

3383 i. *Remedies available.*]—A creditor holding security from the insolvent may, under 1875 Act, ss. 84, 106, assume any one of three positions:—either release his security & prove as an unsecured creditor, or he may value his security & prove for the whole debt less the valuation, or he may outside of insolvency proceedings realise his security in any manner authorised by law.—DEACON *v.* DRIFFIL (1879), 4 A. R. 335.—**CAN.**

3383 ii. ——.]—A railway co., proving against the estate of a bkpt. for calls, must, according to the universal principle in bkpcy., deduct the price or value of the shares from the amount of their claim, or give up the shares for the benefit of the creditors of bkpt.—*Re* JENNINGS, *Ex p.* BELFAST & COUNTY DOWN RY. CO. (1851), 1 I. Ch. R. 236; *affd.* 1 I. Ch. R. 645.—**IR.**

3383 iii. ——.]—*Held:* under 5 Vict. No. 17, s. 39, a mtgee. as a secured creditor can prove in insolvency for the whole amount of his debt & interest, & is not limited to proving for the unsecured balance.—SACHS *v.* BEAUMONT (1887), 8 N. S. W. Eq. 5.—**AUS.**

3383 iv. ——.]—A secured creditor who realised his security after the bkpcy. was not entitled, under 1883 Act, afterwards to prove under the bkpcy. for the difference between the price he sold at & the total amount of his debt, as he could not comply with s. 107 (5), (6), of the Act.—*Re* CAIRNS, *Ex p.* NEW ZEALAND LAND MORTGAGE CO., LTD. (1888), 7 N. Z. L. R. 42.—**N.Z.**

3383 v. ——.]—A debt for the payment of which security was held was provable under 1883 Act, only the creditor must deduct from his proof the value of his security.—PHARAZYN *v.* MAUNSELL (1884), 2 N. Z. L. R. 401.—**N.Z.**

3383 vi. ——.]—A mtgee. of lands of the insolvent obtained against the insolvent the usual decree for sale with a special declaration that he should be at liberty to prove against the estate for any deficiency:—*Held:* under 1875 Act, ss. 84, 106, he was not entitled to prove for such deficiency.—DEACON *v.* DRIFFIL (1879), 4 A. R. 335.—**CAN.**

3383 vii. ——.]—Under Insolvent Act, 1875, a creditor holding security at the time of the insolvency, cannot realise the security, & prove on the estate for the balance.—*Re* BEATY (1880), 6 A. R. 40.—**CAN.**

3383 viii. —— *In law & in equity.*]—A ct. of equity has no power to restrain a mtgee. from exercising all his remedies at law & in equity at the same time.—SACHS *v.* BEAUMONT (1887), 8 N. S. W. Eq. 5.—**AUS.**

3383 ix. —— *Creditor holding bills as collateral security—Right to apply for writ of attachment.*]—HUTCHINS *v.* COHEN & COHEN (1869), 14 L. C. J. 85.—**CAN.**

3383 x. —— *Fidelity bond—Debt founded on felony—Right of proof against principal debtor.*]—Where a debt is founded on a felony, a surety bond given for the offender is no bar to the right of proof on the part of those to whom the bond is given. Although the proof is put forward to protect the surety it is no objection to it, as the surety, by a bill in equity, could compel the creditor to prove against the original debtor.—*Re* M'MASTER (1858), 32 L. T. O. S. 288.—**IR.**

3383 xi. —— *After receipt of dividend under assignment for specified creditors—Proof for balance.*]—An insolvent having assigned certain property to trustees for the benefit of B. & other creditors named, subsequently made a voluntary assignment under Insolvent Act. The trustees after this assignment realised part of the property assigned to them. B. then claimed to prove against the estate for the balance due to him above what he had received from the trustees:—*Held:* the mere fact of the sale did not necessarily exclude him from proof, but the securities sold might yet be valued, & if the estate had not been prejudiced or were recompensed for any loss thereby, B. should still be allowed to prove.—*Re* HURST (1871), 31 U. C. R. 116; *dbtd.* DEACON *v.* DRIFFIL, 4 A. R. 335.—**CAN.**

3383 xii. ——*Appropriation of securities.*]—A creditor, holding securities generally for debts due is entitled to appropriate such securities in discharge of a portion of such debts, & to realise the securities so appropriated; but such creditor can prove only in respect of the balance, if any, of such portion of the debts remaining due after the realisation of the securities, or after having deducted the value of the latter, & cannot, meantime, on foot of the balance, participate in any intermediate dividend payable out of debtor's estate. The other portion of the demand uncovered & excluded from the securities, may be treated as an independent, unsecured debt, & the creditor may prove therefor.—*Re* GREER, *Ex p.* PROVINCIAL BANK (1877), 11 I. L. T. 109.—**IR.**

3383 xiii. —— *Creditor holding charge on compensation fund—Transfer of proceedings.*]—W., claiming to be entitled to a compensation fund, for lands taken by a co., became insolvent, having previously given R., one of his creditors, a specific charge on that fund. R. presented a petition, for the application of the fund in discharge of the debts & incumbrances affecting it, according to the provisions of the co.'s special Act. A cross petition was subsequently presented by the insolvent to obtain a transfer of the fund to the Insolvent Ct. for administration there:—*Held:* (1) the creditor having a specific charge on the fund was entitled to have the order; (2) the cross petition was not sustainable by claimant, either as an insolvent, or under the provisions of the Act, & should be dismissed.—*Re* GREAT SOUTHERN & WESTERN RY. CO. *v.* ROSENTHAL, *Ex p.* WILSON (1851), 3 Ir. Jur. 320.—**IR.**

3383 xiv. —— *Purchase by mortgagee on sale—By registrar before bankruptcy.*]—Where a mtgee. sells through the registrar & purchases the mortgaged property, & his mtgor. subsequently becomes bkpt., he is entitled to deduct the sum which he has paid for the mortgaged premises & to prove for the balance of his debt.—*Re* BENJAMIN & JACOBS (1890), 9 N. Z. L. R. 152.—**N.Z.**

3383 xv. —— —— *Under prior mortgage—After bankruptcy.*]—K., being indebted to pltf. bank, gave the bank a promissory note for the debt, & subsequently while the note was current, a third mtge. upon land, as additional security. On K., assigning all his estate & effects for general benefit of creditors, the bank claimed to rank for the amount then due upon the note & mtge., & interest. The mortgaged land was offered for sale under the second mtge., & the bank bought at the sale subject to the first mtge., & afterwards resold at a profit:—*Held:* (1) the mtge. sale did not extinguish or affect the debt secured by bank's mtge.; (2) K. was liable to the bank for any sum still owing under the covenant, & the bank was entitled to prove against his estate for the sum due, & to rank with the other creditors in the ratable distribution of the assets of the estate, whilst still retaining any profit made on the resale.—UNION BANK OF CANADA *v.* BATES (1914), 28 W. L. R. 602; 6 W. W. R. 1170; 18 D. L. R. 269; 24 Man. L. R. 619.—**CAN.**

3383 xvi. —— *To add simple contract debt to existing security.*]—A debtor

3384. —— To abandon security—Effect of rights of co-obligor with bankrupt.]—If a bill of sale be given in satisfaction of a bond debt, the obligee, on learning of a previous act of bkpcy. by the obligor, may abandon the bill of sale, & sue out a commission against the obligor, & a co-obligor cannot plead the bill as an accord & satisfaction. —HALL *v.* SMALLWOOD (1795), Peake, Add. Cas. 13, N. P.

3385. Right to follow real assets or their proceeds.]—A specialty creditor has the same right under the bkpcy. of the heir of debtor, as if he had not become bkpt., & may follow the real assets or their specific produce in the hands of the assignees. The subject being small, relief was given on petition. —*Ex p.* MORTON (1800), 5 Ves. 449; 31 E. R. 676, L. C.

3386. Whether bound to prove — Unpaid vendor.]—If A. sells land to B., who afterwards becomes a bkpt., part of the purchase-money not being paid, A. shall not be bound to come in as a creditor, but the land shall stand charged with the money unpaid, though no agreement for that purpose.—CHAPMAN *v.* TANNER (1684), 1 Vern. 267; 23 E. R. 461.

Annotations:—**Consd.** Fawell *v.* Heelis (1773), Amb. 724; Blackburn *v.* Gregson (1785), 1 Bro. C. C. 420; Mackreth *v.* Symmons (1808), 15 Ves. 329. **Mentd.** *Re* Lightoller, *Ex p.* Peake (1816), 1 Madd. 346.

See, also, Nos. 3554, 3555, *post*.

3387. Security incapable of valuation.]—A security given by bkpt. to a creditor on an expectancy, as next of kin, in the event of a person dying intestate, must be noticed by the creditor in his proof.—*Re* NORTH, *Ex p.* MCTURK (1836), 2 Deac. 58; 3 Mont. & A. 1, Ct. of R.

3388. Failure of security.]—B. became insolvent in 1827. His mother held a security on a contingent interest of his expectant on her death, which interest would fail if he died in her lifetime. She did not prove in the insolvency, but retained her security, & the assignee sold the equity of redemption, which was purchased by a trustee for persons of whom the mother was one. In 1857 B. died in his mother's lifetime, so that the security failed. The mother died in 1864, & in 1866, further assets having unexpectedly come in, the personal representative of the mother claimed to prove, & the proof was admitted by the comr.: —*Held*: the proof had been rightly admitted.—*Re* BRODIE, *Ex p.* PEAKE (1867), 2 Ch. App. 453; 16 L. T. 511; 15 W. R. 702, L. JJ.

3389. Obligation to produce deeds.]—A mtgee. produced his mtge. deed, & offered to produce the title-deeds, which had been deposited at bankers', at a day's notice:—*Held*: the mtgee. was under no obligation to produce anything more than the

borrowed money from an innocent lender & employed it in preferring a creditor:—*Held*: he was not debarred from recovering the loan & might charge on security already held by him.—COURT *v.* HOLLAND (1883), 4 O. R. 688.—**CAN.**

3383 xvii. —— ——.]—Where a mtgee. is also a creditor in respect of a simple contract debt, he cannot tack the simple contract debt to the mtge. debt, & the creditor does not by reason of his debtor having made an assignment for the benefit of his creditors, acquire any higher position in this respect than he occupied at the time of or immediately prior to the assignment.—YOUNG *v.* SPIERS (1888), 16 O. R. 672.—**CAN.**

3383 xviii. —— *After colourable sale to clerk of mortgagee's solicitor.*]—W. mortgaged certain land to G., with a power of sale in case of default. W. subsequently executed a deed of assignment for the benefit of all his creditors. The mortgaged property was sold by G. & realised less than the sum advanced, the purchaser being a clerk in the employ of G.'s solrs. G. sought to prove in the estate for the unsecured balance:—*Held*: the purchase was colourable, being made on behalf of G., & the claim was disallowed.—*Re* WHITE, *Ex p.* GOGGS (1866), 1 Q. S. C. R. 149.—**AUS.**

3383 xix. —— *Insolvency outside jurisdiction—Security on property within jurisdiction—Right of action.*]—Where, prior to his foreign debtor's insolvency in a foreign jurisdiction, a creditor has acquired a hypothec over property of debtor situated within the jurisdiction of the Supreme Ct., the hypothec can be made effectual by action in the Supreme Ct.—NORDEN *v.* SOLOMON (1847), 2 M. 375, 393.—**S. AF.**

3383 xx. *S. P. Re* JUSTITIA, NORDEN *v.* CLARKE (1846), 3 M. 178.—**S. AF.**

3386 i. *Whether bound to prove.*]—Where a mtgor. becomes insolvent, the mtgee. is not compelled to go in under the Act, but may proceed under his power of sale.—GORDON *v.* ROSS (1865), 11 Gr. 124.—**CAN.**

3386 ii. ——.]—M. pledged certain shares to C. in security for a debt, & afterwards his estate was sequestrated. C. neither proved his debt nor realised his security:—*Held*: the retention of the shares by C. did not amount to a waiver of his right to sue for the amount of the debt.—CAPE OF GOOD HOPE BANK *v.* MELLÉ (1893), 10 S. C. 280; 3 C. T. R. 399.—**S. AF.**

3386 iii. —— *As secured creditor.*]—A trustee can legally recognise a creditor's preference which has not been questioned in the proof of debt, &, if he do so, he is not entitled afterwards to insist on an amendment of the proof of debt, but must award the preference.—TRANSVAALSCHE BANK *v.* MARSHALL BROTHERS (1909), T. S. 88.—**S. AF.**

k. *Not proving concurrently—Liability for costs given against estate.*]—Under s. 113 of Law 13 of 1905, a secured creditor who does not prove concurrently is not liable to contribution towards costs given against the estate in proceedings unauthorised by him & not necessary for the realisation of his security.—BELL *v.* BELL'S TRUSTEE (1909), T. S. 51.—**S. AF.**

3388 i. *Failure of security.*]—A mtgee., relying on his mtge., refused to take the dividend, which was paid, under a composition, to the other creditors, & the bkpcy. was annulled. The mtge. being held invalid, the premises were sold by the ct., & the price was directed to be brought into the bkpcy., when it was claimed by bkpt. The mtgee. moved for leave to prove, so as to be placed in the same position as those creditors who had obtained their dividends. On consent by bkpt.:—*Held*: the motion should be granted. —*Re* LANGAN (1868), 2 I. L. T. Jo. 25.—**IR.**

3388 ii. —— *Creditor remitted to original remedies.*]—A bond, although it merges a debt by simple contract, yet if it turns out bad by the bkpcy. of the obligor, leaves the original debt to be set up again, if from any circumstance it may be more beneficial.—KEMMIS *v.* STEPNEY (1828), 2 Mol. 85.—**IR.**

3388 iii. —— *Knowledge by creditor of fraud of debtor.*]—A husband assigned all his property to his wife in consideration of her paying off a creditor who was threatening proceedings. The wife who owned separate property entered into possession, sold some of the property to the value of £50, & paid off the creditor. On the sequestration of the husband's estate the assignment was held void as a fraud on the other creditors. The wife claimed to prove against her husband's estate for the balance of the amount paid to D. less the £50:—*Held*: her payments to D. must be regarded as *bonâ fide* payments made by her at the implied request of her husband & were not affected by her knowledge of the attempted fraud on the creditors & she was entitled to prove.—*Re* ORR (1889), 15 V. L. R. 590.—**AUS.**

3388 iv. —— *Destruction of mortgaged property.*]—If mortgaged premises be destroyed by fire while under the control of the trustees of the insolvent, the mtgee. can claim upon the general funds of the insolvent for the amount due under his mtge.—*Re* DOOLING & KELLY'S INSOLVENCY, *Ex p.* LITTLE (1817), 1 Nfld. L. R. 45.—**NFLD.**

m. *Second mortgagee taking over security—Bound to pay off prior incumbrance.*]—A subsequent mtgee. who had valued his security & to whom the assignee in insolvency had conveyed in part satisfaction of his claim, without covenants on either side, the mortgaged property, shortly afterwards conveyed the property to a third person, but nevertheless continued to pay interest to the first mtgees.:—*Held*: under Insolvent Act, 1869, s. 19, the subsequent mtgee. taking over his security would be primarily bound to pay off the prior incumbrances; & therefore his payments kept alive the first mtgees.' rights.—TRUST & LOAN CO. OF CANADA *v.* STEVENSON (1892), 20 A. R. 66. —**CAN.**

n. *Right to vote—In respect of what amount.*]—A creditor holding a general bond upon the movable assets of an insolvent estate is entitled to vote upon the manner in which such assets should be disposed of, for the full amount of the debt proved by him, without deducting therefrom the value of his security:—BURGER *v.* DE VILLIERS, *Re* VAN DER MERWE'S ESTATE (1898), 15 S. C. 180.—**S. AF.**

3389 i. *Obligation to produce deeds.*]—A petitioning creditor, to whom a further debt was due, & who also held policies of insurance, proved on a bill of exchange. On making the proof: —*Held*: unnecessary to produce the policies; but the ct. permitted him to state at the bottom of the proof that he had such securities.—*Re* DALY, 6 Ir. Jur. 418.—**IR.**

Sect. 3.—*General position of secured creditor.* *Sect.* 4: *Sub-sect.* 1.]

mtge. deed, & the trustee had no right to call for the mtgor.'s title-deeds in the mtgee.'s hands, & the proof after valuation & deduction of security, should have been allowed.—*Re* DUNKLEY, *Ex p.* CASS (1881), 45 L. T. 560.

3390. Right to rents & profits—From what date.]—An equitable mtgee. by deposit of title deeds, who has entered into possession of bkpt.'s property, is entitled to the rents & profits from the time of taking possession. *Semble:* if not in possession, only from the date of the order.—*Re* POSTLE, *Ex p.* BIGNOLD (1835), 4 Deac. & Ch. 259; 2 Mont. & A. 214; 4 L. J. Bcy. 58, Ct. of R.

Annotations:—**Folld.** *Re* Gordon, *Ex p.* Official Receiver (1889), 61 L. T. 299, D. C. **Consd.** Finck *v.* Tranter, [1905] 1 K. B. 427, D. C.

3391. —— ——.]—An equitable mtgee. is entitled to the rents only from the order of sale, notwithstanding he has previously given notice to the tenants not to pay them to bkpt.—*Re* NORMAN, *Ex p.* BURRELL (1838), 3 Mont. & A. 439; 3 Deac. 76; *sub nom. Re* ——, *Ex p.* BURRELL, 7 L. J. Bcy. 14, Ct. of R.

Annotation:—**Distd.** *Re* Freeman, *Ex p.* Williams (1865), 12 L. T. 180.

3392. —— ——.]—Although an order for the sale of an equitable mtge. is accompanied by an order of reference to the comrs., to ascertain the time of the deposit of the deeds, yet if the certificate of the comrs. agrees with the statement of the equitable mtgee., he is entitled to the rents accruing from the date of the order.—*Re* TEESDALE, *Ex p.* THORPE (1838), 3 Mont. & A. 441; 7 L. J. Bcy. 16; *sub nom. Re* TEASDALE, *Ex p.* THORPE, 3 Deac. 85, Ct. of R.

3393. —— **Whether refund condition of making order of sale.**]—Equitable mtgees., who have received rent before the order for sale in bkpcy., are entitled to retain same as against the assignees, & ought not to be compelled to refund as a condition of obtaining the order.—*Re* FREEMAN, *Ex p.* WILLIAMS (1865), 12 L. T. 180; 13 W. R. 564.

3394. —— **& interest payable by purchaser delaying completion.**]—After an order for sale, the equitable mtgee. is entitled to the rents & profits, &, if the completion of the purchase be delayed, & the purchaser agrees to pay interest for the purchase-money, the assignees are not entitled to have the original debt reduced by that interest.—*Re* PENFOLD, *Ex p.* RAMSBOTTOM (1835), 4 Deac. & Ch. 198; 2 Mont. & A. 79; 4 L. J. Bcy. 33, Ct. of R.

Annotations:—**Folld.** *Re* Barker, *Ex p.* Penfold (1851), 4 De G. & Sm. 282. **Refd.** *Re* Lancaster, *Ex p.* Kensington (1835), 1 Deac. 58, Ct. of R.; *Re* London, Windsor & Greenwich Hotels Co., Quartermaine's Case, [1892] 1 Ch. 639. **Mentd.** *Re* Savin (1872), 7 Ch. App. 760, L. JJ.

3395. —— **Mortgagee declining to assume possession.**]—The mtgee. of property, which had been some time untenanted & unproductive, consented that the assignee of bkpt. mtgor. should let the premises to such person as he might think proper, the mtgee. stipulating that the rents should be paid into a bank in the joint names of mtgor. & mtgee. for the benefit of the party who might be ultimately found entitled to same, & that his consent was not to be considered as assuming the possession of the premises as mtgee. In pursuance of such arrangement the assignee let the property, & received the rents, but paid them into a bank in his own name, for a period of seven years, when the property was sold. The proceeds of the sale were not sufficient to pay off the whole of what was due upon the mtge.:—*Held:* the assignee, & not the mtgee., was entitled to such bygone rents.—*Re* WILCKENS, *Ex p.* CARR (1842), 2 Mont. D. & De G. 534; 6 Jur. 588, Ct. of R.

3396. Right to growing crops—Equitable mortgagee.]—An equitable mtgee. is entitled to the growing crops & rents, from the date of the order of sale.—*Re* KEER, *Ex p.* BIGNOLD (1832), 2 Deac. & Ch. 398; 1 L. J. Bcy. 100, Ct. of R.

Annotation:—**Refd.** *Re* Gordon, *Ex p.* Official Receiver (1889), 61 L. T. 299, D. C.

3397. —— **Mortgagee entering into possession after trustee.**]—After a mtgor. had presented a liquidation petition, the trustee went into possession of mortgaged lands & commenced cutting the growing crops. The mtgee. put a man in possession & required the trustee to give up possession, which he declined to do. An injunction was granted restraining him from cutting crops & from removing the crops cut after the demand made by the mtgee.—BAGNALL *v.* VILLAR (1879), 12 Ch. D. 812; 48 L. J. Ch. 695; 28 W. R. 242.

Annotation:—**Refd.** *Re* Gordon, *Ex p.* Official Receiver (1889), 61 L. T. 299, D. C.

3398. —— **Second mortgagees in possession.**]—On Aug. 18, 1887, B., bkpt., mortgaged his estate to A., & on Aug. 22 executed a second mtge. in favour of resps., his bankers. Resps. obtained judgment against B., & put the sheriff in possession. On May 2 a receiving order was made against B., & the sheriff on May 4 withdrew from possession. On June 25 resps. took possession under their mtge., & on the same day an arrangement was come to between them & the official receiver, by which certain crops on the land were cut & sold without prejudice to the legal position of the parties:—*Held:* as second mtgees., resps. had taken lawful possession of the land, & they were entitled as against the official receiver to the proceeds of sale of the crops.—*Re* GORDON, *Ex p.* OFFICIAL RECEIVER (1889), 61 L. T. 299; 6 Morr. 150, D. C.

3399. Grantee of bill of sale & trustee in concurrent possession—Removal of property by grantee.]—The grantee of a bill of sale & the trustee in bkpcy. of the grantor were in concurrent possession of the property comprised in it. The grantee had taken possession first. The trustee impeached the validity of the bill of sale. Before the question of its validity had been decided, the grantee forcibly removed part of the property:—*Held:* notwithstanding the fact that the grantee had taken possession first, the removal was an unlawful act, & the grantee must pay the trustee's costs of a motion, which had been refused in the county ct., to compel the restoration into the joint possession of the property which had been removed.—*Re* FELLS, *Ex p.* ANDREWS (1876), 4 Ch. D. 509; 46 L. J. Bcy. 23; 36 L. T. 38; 25 W. R. 382.

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o. *Obligation to deliver deeds—For realisation.*]—A deed of transfer, pledged by an insolvent, must be delivered by the pledgee to the trustee, for the purpose of effecting sale & transfer of the property.—WILSON'S TRUSTEES *v.* PREUSS (1857), 5 E. D. C. 375; 1 W. 14.—**S. AF.**

p. —— ——.]—A person to whom a life policy has been ceded by his debtor in security of a debt, is bound on the insolvency of the pledgor, to hand up the policy to the trustee for realisation.—OSMOND'S TRUSTEES *v.* HOFMEYER (1885), 4 S. C. 43.—**S. AF.**

q. *Security given for illegal debt—In hands of third party with notice.*]—A security for a debt for gun-barrels, which the party purchasing had not a licence to import under 1 Will. 4, c. 44, & the seller knew this, cannot be proved under a commission of bkpcy., even in the hands of a third person, who was cognisant of the original transaction.—*Re* KAVANAGH, *Ex p.* HUNT (1830), 4 Ir. L. Rec. 1st ser. 6.—**IR.**

s. *Failure to disclose—Loss of right to prove.*]—PICTOU BANK *v.* FRASER (1881), 2 R. & G. 116; 1 C. L. T. 567.—**CAN.**

3400. Holder of unindorsed bill of exchange—Right to indorsement.]—Bkpt., owing creditors £800, undertook to indorse to them a bill for £500 to be drawn upon himself, & accepted by a co. He delivered to them such a bill unindorsed, promising to indorse the bill or to give an equally good security in its place. The bill was not indorsed prior to the bkpcy., in which the creditors proved for the balance of their debt, after deducting the £500. The bill was presented & refused payment, because bkpt. had not indorsed it:—*Held:* bkpt. must indorse it.—*Re* DEAN, *Ex p.* RHODES (1837), 2 Deac. 364; 3 Mont. & A. 217, Ct. of R.

SECT. 4.—PROOF BY SECURED CREDITORS.

SUB-SECT. 1.—ABANDONMENT OF SECURITY.

3401. Who may abandon—Committee of lunatic's estate.]—The committee of the estate of a lunatic creditor has no power, without the sanction of the Ct. in Lunacy, to waive any of his rights against debtor's estate, *e.g.*, to abandon the lunatic's security.—*Re* WRIGHT, *Ex p.* WOOD (1879), 10 Ch. D. 554; 39 L. T. 646; 27 W. R. 401, C. A.

Annotations:—**Consd.** *Re* Head, *Ex p.* Kemp (1893), 10 Morr. 76. **Mentd.** *Re* Daniel (1896), 3 Mans. 312.

3402. What amounts to abandonment—Proof of debt—Voting in choice of assignees—Signing certificate.]—A creditor, having a lien on property of bkpt. for his debt:—*Held:* concluded by proving his debt, voting in the choice of assignees, & signing the certificate, & ordered to deliver up the property on which he had a lien.—*Re* AUBUSSON, *Ex p.* SOLOMON (1821), 1 Gl. & J. 25.

Annotations:—**Mentd.** Stammers *v.* Elliott (1867), L. R. 4 Eq. 675; *Re* Oxley, *Ex p.* Turnbull (1868), 19 L. T. 463; *Re* Firth, *Ex p.* Schofield (1879), 12 Ch. D. 337, C. A.; *Re* Rhoades, *Ex p.* Rhoades, [1899] 1 Q. B. 905.

3403. —— —— Disclosing mortgage for part—Receipt of dividend.]—A creditor who proves his whole debt, & exhibits a mtge. for a part, & receives a dividend, forfeits the mtge.—*Re* FARMER, *Ex p.* EGGINGTON (1830), Mont. 72, L. C.

Annotation:—**Mentd.** *Re* Oxley, *Ex p.* Turnbull (1868), 19 L. T. 463.

See 1914 Act, Sched. I., r. 10, Sched. II., rr. 10–18.

3404. —— —— Without disclosing security.]—A debt cannot be expunged because a creditor holds a security, not disclosed on proving. So doing is an election to abandon his lien thereon.—*Re* RIDGE, *Ex p.* ROLFE (1837), 3 Mont. & A. 305; 2 Deac. 421; 6 L. J. Bcy. 84, Ct. of R.

Annotation:—**Mentd.** Stammers *v.* Elliott (1867), L. R. 4 Eq. 675.

See 1914 Act, Sched. I., r. 10, Sched. II., rr. 10–18. *See, also,* Nos. 3218, 3383, *ante.*

3405. —— —— —— Creditor having further demand against which security set.]—An attorney proved a debt without exhibiting a bond given to bkpt. by a debtor, which bkpt. had deposited with him as security. The attorney had a further demand for costs, against which he had set the bond:—*Held:* the bond need not be given up.—*Re* BROOKS, *Ex p.* AMPHLETS (1830), Mont. 77.

3406. —— —— Made to preserve rights pending decision as to validity of security.]—Where the intention of all parties, in entering a proof upon the proceedings, appears to be for the simple purpose of reserving the dividend until such time as the respective rights of the assignees & the creditor, in respect of the security held by the latter, are determined, the ct. will not construe such proof, without more, as an election on the part of the creditor to abandon his security.

The proof of a debt by a creditor holding security, the dividends upon which are ordered to be stayed until a suit in Ch. wherein the assignees are disputing the security is settled, is not *per se* an election on the part of the creditor to abandon his security.—*Re* AXTELL, KNIGHTS & AXTELL, *Ex p.* MERCANTILE DISCOUNT CO., LTD. (LIQUIDATORS) (1866), 14 L. T. 260.

3407. —— —— Security valueless at time of proof.]—A deed of assignment provided that it should not affect any surety nor any security which any of the creditors might have, but if such security should be enforceable against debtor or his estate, then the creditor, unless he should consent to abandon his security, should be entitled to receive dividends upon so much only of his secured debts as might remain after such security

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PART IX. SECT. 4, SUB-SECT. 1.

3401 i. *Who may abandon—Creditor jointly interested with others.*]—A petitioning creditor, who is jointly interested with others in a security, may, so far as he is concerned, value it as nothing, & give it up for the benefit of creditors generally.—*Re* INGLIS (1877), 3 V. L. R. 100.—**AUS.**

3402 i. *What amounts to abandonment—Proof of debt—Without valuing security.*]—A bank, sent in a claim in response to a posting for creditors. The claim stated the full amount of the debt, & stated also that the bank held security, but stated that the bank, not expecting that the estate would be insufficient for payment of debts in full had not valued the security, but would do so if a deficiency was apprehended. In reply to an inquiry, the bank was informed that the estate was likely to prove insolvent. The chief clerk's certificate, set out the bank's debt in the first schedule, & set out the security in the fourth schedule, & stated that the full amount of the debt was due thereon. The bank subsequently applied for liberty to realise their security with a view to ascertaining its value in the event of the estate proving insolvent:—*Held:* it was still competent for the bank to value their securities, & prove for the balance of the debt against the general assets.—COOPER *v.* TEAHAN (1889), 23 L. R. Ir. 203.—**IR.**

3402 ii. —— —— *Valuation of part.*]—A creditor filed a claim with the assignee without valuing his securities which consisted of a lien on machinery & a policy of fire insurance on the machinery & on the plant & buildings of debtor. There was a fire & debtor assigned for the benefit of creditors. The assignee insisting on a value being placed on all the securities, the creditor placed a value on the machinery but stood by knowing that the assignee was carrying on a suit against the insurance co. in the belief that the fruits of the litigation would belong to the estate or to those creditors who voluntarily contributed to the cost thereof. The assignee succeeded in his suit:—*Held:* an abandonment of the preferential claim & no revaluation was permissible.—WILLIAMS MACHINERY CO. *v.* GRAHAM (1918), 1 W. W. R. 161; 25 B. C. R. 284; 39 D. L. R. 143; *affd.* 43 D. L. R. 437; 3 W. W. R. 597; 57 S. C. R. 229.—**CAN.**

3402 iii. —— —— *On bill already due—Other bills not due.*]—A creditor, who has received several bills accepted by his debtor for the amount of a general balance, may prove under a commission of bkpcy. against his debtor upon one bill, & afterwards sue at law upon another bill, which had been negotiated & was not due at the time of making proof on the first; it is not an election.—*Re* CONROY, *Ex p.* CONROY (1827), 1 Mol. 1.—**IR.**

3404 i. —— —— *Without disclosing security.*]—A creditor who proves without giving notice of securities, does not thereby necessarily waive his right to such securities.—DALTON & RYAN'S TRUSTEES *v.* ATTWOOD & HAYNES (1818), 1 Nfld. L. R. 67.—**NFLD.**

3404 ii. —— —— ——.]—A judgment creditor who files a claim for whole amount of his judgment without putting a value upon it abandons his security.—SHERLOCK *v.* MCLELLAN, R. E. D. 165.—**CAN.**

3404 iii. —— —— —— *Withdrawal or amendment of proof.*]—T., who had a claim against an insurance co., gave several orders upon the local agents of the co. in favour of certain creditors for amounts due to them, & these orders were accepted by the local agents. He was subsequently adjudicated a bkpt. as from Nov. 16. On Nov. 17 the claim was paid by the co. to the local agents. It was not alleged that any of these orders amounted to a fraudulent preference. Some of the creditors who had obtained orders subsequently proved in the bkpcy., without stating that they held the orders as security, or without valuing their security:—*Held:* as those creditors who had proved without disclosing that they held an order as security, or without valuing their security, the official assignee was not justified in paying them the amounts of their respective orders, but they could make a substantive application to the ct. to be allowed to withdraw or amend their proofs.—*Re* THOMAS'S ESTATE (1910), 29 N. Z. L. R. 510.—**N.Z.**

Sect. 4.—Proof by secured creditors: Sub-sect. 1.]

should have been realised, or after credit should have been given for the full value thereof. A creditor, holding a policy of assurance at that time valueless, proved for the full amount of his debt & received a dividend thereon :—*Held :* there was no evidence of the creditor's intention to abandon his security.—PARKER *v.* ANGLESEA (MARQUESS) (1871), 25 L. T. 482 ; 20 W. R. 162.

See 1914 Act, Sched. II., r. 13.

3408. —— —— Acceptance of composition.]—A secured creditor, who proves his debt under a liquidation petition, without deducting the value of his security, cannot, after a composition has been accepted, be allowed to set up his security.—*Re* BALBIRNIE, *Ex p.* JAMESON (1876), 3 Ch. D. 488 ; 35 L. T. 533 ; *sub nom. Re* BALBIRNIE, *Ex p.* BALBIRNIE, 45 L. J. Bcy. 156, C. A.

Annotation :—**Consd.** *Re* McColla, *Ex p.* McLaren (1881), 16 Ch. D. 534, C. A.

3409. —— —— Proof made before knowledge that security available.]—A client deposited a sum of money for investment with a firm of solrs., who appropriated certain securities belonging to one of the partners, as exor. of a late member of the firm, as security for the debt, in circumstances which were not disclosed to the client until after the bkpcy. of the firm :—*Held :* a good & equitable charge had been created, & the client was not prevented from claiming his security, although he had proved as an unsecured creditor in the bkpcy., the proof having been made before he became aware of his rights.—*Re* PIDCOCK, PENNY *v.* PIDCOCK (1907), 51 Sol. Jo. 514.

3410. —— Voting without producing security.]—If a secured creditor votes without producing his security, his vote is valid, but his security is forfeited.—*Re* HOARE, *Ex p.* ASHWORTH (1874), L. R. 18 Eq. 705 ; 43 L. J. Bcy. 142 ; 30 L. T. 906 ; 22 W. R. 925.

Annotations :—**Dbtd.** *Re* Ker, *Ex p.* Bagshaw (1879), 13 Ch. D. 304, C. A. **Mentd.** *Re* Stanger, *Ex p.* Geisel (1882), 22 Ch. D. 436, C. A.

See 1914 Act, Sched. I., r. 10.

3411. —— Omission of part of security.]—*Semble :* a secured creditor, who by mistake has omitted from his proof of debt a part of his security, will not necessarily be held to have forfeited that part, but may be allowed to rectify his proof.—*Re* KER, *Ex p.* BAGSHAW (1879), 13 Ch. D. 304 ; 41 L. T. 743 ; 28 W. R. 403, C. A.

Annotation :—**Refd.** Couldery *v.* Bartrum (1881), 19 Ch. D. 394, C. A.

3412. —— Omission in petition to estimate or state readiness to give up security.]—There is no rule in bkpcy. that a petitioning creditor, who omits in his petition either to give an estimate of the value of his security, or to state that he will be ready to give up his security for the benefit of the creditors in the event of his debtor being adjudicated bkpt., thereby forfeits the benefit of his security.—MOOR *v.* ANGLO-ITALIAN BANK (1879), 10 Ch. D. 681 ; 40 L. T. 620 ; 27 W. R. 652.

See 1914 Act, s. 4 (2).

3413. Effect of abandonment—Right to retract.]—A mtgee., having given up his mtge., & proved under a commission of bkpcy. against the mtgor., was not allowed to retract.—*Ex p.* DOWNES (1811), 18 Ves. 290 ; 34 E. R. 327, L. C.

Annotations :—**Mentd.** *Re* Wailey, *Ex p.* Alexander (1832), 1 L. J. Bcy. 79, Ct. of R. ; *Re* Buxton, *Ex p.* Davenport (1840), 10 L. J. Bcy. 1 ; Stammers *v.* Elliot (1867), L. R. 4 Eq. 675 ; *Re* Rhoades, *Ex p.* Rhoades, [1899] 1 Q. B. 905.

3408 i. —— —— *Acceptance of composition.*]—A debtor having failed to pay the second instalment of a composition, was adjudicated bkpt. upon a declaration of insolvency. D. Co., who had a vendors' lien for the unpaid purchase-money on certain goods sold to C. which had not been delivered, filed a proof in the arrangement for the full price of the goods, & stated that they held no security. After C. had been adjudicated, D. Co. filed a proof of debt in the bkpcy., in which they valued their security, & claimed to prove for the balance of their debt : —*Held :* upon the failure by debtor to pay the composition, D. Co. were remitted to their original rights, giving credit for anything which they received, & they were entitled to rely on their lien.—*Re* CAMPION, [1899] 2 I. R. 112. —**IR.**

3408 ii. —— —— ——.]—P. carrying on business at Cork, as a sole trader, under the style of D., & at Glasgow (in partnership with M.), under the style of S. & Co., gave both as D. & in his individual capacity a continuing guarantee by deed to the U. bank, carrying on business in Scotland, for advances to S. & Co. At a meeting of the creditors of S. & Co., at which the U. Bank was represented, statements of their affairs & of D., were investigated & P. proposed to liquidate the debts of S. & Co. by acceptances of D., which proposal was accepted & it was agreed that P. should carry on the business of S. & Co. alone. P., being unable to meet the composition bills, was adjudicated a bkpt. in Ireland on his own petition. On a petition filed by the U. Bank in Scotland on foot of their original debt, a sequestration of the estates of S. & Co. was ordered. The U. Bank also claimed to be admitted to prove unconditionally, in the Irish bkpcy., for the amount of the guarantee :—*Held :* notwithstanding the composition bills taken by them the U. Bank were entitled to prove on the guarantee. In the case of a composition with creditors, nothing short of a clear & express contract to give up his securities can preclude a creditor from relying on them.—*Re* PIM (1881), 7 L. R. Ir. 458.—**IR.**

a. —— —— *Under arrangement clauses.*]—A mtgee. proved under the arrangement clauses. The case was turned into bkpcy. :—*Held :* such proof was not an abandonment of his right as mtgee.—*Re* WILSON (1862), 14 Ir. Jur. 328.—**IR.**

b. —— *Release of lien to enable property to be sold.*]—A. conveyed his real & personal estate to deft. in trust (1) to pay expenses, commissions, mtges., judgments, liens, etc., & (2) to pay to a bank the amount of all promissory notes & bills of exchange held by the bank, upon which pltf. & others were liable as sureties. The bank having released liens on real estate of insolvent for the purpose of enabling same to be sold :—*Held :* the bank, by becoming a party to the deed, & afterwards releasing the liens, did not abandon & forfeit the position of a preferred creditor.—HARRIS *v.* RITCHIE (1889), 22 N. S. R. 141.—**CAN.**

c. —— *Acceptance of composition —After declaration of intention to rely on security.*]—A creditor of an arranging debtor declared his intention to rely upon his security, &, although he took no part in the arrangement proceedings, the assignees sent him a dividend warrant for his composition, which he put to the credit of his mtge. debt :—*Held :* this was not such an acquiescence in the arrangement proceedings as to level his security to the same position as ordinary creditors, & he should be allowed to put the dividend to the credit of his mtge. debt & to prove on the estate for the difference, on the trader afterwards becoming bkpt.—*Re* FERRALL (1867), 1 I. L. T. Jo. 103. —**IR.**

d. —— *Arrest of debtor.*]—A verdict having been recovered against F., a rule *nisi* was taken out to set aside, & the sureties to respond the final judgment took a mtge. from him to secure them from loss on account of their bond. The rule *nisi* having been discharged & judgment entered up against F., an execution was issued, under which he was arrested. While he was in custody his estate was placed in insolvency :—*Held :* the judgment creditors had not lost their lien on the mortgaged property in consequence of their having arrested F. under the judgment.—TUCKER *v.* CREIGHTON (1877), R. E. D. 261.—**CAN.**

e. —— *Failure to exercise jus retentionis.*]—A pledgee, who fails to exercise his *jus retentionis*, loses his right of preference upon the insolvency of the pledgor.—M'GLASHAN'S TRUSTEE *v.* THOMPSON (1903), 17 E. D. C. 117.—**S. AF.**

3413 i. *Effect of abandonment—Right to retract.*]—Mtgees., who had obtained an order for sale of the premises, subsequently proved for a portion of the mtge. debt, as being the balance over the value of the premises as then estimated by the mtgees. A dividend being struck on debts proved, the mtgees. refused to accept their quota, pending the realisation of their security. The premises, afterwards sold, realised sufficient to pay the mtgees. in full :—*Held :* the mtgees. had elected to take a dividend upon the amount proved for, as unsecured creditors, & such election was binding & could not be retracted.—*Re* DALY (1872), 6 I. L. T. 172.—**IR.**

3414. —— On surety for original debt.]—Deft. became surety for the payment of a debt owing from P. to pltf. P. handed over a policy of insurance on his life to pltf. as collateral security. P. became bkpt., & at that time premiums on the policy remained unpaid, & the policy had lapsed. Pltf. proved in P.'s bkpcy. for the full amount of her debt, stating in her proof that she held the policy as collateral security, but putting no value on it. The policy was afterwards given up to the trustee for the benefit of the creditors, & the insurance co. agreed to reinstate it. Pltf. sued deft. as surety, for the amount of P.'s debt, & at the trial pltf. agreed to credit deft. with the admitted value of the policy when reinstated:—*Held:* (1) deft.'s position as a surety was not discharged by reason of the course pltf. had pursued in the bkpcy., as the policy was valueless when she sent in her proof; (2) if the policy was of value when pltf. proved in the bkpcy., & if she exercised her option under the bkpcy. law of handing over her security to the trustee & proving for the whole amount of her debt, deft. was not thereby wholly discharged from liability as a surety, but only to the extent of the value of the policy.—RAINBOW *v.* JUGGINS (1880), 5 Q. B. D. 422; 49 L. J. Q. B. 718; 43 L. T. 346; 44 J. P. 829; 29 W. R. 130, C. A.

Annotation:—**Followed.** *Re* Wolmershausen, Wolmershausen *v.* Wolmershausen (1890), 62 L. T. 541.

See, also, No. 3384, *ante.*

Amendment of proof, *see* Part VIII., Sect. 10, *ante.*

3415. —— ——.]—Debtor was indebted to petitioning creditor, &, as a collateral security, transferred to him bills of lading & a quantity of butter. Petitioning creditor signed a memorandum, acknowledging that he had received the bills of lading in consideration of the money due to him. Before delivery the consignor had stopped the goods *in transitu*, & the bills of lading became of no value to petitioning creditor:—*Held:* petitioning creditor had a right, in the circumstances, to repudiate his claim on the bills of lading, & to issue a fiat on the original debt, & having done so, whatever might become of the right of the consignor to stop *in transitu*, the assignees had a right to hold petitioning creditor to his relinquishment of the bills of lading.—*Re* ASHTON, *Ex p.* ASHTON (1832), 2 Deac. & Ch. 5, Ct. of R.

3416. —— Right to prove as unsecured creditor.]—A legal mtgee. sold part of the property under an order for sale, & applied the proceeds in reduction of the debt. The remainder of the property proved unsaleable:—*Held:* the mtgee., on giving up the unsold part of the property, might prove.—*Re* PRICE, *Ex p.* GREAVES (1845), De G. 119, Ct. of R.

3417. —— ——.]—A creditor advancing money at 6 per cent. on bills of exchange to a trader, who afterwards becomes bkpt., with collateral real security, is entitled to prove on the estate of bkpt. as an unsecured creditor, on giving up all his real securities.—*Re* LEAKE, *Ex p.* WARRINGTON (1853), 3 De G. M. & G. 159; 22 L. J. Bcy. 33; 21 L. T. O. S. 111; 17 Jur. 430; 1 W. R. 261; 43 E. R. 64, L. JJ.

Annotations:—**Consd.** James *v.* Rice (1854), Kay, 231; Lane *v.* Horlock (1856), 5 H. L. Cas. 580, H. L.; *Re* Lane, *Ex p.* Hodge (1857), 29 L. T. O. S. 284. **Mentd.** Fussell *v.* Daniel (1854), 10 Exch. 581; Thomas *v.* Cooper (1854), 2 Eq. Rep. 1185; Bond *v.* Bell (1857), 4 Drew. 157.

3418. —— Petition subsequently dismissed—Security returned to creditor.]—Where a creditor gives up his security for the purpose of proving his debt under the bkpcy., & the petition is afterwards dismissed on the ground that certain creditors have been omitted from bkpt.'s statement of debts, the creditor is entitled to have his security returned to him, notwithstanding a new petition is presented by a creditor the same day, & bkpt. is adjudicated thereunder, upon the ground that the surrender of the security was conditional only & not absolute.—*Re* TYRIE, *Ex p.* MORRIS (1866), 14 L. T. 606; 14 W. R. 741.

3419. —— On subsequent incumbrances—Whose estate benefited.]—A. & B. were respectively first & second mtgees. A. proved in the mtgor.'s bkpcy. for the full amount of his debt, giving up his security. B. did not prove:—*Held:* the benefit of A.'s mtge. had passed to the trustee, & was kept alive for the benefit of the general creditors, & was not merged in the equity of redemption of the mortgaged premises for the benefit of B.—CRACKNALL *v.* JANSON (1877), 6 Ch. D. 735; 46 L. J. Ch. 652; 37 L. T. 118; 25 W. R. 904.

Annotation:—**Mentd.** *Re* Cross, *Ex p.* Payne (1879), 11 Ch. D. 539, C. A.

3420. —— Security also covering debts not proved—Surrender of whole security.]—At the first meeting of creditors a creditor of bkpt. proved for a debt of £1,113, without stating the particulars of or valuing a deed of indemnity & mtge., which covered not only the debt of £1,113, but all money which might become owing by debtor to him, & voted in respect of the proof for the £1,113. At the time the creditor voted debtor was in fact indebted to him in further sums, & the creditor was entitled to prove also for his contingent liability as a surety for bkpt.

3416 i. —— *Right to prove as unsecured creditor.*]—A creditor held a mtge. over property of bkpt., & proved, valuing her security. The assignee claimed to avoid the security, & the creditor ultimately agreed that it should be given up, but before this was arranged a dividend was declared. The creditor then put in a new proof, which was ultimately allowed, & claimed to be paid a sum equal to a full dividend on the amount of the new proof. There were not funds to the credit of the estate sufficient to make such a payment:—*Held:* assignee could not be compelled to pay a full dividend.—*Re* MCGREGOR, *Ex p.* MCGREGOR (1888), 7 N. Z. L. R. 241. —**N.Z.**

g. —— *Abandonment of part of security.*]—A creditor having a bill of sale over insolvent's furniture as security for his debt & claiming a lien on two deeds gave up the deeds & agreed to a sale of the furniture by the official assignee on his behalf the assignee consenting to his proving on the estate for the deficiency:—*Held:* the proof must be rejected.—*Re* KINGSLAND, *Ex p.* WARBURTON (1869), 6 W. W. & A'B. 10.—**AUS.**

h. —— ——.]—A mtgee. who under a decree for a foreclosure, has received part of his debt by sale of a part of the lands, may, upon giving up all remaining benefit of the decree, come in for the deficiency, under the commission.—*Ex p.* WYLY (1788), Vern. & Scr. 518.—**IR.**

3420 i. —— *Security also covering debts not proved—Partial waiver of security.*]—Petitioning creditors, in their petition, & the affidavit in support of it, relied upon debts due by a trader, amounting to £2,000, which were stated to be part of his debts to petitioning creditors. The petition & affidavit stated that petitioning creditors held a security or lien on goods of bkpt. in the hands of a New York firm, which security or lien they waived as against the debt on which they relied, but without prejudice to their right to retain it against their other demands:—*Held:* the petition could not support an adjudication.—*Re* EASDALE, *Ex p.* BIRLEY BROTHERS (1874), 8 I. L. T. 212.—**IR.**

3420 ii. —— —— *Partial surrender of security.*]—A petition having been presented against a debtor, on a bill of exchange which formed part of a floating balance of money due to petitioner, for which they held a general security, the ct. adjudicated debtor bkpt. upon petitioner giving up his security, so far as related to the bill of exchange.—*Re* O'NEILL, *Ex p.* NATIONAL BANK (1873), 7 I. L. T. 70.—**IR.**

k. —— *On right to share in surplus.*]—A judgment creditor abandoned his security & ranked for the full amount of it. He had assigned it to his solrs.:—*Held:* they were not entitled to a share in a surplus.—SHERLOCK *v.* MCLELLAN, R. E. D. 165.—**CAN.**

Sect. 4.—Proof by secured creditors: Sub-sects. 1, 2 & 3.]

on bills for a considerable amount on which he had placed his name. All these matters were covered by the mtge. The judge was not satisfied that the omission to value the mtge. had arisen from inadvertence:—*Held:* (1) the creditor, by voting in respect of the debt he had proved, must be deemed under 1914 Act, Sched. I., clause 10, to have surrendered the mtge., not only to the extent of the £1,113, but to the extent of the whole liability of bkpt. to him, & the mtge. must be cancelled so far as it consisted of a security on the property of bkpt. for debts to become due from him to the creditor; (2) the words "whole debt" in clause 10 meant the debt for which the creditor had proved.—*Re* PAWSON, [1917] 2 K. B. 527; 86 L. J. K. B. 1285; 117 L. T. 315; [1917] H. B. R. 87.

Annotation:—**Mentd.** *Re* Maxson, *Ex p.* Trustee (1919), 88 L. J. K. B. 854.

SUB-SECT. 2.—VALUATION OF SECURITY.

Amendment of proof.]—*See* Part VIII., Sect. 10, *ante*.

3421. Basis of valuation—Value of pledge sold by creditor.]—A creditor may himself deduct the value of a pledge sold by him from his proof.—*Re* RIDGE, *Ex p.* ROLFE (1837), 3 Mont. & A. 305; 2 Deac. 421; 6 L. J. Bcy. 84, Ct. of R.

Annotation:—**Mentd.** Stammers *v.* Elliott (1867), L. R. 4 Eq. 675.

See 1914 Act, s. 59.

3422. —— Costs of action brought against creditor—Costs of appeal by creditor—Loss on realisation.]—Bkpt. had, before his bkpcy., obtained advances from a bank on the security of the deposit with them of the dock warrants of a quantity of tobacco, which he represented to be his own property. After the adjudication it was discovered that fifty bales of the tobacco did not belong to him, but that he had sold them & had received the purchase-money, the purchaser having left the dock warrants relating to them with him to enable him to clear them as the purchaser should require them. After the adjudication the purchaser of the fifty bales sued the bank, & recovered from them as damages the sum which he had paid for the fifty bales, together with his costs of the action, & the judgment was affirmed by the Ct. of Appeal. The bank afterwards tendered a proof in the bkpcy. for the balance of their debt beyond the value of their security:—*Held:* in estimating that value, they were entitled to bring into account the costs (their own as well as pltf.'s) of the action, but not the costs of the appeal.

After the decision of the appeal, the bank sold the fifty bales for less than the purchaser had paid bkpt. for them:—*Held:* there being no evidence that his loss had arisen from any default on the part of the bank, they were entitled to bring that loss into account in estimating the value of their security.—*Re* HOFMANN, *Ex p.* CARR (1879), 11 Ch. D. 62; 48 L. J. Bcy. 69; 40 L. T. 299; 27 W. R. 435, C. A.

3423. —— Lumping securities—Right of trustee & creditor to separate valuations.]—A secured creditor is entitled to lump his securities together & assess their value as a whole. He need not state the particular securities he holds against particular debts, nor need he assess the value of each security. The trustee in bkpcy. can, however, compel him to value any particular security, & the creditor has a corresponding right to have any security separately valued.—*Re* SMITH, *Ex p.* LOGAN (1895), 72 L. T. 362; *sub nom. Re* SMITH & LOGAN, *Ex p.* FLETCHER *v.* BRANDON, 43 W. R. 413; 39 Sol. Jo. 349; 2 Mans. 70.

Annotation:—**Consd.** *Re* Morris, James *v.* London & County Banking Co., [1898] 2 Ch. 413.

See, now, 1914 Act, Sched. II., r. 13.

PART IX. SECT. 4, SUB-SECT. 2.

m. *What securities must be valued—Limited guarantee against loss on sale of goods.*]—A deceased person, of whom pltf. was exor., gave defts. a guarantee in respect of goods sold & to be sold to another in the following terms:—"I hereby undertake to guarantee you against all loss in respect of such goods sold or to be sold, provided I shall not be called on in any event to pay a greater sum than $2,500." The principal debtor being indebted to defts. in $5,500, made an assignment under R. S. O. 1887, c. 124, & defts. filed a claim with the assignee, but did not in the affidavit proving the claim state whether they held any security or not. At a later date pltf. paid defts. the $2,500 & filed a claim with the assignee. The dividends from the estate were insufficient to pay the balance of defts.' claim:—*Held:* the guaranty was not a security which defts. were required to value, & the omission from their claim of a piece of information which could not affect it did not render it invalid.—MARTIN *v.* MCMULLEN (1890), 19 O. R. 230.—**CAN.**

n. —— *Judgment debt after seizure.*]—Where execution has been levied by seizure, the creditor has a security for his debt, but as the property levied upon passes to the assignee or trustee of debtor's estate upon sequestration, the creditor, in petitioning therefor on the ground that such process has not been *bonâ fide* satisfied within four days of seizure, need not state in his petition that he will be ready to give up such security or give an estimate of the value thereof.—*Re* KENNEDY, *Ex p.* TATTERSON (1892), 18 V. L. R. 988.—**AUS.**

o. —— *Security held for unsatisfied judgment.*]—Where petitioning creditor seeking to sequestrate an estate sued upon an unsatisfied judgment for which he held a security, but which security he did not allege or value in his affidavit, the ct. discharged the provisional order of sequestration, on the ground that the security should have been alleged & valued.—FLEMING & MUDIE *v.* VAN ESSEN (1886), 4 S. C. 366.—**S. AF.**

p. —— *Securities returned by sheriff as valueless.*]—Where the affidavit did not put a value on the securities held by petitioner, but the sheriff's return described the securities as practically valueless, & the value was fully discussed in affidavits on both sides, objection on the ground that petitioner's affidavit had not put a value on the securities was overruled.—KERR *v.* ALDERSON, ALDERSON *v.* KERR (1884), 1 Buch. A. C. 355.—**S. AF.**

q. —— *Security for debt other than that on which petition founded.*]—A petitioning creditor is not bound to state & value the security he holds in respect of a debt other than that upon which he sues for sequestration.—LE VOY *v.* BIRCH'S EXECUTORS (1913), App. D. 102.—**S. AF.**

r. *Affidavit of valuation—Who may make—On behalf of corporation.*]—5 Vict. No. 17, s. 39, does not require that the affidavit valuing the creditors' security should be made by the proving creditor himself & such affidavit may in the case of a corpn. be made by an attorney under power.—*Re* RUTLEDGE & BANK OF AUSTRALASIA, *Ex p.* KNOX (1863), 2 W. & W. 65.—**AUS.**

3423 i. *Basis of valuation—Lumping securities—Right of trustee to separate valuation.*]—A debtor borrowed several sums from the same lenders depositing shares as security for each loan & it was agreed that the security on each occasion so furnished should extend to any sums of money in which he might be indebted to the lenders, while the shares remained in their hands:—*Held:* the lenders were not compellable separately to value the securities held by them.—*Re* DU BEDAT (1892), 29 L. R. Ir. 324.—**IR.**

s. *At what time—After partial realisation.*]—An insolvent, having assigned certain property to trustees for the benefit of B. & other creditors named subsequently made a voluntary assignment under Insolvent Act. The trustees after this assignment realised part of the property assigned to them. B. then claimed to prove against the estate for the balance due above what he had received from the trustees:—*Held:* the mere fact of the sale did not necessarily exclude him from proof, but the securities sold might yet be valued.—*Re* HURST (1871), 31 U. C. R. 116; *dbtd.* DEACON *v.* DRIFFIL, 4 A. R. 335.—**CAN.**

t. *Revaluation—Grounds for—Mistake.*]—Mtgees. having claimed to rank for the excess of their claim over the value of their security, discovered that certain property intended to be included in the security had, by mutual mistake, been omitted therefrom, & filed a bill in the Ct. of

3424. Power of trustee when dissatisfied.]—1870 Rules, r. 136, applies only to the case of a secured creditor, who desires to value instead of realising his security, & even then it only gives the trustee, if he is dissatisfied with the value stated by the creditor, a power indirectly to compel the realisation of the security, by refusing to admit the creditor's proof till he has realised the security (COTTON, L.J.).—*Re* LEE, *Ex p.* GOOD (1880), 14 Ch. D. 82; 49 L. J. Bcy. 49; 42 L. T. 450; 28 W. R. 553, C. A.

3425. Creditor relying on security incapable of valuation—Security realising less than debt.]—A. died in 1889 insolvent, & an order was made for the administration of his estate. A creditor for £47,000 held as security (*inter alia*) shares & debentures of the Delagoa Bay Railway. The railway was seized by the Portuguese Govt., & an arbn. tribunal was appointed in 1891. Creditor declined to prove for his debt, & stated that he preferred to rely on his securities. In 1893 the chief clerk filed his certificate, in which the creditor's claim was entered as disallowed. In 1900 the award was made, & resulted in the creditor only receiving £1,448 in respect of his shares & debentures. In Jan., 1902, he took out a summons to vary the certificate by allowing his claim, & for liberty to prove for his debt:—*Held:* under 1886 Rules the creditor could come in & prove at any time if there were assets undistributed, & if no injustice would be caused, & the creditor must be allowed upon terms to come in & prove.

The Legislature clearly contemplated the right of a creditor, on any alteration during the bkpcy., in the value of his security by realisation of that security or otherwise, to be allowed to readjust his claim, of course, not by so doing thereby creating any injustice to the other parties, & of course not interfering with anything that had been done as to dividend or otherwise prior to the change of proof, & it could not be said that merely because the creditor had originally valued his security as being greater than his debt, or equal to it, he was thereby for ever prevented from coming in & proving when it turned out, by realisation or otherwise, that his security was insufficient to pay his debt. Of course the Ct. of Bkpcy. would have had power to impose terms, if terms had been necessary, &, in such a case, in the absence of any special circumstances which would render it unjust to allow the creditor to come in, he would & ought to have been allowed in bkpcy. to come in, & the bkpcy. practice would clearly have allowed him to do so (ROMER, L.J.).—*Re* MCMURDO, PENFIELD *v.* MCMURDO, [1902] 2 Ch. 684; 71 L. J. Ch. 691; 86 L. T. 814; 50 W. R. 644; 46 Sol. Jo. 550, C. A.

See 1914 Act, Sched. II., rr. 10–18, & *see, generally,* EXECUTORS & ADMINISTRATORS.

See, also, No. 3237, *ante.*

SUB-SECT. 3.—REDEMPTION OF SECURITY.

3426. What securities—Securities stolen by bankrupt—& returned to creditor under Larceny Act, 1861 (c. 96)—Securities valued & deducted from proof.]—V. bought shares of H., & induced H. to give him the certificates of the shares & to accept his cheque for £3,298 16*s.* in payment, representing that it would be met. The cheque was dishonoured & V. absconded. Soon afterwards V. was adjudicated bkpt. on a petition presented against him by H., based on the dishonoured cheque, H. alleging in his petition that he had a security or lien on the shares, which security or lien he valued at £3,200. Meantime H. had issued a warrant against V., under which he was arrested & committed for trial for fraud, & subsequently convicted. Thereupon the certificates of the shares were, on an order of the ct. made under s. 100 of the above Act, restored to H. The trustee in bkpcy. of V. then claimed to redeem the shares at the value placed on them by H. in his petition:—*Held:* (1) as the title to the shares had, on the conviction of V., revested in H. under s. 100, he ought not to be deprived of them by reason of his mistake

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Ch. to have the mtge. rectified & the security realised:—*Held:* (1) their having so proceeded in insolvency formed no objection to the relief asked, & rectification was ordered; (2) the parties must be remitted back to the insolvency proceedings with a view of the same or a new value being placed by the mtgees. on their security, in order that the assignee & creditors might proceed under the stat.; & in the event of those proceedings resulting in the security being retained by the mtgees., the bill must be retained to enable them to resume proceedings to realise the security.—CAMERON *v.* KERR (1867), 23 Gr. 374.—**CAN.**

u. —— —— *Excessive valuation.*]—Secured creditors who have proved cannot change the valuation to which they have sworn.—*Re* STREET, 15 C. L. J. N. S. 86.—**CAN.**

a. —— —— *Value of security uncertain.*]—A bank valued certain shares held by it as security for its debt in its proof, but the value was only approximate, inasmuch as pending the result of a certain arbn. it was impossible to state the value of the shares with accuracy. The award of the arbn. being announced, the shares rapidly declined in value, & became practically worthless. One of the trustees in the estate then wrote to the manager of the bank (who was his co-trustee) suggesting that the bank should retain the shares at its own valuation. This proposal was at once repudiated, & the shares subsequently revalued on oath:—*Held:* the trustee had not given a definite notice to the bank to retain the shares; & the bank was within its rights in revaluing the securities.—WILLIAMSON'S TRUSTEE *v.* STANDARD BANK, LTD. (1905), 19 E. D. C. 188.—**S. AF.**

b. —— —— *Security realised for more than valuation.*]—Where an assignee fails to redeem a creditor's security & the creditor, having ranked for the balance of his debt after deducting the amount of his valuation, realises his security for more than that amount, the latter cannot be required to revalue his security.—BANK OF OTTAWA *v.* NEWTON (1906), 16 Man. L. R. 242; 4 W. L. R. 508.—**CAN.**

c. —— *To what extent.*]—A creditor holding a mtge. security over part of the insolvent's estate valued his security & proved for the balance. The official assignee, after the plan of distribution was confirmed & a dividend had been paid on the creditor's claim, claimed an assignment of the security. The creditor thereupon claimed to revalue:—*Held:* he could do so to the extent of the principal sum secured by the mtge.—HUMPHREY *v.* LOBB (1875), 13 N. S. W. S. C. R. 1.—**AUS.**

d. —— *How right lost.*]—W. sold machinery to a co., retaining the right of property therein, the parties agreeing that schedule insurance should be effected & that W. should be entitled to $9,000 thereof, so holding insurance not only on his insurable interest in the machinery under the liens, but also on the plant & buildings of the co. A fire having occurred the co. assigned for the general benefit of creditors. The assignee by threatening to enforce a valuation of W.'s security by the ct. succeeded in obtaining a valuation from W., the insurance being at the time a subject of litigation in which W. took no part: W. subsequently claimed that he had not valued or that if he had he was entitled to revalue on the grounds of a mistake in law:—*Held:* W. could not succeed.—WILLIAMS MACHINERY CO. *v.* GRAHAM, [1917] 1 W. W. R. 803; 23 B. C. R. 481; *affd.* 25 B. C. R. 284; 39 D. L. R. 143; 43 D. L. R. 437; 3 W. W. R. 597; 57 S. C. R. 229.—**CAN.**

PART IX. SECT. 4, SUB-SECT. 3.

e. *Duty of trustee to elect—What amounts to election.*]—On insolvency of the owner of books, on which, an independent book-keeper has bestowed his time & labour, the book-keeper must hand them up to trustee, who, in the event of a dispute arising, must elect whether he will take an assignment of the lien or security for the benefit of the creditors generally, or reserve the full effect of the security to the book-keeper.

Where the trustee took possession of the books subject to the lien of th book-keeper:—*Held:* he had taken an assignment of the security for the benefit of the estate.—SPURRIER *v.* COXWELL (1914), C. P. D. 83.—**S. AF.**

Sect. 4.—Proof by secured creditors: Sub-sects. 3 &, 4.]

in treating them as a security in his petition; (2) even if H. had affirmed the contract of sale for the shares, there was nothing in 1883 Act, or the rules thereunder, that entitled the trustee to redeem the shares at the amount at which they were valued in the petition.—*Re* VAUTIN, *Ex p.* SAFFERY, [1899] 2 Q. B. 549; 68 L. J. Q. B. 971; 48 W. R. 96; 43 Sol. Jo. 706; 6 Mans. 391.

Annotation:—**Consd.** *Re* Button, *Ex p.* Voss, [1905] 1 K. B. 602, C. A.

3427. —— One of several mortgages on same property.]—Three mtges. of the same property were granted by the same mtgor. to three different parties, the third mtge. also including other property. Only the first mtge. contained a clause reserving a right of consolidation. On the bkpcy. of the mtgor., the second mtgee. took transfers of the first & third mtges.:—*Held:* the trustee in bkpcy. could not redeem the third mtge. without also redeeming the first & second mtges.—*Re* SALMON, *Ex p.* THE TRUSTEE, [1903] 1 K. B. 147; 72 L. J. K. B. 125; 87 L. T. 654; 51 W. R. 288; 10 Mans. 22.

3428. —— Several mortgages of different properties—To same mortgagee.]—Where bkpt. has executed several distinct mtges. of different estates to the same mtgee., his assignees cannot apply to redeem one mtge., without also redeeming the others.—*Re* BREEDS, *Ex p.* ALSAGER (1841), 2 Mont. D. & De G. 328, Ct. of R.

Annotation:—**Refd.** *Re* Loosemore, *Ex p.* Berridge (1843), 3 Mont. D. & De G. 464.

3429. Within what time—After judgment in foreclosure action.]—A mtgee., who had assessed the value of his security in the bkpcy. of the mtgor., afterwards obtained judgment in the usual form in a foreclosure action:—*Held:* it was too late for the trustee in the bkpcy. after judgment to raise the question that he was entitled to redeem the security at the value assessed.—SANGUINETTI *v.* STUCKEY'S BANKING CO., [1896] 1 Ch. 502; 65 L. J. Ch. 340; 74 L. T. 269; 44 W. R. 308; 40 Sol. Jo. 295.

3430. At what price—Petitioning creditor's estimate.]—When a secured creditor presents a bkpcy. petition against his debtor, it is not necessary that the estimate given by petitioner of the value of his security should be a true estimate, but, if an adjudication is made, the trustee in the bkpcy. will be entitled to redeem the security at the amount of petitioner's estimate.—*Re* LACEY, *Ex p.* TAYLOR (1884), 13 Q. B. D. 128; *sub nom. Re* LACY, *Ex p.* TAYLOR, 1 Morr. 113, D. C.

Annotations:—**Distd.** *Re* Vautin, *Ex p.* Saffery, [1899] 2 Q. B. 549. **Consd.** *Re* Button, *Ex p.* Voss, [1905] 1 K. B. 602, C. A.

3431. —— ——.]—Where a secured creditor has assessed the value of his security in his petition, but has not proved in the bkpcy., the trustee cannot call upon him to surrender his security upon payment of the value at which it has been assessed in the petition. His right is confined to cases where the creditor has proved either for the purpose of voting, or for the purpose of ranking for a dividend.—*Re* VAUTIN, *Ex p.* SAFFERY, [1899] 2 Q. B. 549; 68 L. J. Q. B. 971; 48 W. R. 96; 43 Sol. Jo. 706; 6 Mans. 391.

Annotation:—**Consd.** *Re* Button, *Ex p.* Voss, [1905] 1 K. B. 602, C. A.

3432. —— ——.]—Where a secured creditor presents a petition in bkpcy. & gives an estimate of his security, if the estimate is a genuine estimate, the ct. will not inquire into its correctness, although the result of the inquiry might be to show that the unsecured balance of the debt was not sufficient to support the petition; & when petitioning creditor comes in to prove in the bkpcy. in the absence of mistake as to value he will not be allowed to depart from his estimate.—*Re* BUTTON, *Ex p.* VOSS, [1905] 1 K. B. 602; 74 L. J. K. B. 403; 92 L. T. 250; 53 W. R. 437; 49 Sol. Jo. 296; 12 Mans. 111, C. A.

3433. —— Security transferred by creditor to third party.]—On application by the trustee in the bkpcy. for a declaration that the handing over of certain wine to resp. by a creditor, with whom they had been deposited as security for a loan, was a mere transfer of a pledge & that the trustee was entitled to redeem the wine on paying off the security:—*Held:* upon the evidence the transaction was a mere substitution of resp. in place of the original creditor as pledgee of the wine & was not a purchase by resp. out & out, & an account must be taken of the sums due to resp. on the security of the wine taken over by him, credit being given by resp. for money received from the sale of certain of the wine, & the trustee would be entitled to redeem on payment of the balance due.—*Re* TILLETT, *Ex p.* HARPER (1890), 7 Morr. 286.

See 1914 Act, s. 59.

3434. —— Securities lumped.]—P. was adjudicated bkpt. K. & Co., who had various debts & various securities, sent in their proof as secured creditors, lumping together their debts & securities & claiming to prove for the balance. The securities consisted of (1) a vendor's lien on ship shares, & (2) a mtge. of policies, a debt, and freeholds. The

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3429 i. *Within what time.*]—M., being resident in the Transvaal, pledged certain shares to C. in security of a debt incurred there, & afterwards his estate was sequestrated as insolvent by the High Ct. of the Transvaal. C. neither proved his debt nor realised his security. M., without first obtaining his rehabilitation, came to reside in the Cape Colony. In an action by C. for the amount of the debt:—*Held:* the shares should not be declared executable without giving the trustee an opportunity of claiming delivery of the shares for realisation.—CAPE OF GOOD HOPE BANK *v.* MELLÉ (1893), 10 S. C. 280.—**S. AF.**

3429 ii. ——.]—Where the secured creditor has valued his security for the purpose of proof, the decision of the assignee must be promptly made. A formal resolution of the assignee allowing the creditor to retain the property is not necessary.—BELL *v.* ROSS (1885), 11 A. R. 458.—**CAN.**

3430 i. *At what price—Payment of dividend not sufficient.*]—Payment of a dividend in bkpcy. is not payment of the debt except as against debtor, himself, & confers no right on bkpt. or his assignee to call upon the creditor to surrender any collateral securities.—EWART *v.* LATTA (1865), 4 Macq. 983.—**SCOT.**

3430 ii. —— *Creditor's valuation—Claim to revalue.*]—A secured creditor valued his security & proved for the balance as a creditor in distribution. After the plan of distribution was confirmed & the creditor had received his dividend on his current claim, the official assignee claimed an assignment of the security, & a conveyance of the premises, upon payment of the sum at which the security had been valued. The creditor thereupon claimed to put another value on the security:—*Held:* the official assignee was not entitled, at the time he made the demand, to a conveyance & assignment of the premises on payment of the amount of the creditor's valuation.—HUMPHREY *v.* LOBB (1875), 13 N. S. W. S. C. R. 1.—**AUS.**

3430 iii. —— *Book-keeper's lien for work done.*]—An independent book-keeper had a lien on the books of insolvent, & on a dispute arising the trustee elected to take an assignment of the lien:—*Held:* the value of the security or lien was not the value of the mere leaves or cover of the books, but the value at the time the dispute arose & the assignment took place.—SPURRIER *v.* COXWELL (1914), C. P. D. 83.—**S. AF.**

3434 i. —— *Securities lumped.*]—In an action of foreclosure, an order was made for foreclosure or redemption, & the usual accounts.

S., B., C. & D. were made parties to the action & proved the claims on their respective judgments. The master reported that pltfs. & these four were the only incumbrancers. W. who had

trustee asked for details of value, & (1) was assessed at £1,325, & the property in (2) at £2,481, making in the aggregate £3,806. The trustee did not object to the proof being made for a lump sum, nor did he require the separate values of the securities to be assessed in the proof, but he admitted the proof to rank for the amount claimed less the aggregate assessed value of the securities. Subsequently a scheme for a composition was approved, & on payment of the composition the bkpcy. was annulled & the outstanding estate of P. was ordered to revest in him. A subsequent incumbrancer on the freeholds included in mtge. (2) having claimed to redeem, K. & Co. contended that redemption could only be obtained on payment of the full sum of £3,806 :—*Held :* the trustee in bkpcy. could not, by accepting the securities as worth the aggregate sum assessed, confer upon the secured creditor any part of bkpt.'s property to which the secured creditor was not entitled, or compel a mtgee. to put a separate value on two different properties included in the same security, & mtge. (2) could be redeemed for £2,481 after allowing for what had already been received by the mtgees. on that security. *Pearce* v. *Bullard, King & Co.*, [1908] 1 Ch. 780, overd.—*Re* PEARCE, [1909] 2 Ch. 492 ; 78 L. J. Ch. 628 ; 100 L. T. 792 ; 16 Mans. 191, C. A.

See, also, Nos. 3231, 3232, *ante*.

SUB-SECT. 4.—REALISATION OF SECURITY.

See 1914 Act, Sched. II., r. 13, 1915 Rules, r. 75.

A. Jurisdiction of Court.

3435. Court of bankruptcy—To postpone sale of mortgaged property.]—The ct. in bkpcy. has no jurisdiction to postpone the sale of mortgaged property, the mtgees. not consenting.—*Re* MABERLY, *Ex p.* BELCHER (1833), 2 Deac. & Ch. 587, Ct. of R.

3436. —— To interfere if property sold to disadvantage.]—Where an order has been made for the sale of property under an equitable mtge., the ct. has jurisdiction, on the application of a creditor who is an aggrieved party, to interfere, if the property has been sold to a disadvantage, but it will not move merely to get a better price. —*Re* WHITEHEAD, *Ex p.* COLUMBINE (1841), 2 Mont. D. & De G. 24, Ct. of R.

3437. —— To order trustee to give creditor possession—To have accounts taken—To make foreclosure order.]—A first mtgee. of a leasehold house, of which bkpt. had been weekly tenant, applied to the Ct. of Bkpcy. for an order that the trustee in bkpcy. should deliver him possession, that an account should be taken of what was due on his security, & that, in default of payment, the trustee might stand foreclosed :—*Held :* the ct. had jurisdiction to make the order for delivery of possession, & for the account to be taken. *Qu. :* whether the Ct. of Bkpcy. would have had jurisdiction to make a foreclosure order, if a second mtgee., who was not before the ct., had been before the ct.—*Re* HART, *Ex p.* FLETCHER (1878), 9 Ch. D. 381 ; 39 L. T. 187 ; 26 W. R. 843, C. A.

3438. —— To order sale of security—Held by creditor who has not proved.]—The trustee of a liquidating debtor had, with the sanction of the creditors, accepted a composition under 1869 Act, s. 28 :—*Held :* the Ct. of Bkpcy. had no jurisdiction, upon the application of a secured creditor who had not proved in the liquidation, to order the sale of his security, but his proper course was to realise his security as a mtgee. in the usual manner in the High Ct., & then prove for any deficiency that might ensue in the Ct. of Bkpcy. —*Re* HOLMES, *Ex p.* WOODS (1880), 43 L. T. 447.

3439. —— —— Title deeds of which held by third party—Agreement to pay creditor out of proceeds.]—Bkpt. being indebted to petitioners, as the acceptor of two bills of exchange, entered into an agreement with them & L. that the bills should be paid out of the proceeds of certain property, the deeds of which were then in the hands of L. for sale :—*Held :* the agreement amounted to an agreement by bkpt. to deposit the deeds subject to any lien of L. & an order ought to be made as in the case of an equitable mtgee. Form of order.—*Re* SELL, *Ex p.* GREENHILL (1833), 3 Deac. & Ch. 334, Ct. of R.

3440. —— —— Held by creditor not claiming under composition deed.]—Upon the bkpcy. of two partners, A. & C., the creditors at the first meeting passed resolutions pursuant to 1861 Act, s. 110, providing for the administration of the joint estate, & also of the separate estate of A., & providing that all questions & disputes arising in the course of such winding up & administrations should be referred to the decision of the ct., but making no provision for the winding up & administering the separate estate of C., except that his separate creditors should accept a composition to be secured by a deed, upon payment of which his estate was to be reconveyed to him :—*Held :* the ct. had no jurisdiction, by s. 136, under the deed, to entertain a petition of a creditor of the firm, claiming to be an equitable mtgee. of part of the separate estate of C. in respect of a debt of the firm, & praying the usual accounts & sale of the properties comprised in the several securities, upon the ground that the

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obtained assignments of the judgments of four execution creditors of the mtgor. also redeemed the mtges. The master made the usual order for redemption on a given date. Before that date the mtgor., made an assignment to E., who claimed to redeem by paying the mtge. claim & in priority to the claims of the execution & judgment creditors held by W. :—*Held :* W. had a right to redeem the mortgaged premises which he exercised before E., *pendente lite*, acquired the equity of redemption. & in the event of a sale taking place, W. had priority over E. as well in respect of the mtge. as of the judgments.—FEDERAL LIFE ASSURANCE CO. *v.* STINSON (1906), 8 O. W. R. 929.—CAN.

g. *Failure of assignee to redeem—Rights of creditor.*]—When the assignee for the benefit of creditors has failed within a reasonable time to exercise his right to take over the securities held by a creditor at 10 per cent. over the amount at which the creditor has valued them, the creditor may collect what he can from the securities & rank on the estate for the full amount of the difference between his total claim & the valuation made, although he may have collected on the securities more than the amount of the valuation, provided he shall not receive in all more than 100 cents in the dollar. —BANK OF OTTAWA *v.* NEWTON (1906), 4 W. L. R. 508 ; 16 Man. L. R. 242.—CAN.

PART IX. SECT. 4, SUB-SECT. 4. —A.

3435 i. *Court of Bankruptcy—To vary conditions of sale approved by creditors.*]—In an application under Insolvency Law (No. 13 of 1895), s. 96, objecting to conditions of sale as determined by a meeting of creditors, the ct. has general powers to approve, disapprove, or vary such conditions. Such application should be made timeously & not a few days prior to the advertised date of sale.—PRETORIA ESTATE & MARKET CO. *v.* ROOD'S TRUSTEE (1910), T. P. D. 1080.—S. AF.

3435 ii. —— *To set aside creditors' directions as to sale—When exercised.*]—Creditors in an insolvent estate passed a resolution under Act 32 of 1916, s. 76 (1) directing the trustee to dispose of the mortgaged property by public sale, sale out of hand . . . or by sale on such terms as the trustee might determine. A secured creditor applied under s. 51 (2) to set aside this direction :—*Held :* (1) the direction was too wide in its terms ; (2) the *onus* was on the secured creditor to prove that the direction interfered with or injured his first rights ; the ct. in coming to a decision on the application should not be guided by the resolution alone, but should take all the facts of the case into consideration.—BOURBON *v.* TERBLANCHE'S TRUSTEE (1917), W. L. D. 58.—S. AF

Sect. 4.—*Proof by secured creditors: Sub-sect.* 4, *A. & B.*]

subject-matter of the petition did not refer to a dispute between any of the parties claiming under the deed.—*Re* CARTER & JUSTINS, *Ex p.* SHEFFIELD UNION BANKING CO. (1865), 13 L. T. 477.

3441. —— Equity of redemption no longer vested in bankrupt.]—There is no authority in bkpcy. on the petition of an equitable mtgee. by deposit of deeds, to order sale of the estate, where there is a subsequent equitable assignee of the equity of redemption who objects, & who has not proved under the commission, the proper remedy being by bill.

Even in the case of a legal mtge. the comrs. are not authorised to order a sale, unless in cases where bkpt. has in himself the equity of redemption (PLUMER, V.-C.).—*Ex p.* TOPHAM (1815), 1 Madd. 38; 56 E. R. 15.

3442. —— To restrain sale of property—Mortgaged by undischarged bkpt.]—An undischarged bkpt. executed a mtge. of reversionary property, & the mtgees. subsequently put the property up for sale, the property being "offered for sale subject to the rights of the trustee & the creditors under the bkpcy." Upon an application by the trustee a county ct. judge made an order perpetually restraining the mtgees. from proceeding with the sale:—*Held:* there was no jurisdiction to make the order.—*Re* EVELYN, *Ex p.* GENERAL PUBLIC WORKS & ASSETS CO., LTD., [1894] 2 Q. B. 302; 63 L. J. Q. B. 658; 70 L. T. 692; 42 W. R. 512; 10 T. L. R. 456; 38 Sol. Jo. 479; 1 Mans. 195; 10 R. 238, D. C.

Annotation:—**Mentd.** Bird *v.* Philpott (1900), 82 L. T. 110.

3443. Court of Chancery—Effect of 1869 Act.]—Where a trustee has been appointed under a liquidation of the affairs of an equitable mtgor., the mtgee. may, instead of applying in bkpcy., proceed in Ch. against the trustee for the purpose of having the security realised, the jurisdiction in Ch. not being taken away by 1869 Act.—WHITE *v.* SIMMONS (1871), 6 Ch. App. 555; 40 L. J. Ch. 689; 19 W. R. 939, L. C.

Annotations:—**Folld.** Coulthurst *v.* Smith (1873), 29 L. T. 243. **Consd.** *Re* Hart, *Ex p.* Fletcher (1878), 9 Ch. D. 381, C. A. **Mentd.** Jenney *v.* Bell (1876), 2 Ch. D. 547.

B. The Order for Sale.

3444. Who may apply—Legal mortagee.]—A mtgee., with a power of sale, may apply to the ct. to have the premises sold.—*Re* COOK, *Ex p.* HODGSON (1821), 1 Gl. & J. 12.

3445. —— ——.]—A petition for the sale of property of a bkpt., over which the creditor holds a legal mtge., will be dismissed with costs.—*Re* HUNTINGDON, *Ex p.* MOORE (1832), 2 Deac. & Ch. 7, Ct. of R.

3446. —— —— Of equitable estate.]—In the case of a legal mtge. of an equitable estate, it is unnecessary to petition for the sale of the property.—*Re* JACKSON, *Ex p.* ATTWOOD, SPOONER & CO. (1834), 2 Mont. & A. 24, Ct. of R.

3447. —— —— After previous act of bankruptcy.]—A petition to obtain an order for sale of estates, & to be admitted to prove for the residue, was objected to on the ground that the mgte. was subsequent to an act of bkpcy.:—*Held:* the relation to the act of bkpcy. could not be carried back beyond the debt upon which the commission had proceeded, & an order should be made in the terms of the petition.—*Re* REYNOLDS, *Ex p.* BIRKETT (1814), 2 Rose, 71, L. C.

See 1914 Act, s. 30 (3).

Relation back, *see, generally,* Part XX., Sect. 3, *post.*

3448. —— —— After notice of bankruptcy.]—A legal mtge. was executed by bkpt., in pursuance of a previous equitable mtge., but not till after the mtgee. had notice of the act of bkpcy.:—*Held:* it did not operate as a merger of the equitable mtge., & the party was entitled to the usual order, as equitable mtgee.—*Re* EMERY, *Ex p.* HARVEY (1839), 2 Mont. & Ch. 261; 3 Deac. 547; 4 Deac. 52, Ct. of R.

3449. —— Sub-mortgagee of mortgage for fluctuating amount—Preliminary inquiry as to sum due.]—A person, to whom estates were mortgaged to secure the balance due from time to time on an account current, mortgaged his interest under the mtge., & became bkpt.:—*Held:* the sub-mtgee. could not have an order for sale of the original mtge. debt, without a preliminary inquiry as to its amount.—*Re* WRIGHT, *Ex p.* MACKAY (1841), 1 Mont. D. & De G. 550, Ct. of R.

Annotations:—**Mentd.** *Re* Buller, *Ex p.* Wornald (1860), 2 L. T. 544; *Re* Richards, Humber *v.* Richards (1890), 45 Ch. D. 589.

3450. —— Vendor with lien for unpaid purchase-money.]—A quantity of tea was sold at a price, which was to be paid at a future day. After the day had elapsed, the purchaser paid a sum on account, & wrote to the vendors, who had retained the warrants in their possession, requesting them to wait the arrival of the overland mail, & on its receipt to dispose of the tea. He afterwards became bkpt.:—*Held:* (1) the vendors had a lien on the tea for the unpaid purchase-money; (2) an application to the ct. for an order for sale was not improper or unnecessary; (3) the letter was a sufficient written memorandum to entitle the vendors to costs.—*Re* COLES, *Ex p.* TWINING (1841), 1 Mont. D. & De G. 691; 10 L. J. Bcy. 60; 5 Jur. 536, Ct. of R.

3451. Service of petition for order—Who must be served.]—The petition of an equitable mtgee. for a sale need not be served on an incumbrancer, whose title was prior to that of the mtgor.—*Re* HILDYARD, *Ex p.* SMITH (1842), 2 Mont. D. & De G. 587; 11 L. J. Bcy. 16; 6 Jur. 610, Ct. of R.

Annotations:—**Consd.** *Re* Carter & Justins, *Ex p.* Sheffield Union Banking Co. (1865), 13 L. T. 474. **Mentd.** Fawcett *v.* Fearne (1844), 13 L. J. Q. B. 300.

3443 i. *Court of Chancery—To set aside fraudulent sale—In Insolvent Court.*]—The Ct. of Ch. has jurisdiction to set aside a fraudulent sale in the Insolvent Ct.; but it will not be exercised if there be a remedy in the latter ct.—MAGUIRE *v.* O'REILLY (1846), 9 I. Eq. R. 335; 3 Jo. & Lat. 224.—IR.

PART IX. SECT. 4, SUB-SECT. 4. —B.

3444 i. *Who may apply—Legal mortgagee.*]—Where a mtgor. becomes bkpt., the mtgee. is not compelled to go in under the Act, but may proceed to sell the property under a power of sale in his mtge.—GORDON *v.* ROSS (1865), 11 Gr. 124.—CAN.

3444 ii. —— *Assignee of mortgage in possession.*]—An assignee of a mtge. of part of a bkpt.'s property, who had got into possession, petitioned that an account might be taken of what he had received while in possession, for a sale, & that he should be permitted to prove for any deficiency:—*Held:* he was entitled to this relief, & he might have the account taken before a Master in Ch., instead of one of the comrs.—*Re* WILSON (1830), 3 Ir. L. Rec. 1st ser. 112.—IR.

3444 iii. —— *Judgment creditor.*]—A judgment creditor of 1843, during the lifetime of the conusor, filed a bill to redeem a judgment of 1842, & for a sale, to pay the sum advanced for redemption & his own debt:—*Held:* he was entitled to redeem, & to have an assignment of the prior creditor's security, but not to a sale, there being creditors prior to Nov., 1840. *Semble:* a detaining creditor of an insolvent cannot file a bill for a sale on foot of his judgment under 3 & 4 Vict. c. 105.—MAGUIRE *v.* O'REILLY (1846), 9 I. Eq. R. 335; 3 Jo. & Lat. 224.—IR.

3444 iv. —— *Sureties.*]—The ct. will not, sitting in bkpcy. on behalf of the sureties of a bkpt., direct a sale of mortgaged premises for payment of the debt secured by recognisance, or for payment of any other security except a mtge.—*Ex p.* USHER (1809), 1 Ball & B. 197.—IR.

3452. What procedure court may adopt—To protect interests of surety's creditors—On sale of security.]—A. deposited deeds with B., by way of equitable mtge., & C. became his surety for the payment of any balance due. Separate fiats issued against A. & C., & under the fiat against C. B. was appointed sole assignee. B., as equitable mtgee., petitioned for the usual order for the sale of the property:—*Held:* before such order could be made, some person must be chosen by C.'s creditors, to protect their interests, & the petition must stand over until that had been done.—*Re* BARNETT, *Ex p.* HAINES (1838), 4 Deac. 20; Mont. & Ch. 32, Ct. of R.

3453. —— Reference to commissioners to ascertain validity of security.]—On a petition that the property, on which an annuity was charged, should be sold, for the payment of the value of the annuity:—*Held:* the ct. would refer it to the comrs. to ascertain, in the first instance, whether petitioner had a valid security on the premises, on which the annuity was alleged to be charged.—*Re* STUART, *Ex p.* STUART (1842), 2 Mont. D. & De G. 540.

3454. —— Sale by private contract.]—The ct. will not make an order for a sale, by private contract, of premises, under an equitable mtge., but the comr. may order such sale if thought most expedient.—*Re* BARKER, *Ex p.* LADBROKE (1834), 1 Mont. & A. 384; 3 L. J. Bcy. 56, Ct. of R.

3455. Grounds for refusing—Security of no value—Possibility of becoming valuable.]—In May, 1820, bkpt. deposited the bond of a debtor to him with J. as a security for money lent by J. to bkpt. The commission issued in Nov., 1824. J.'s exors. prayed that the bond be sold before the comrs. & the proceeds paid to them, & that they might prove for any deficiency. The obligor had left the country & gone to the East Indies, & the assignees suggested that, if the bond were then sold, it would produce nothing, though, with proper management, it might thereafter prove valuable:—*Held:* no sale should be ordered, but petitioners should be at liberty to prove their whole debt under the commission.—*Re* BUNSCOMBE, *Ex p.* SMITH & STRICKLAND (1826), 2 Gl. & J. 105.

3456. —— Dispute.]—The ct. will only interfere to order the sale of equitable mtges., in cases where there is no dispute.—*Re* JACKSON, *Ex p.* ATTWOOD, SPOONER & Co. (1834), 2 Mont. & A. 24, Ct. of R.

3457. —— —— As to whether deeds deposited as security or not.]—The ct. will order a sale of property comprised in deposited deeds, although there is conflicting evidence upon the question whether they were deposited as a security or not.—*Re* STRATTON, *Ex p.* BARNES (1842), 6 Jur. 652, Ct. of R.

3458. —— Suspicion that mortgage fraudulent preference.]—The ct. will not interfere in making an order for the sale of mortgaged property, where the circumstances, are suspicious as to the mtge. being a fraudulent preference.—*Re* DAVY, *Ex p.* DEWDNEY (1835), 4 Deac. & Ch. 181; 2 Mont. & A. 72, Ct. of R.

3459. —— No memorandum—Delay—Bankrupt dead.]—Where there is no memorandum, the deposit of deeds twelve years ago, & bkpt. dead, the ct. will not interfere to make the common equitable mtge. order.—*Re* OLIVER, *Ex p.* JONES (1837), 3 Mont. & A. 152, Ct. of R.

3460. —— Bankrupt not mortgagor but purchaser of equity of redemption—Vendor joining in application.]—A mtgee. cannot have the usual order for sale where bkpt. is not the mtgor., but a purchaser of the equity of redemption, although the vendors of the equity of redemption, with whom bkpt. has covenanted to pay the debt, join in the petition, & pray to be at liberty, after paying the deficiency, to prove for the amount.—*Re* STOCKDALE, *Ex p.* KEIGHTLEY (1849), 3 De G. & Sm. 583; 64 E. R. 616.

3461. —— Debt not provable—Sum due bankrupt member of banking company—Lien on shares.]—Petition, by the public officer of a joint stock banking co., for the usual order as equitable mtgees. of some property in which bkpt. had a life interest, & also claiming a lien on shares held by bkpt. as a member of the co. The Act of Parliament, under which the co. was incorporated, provided that the co. should have a lien on the shares of any proprietor who became indebted to the bank. The right to an order for the sale of the life interest was not disputed:—*Held:* the balance due by bkpt. to the bank being a provable debt, the order might be taken for the sale of the shares, as well as of bkpt.'s life interest in the other property, with liberty to prove for the residue.—*Re* DREWRY, *Ex p.* WALLIS (1841), 2 Mont. D. & De G. 201, Ct. of R.

3462. —— Application on appeal—No consent of trustee.]—When no application has been made by a mtgee. to the registrar for a sale of the property under 1870 Rules, r. 78, an order for sale on appeal cannot be made without the consent of the trustee.—*Re* HART, *Ex p.* FLETCHER (1879), 10 Ch. D. 610; 27 W. R. 622, C. A.

3463. What may be ordered to be sold—Part of security.]—An order was made for sale of part of the property comprised in a security, without prejudice to the creditor's lien upon the remainder, which was at the time unsaleable, being the subject of litigation.—*Re* PRICE, *Ex p.* WACE (1842), 2 Mont. D. & De G. 730.

3464. —— Bankrupt's reversionary interest—Misapplication of trust funds by bankrupt trustee.]—A bkpt.'s reversionary interest under the trusts of a will was ordered to be sold, & the proceeds applied in making good money which had come to his hands as trustee under the same trusts, & which had been misapplied.—*Re* MOLYNEUX, *Ex p.* HARDMAN (1844), 3 Mont. D. & De G. 559, Ct. of R.

3465. —— Equity of redemption purchased by sub-mortgagor—After deposit of title deeds of mortgage by way of equitable mortgage.]—W. being mtgee. of an estate under a demise by way of mtge. for five hundred years, deposited the mtge. deed

3453 i. *What procedure court may adopt—Reference to commissioners to inquire into facts.*]—In a mtge. petition in a bkpcy. matter, it appearing that the mtgee. was the sole creditor, & was assignee; the ct. referred it to the comrs. to inquire into the facts & the sum now due, & if it appeared fair, to sell.—*Re* MEARA (1820), 2 Mol. 453.—**IR.**

3456 i. *Grounds for refusing—Dispute—As to position of creditors.*]—Where certain secured creditors in an insolvent estate objected to an advertised sale being held, on the ground that a dispute was pending as to the preference of certain other creditors, & that until that question was settled & appcts. did not know their position & were therefore prejudiced in bidding at the sale:—*Held:* appcts. must show that they had some strict legal right which might be injured or interfered with, & they failed so to do.—PRETORIA ESTATE & MARKET Co. *v.* ROOD'S TRUSTEE (1910), T. P. D. 1030.—**S. AF.**

3463 i. *What may be ordered to be sold—Dispute as to property included in the mortgage—Proceeds to be paid into court.*]—Where the mtgees. of a bkpt. apply for liberty to prove their debt under the commission, & there is a doubt whether the machinery of the mill which is the subject of the mtge. is included in their security, the mill & machinery will be ordered to be sold together, so as to make the produce most beneficial, & the money to be brought into ct. until the title to that produce is decided.—*Re* MILLNER (1831), 4 Ir. L. Rec. 1st ser. 163.—**IR.**

Sect. 4.—Proof by secured creditors: Sub-sect. 4, B., C. & D.; sub-sect. 5, A.]

with T. in order to give him an equitable mtge. for £800. W. afterwards purchased the equity of redemption, & subsequently became bkpt. T. petitioned that he might be declared equitable mtgee., & for a sale, not of the mtge. term only, but of the equity of redemption which had been purchased by W., on the ground that the deposit was not a conveyance, but a transaction giving a lien for the full amount intended to be thereby secured, & that the redelivery of the deeds could not be enforced until the whole sum so secured was paid:—*Held:* the usual order for sale should be made, & if the assignees did not take the equity of redemption & pay off T., he might put up for sale the whole interest of bkpt. in the premises, in which case the assignees would join in the conveyance to the purchaser.—*Re* WATTS, *Ex p.* TUFFNELL (1834), 1 Mont. & A. 620; 4 Deac. & Ch. 29, Ct. of R.

3466. —— Purchase of mortgaged property by bankrupt not completed.]—Bkpt. was the purchaser of an estate, but the purchase-money was not paid. Bkpt. had equitably mortgaged the estate to W., who presented the common petition of an equitable mtgee.:—*Held:* (1) unless the unpaid vendor consented the estate could not be sold, but only bkpt.'s interest therein; (2) the ct. expected petitioner to exert himself to have the estate sold to the very best advantage, & to do that the unpaid vendor should be brought before the ct., in the hope that he would consent to a sale; (3) the unpaid vendor should be served with the petition, & if he would not appear or would not consent then perhaps the ct. might order a sale of bkpt.'s interest only.—*Re* WATTS, *Ex p.* WRIGHT (1837), 3 Mont. & A. 49, Ct. of R.

See, also, No. 3441, *ante.*

3467. At what time order may be made—Security for replacing stock within three years.]—B. by bond bound himself in the penalty of £1,000 to replace within three years £550 Govt. stock & meanwhile to pay dividends on that sum. He also agreed in writing to assign as collateral security for the replacing of the stock & the payment of the dividends certain real estate. Before the expiration of the three years B. became bkpt. Dividends had accrued before the bkpcy., which had not been paid. On a petition for a sale of the estate, the produce to be applied in replacing the stock, & to prove for the difference, if the proceeds were not sufficient to satisfy the demand, it was contended for the assignees that the money to arise from the sale ought not to be laid out until the three years had expired, & that the estate might have the benefit, if the price of the stock should then have fallen:—*Held:* (1) the bond being forfeited at the time of the bkpcy., there was then a legal demand for the penalty, & the amount of the penalty would upon proof have been reduced upon equitable principles to the then actual value of £550 stock; (2) the estate was a security for the sum which would have been the subject of proof, & the creditor was entitled to have his stock replaced immediately, & an order should be made as prayed.—*Re* BARKER, *Ex p.* FISHER (1818), 3 Madd. 159; Buck, 188; 56 E. R. 469.

Annotations:—**Consd.** Sammon *v.* Miller (1832), 3 B. & Ad. 596. **Mentd.** Clements *v.* Langley (1833), 5 B. & Ad. 372.

3468. —— Power of sale not to be exercised for five years.]—Bkpt. executed a mtge., with a power of sale, subject to a proviso that the power was not to be exercised for five years, if the interest was regularly paid:—*Held:* the mtgee. might have the common order for sale within five years, with liberty to prove for the residue.—*Re* THEOBALD, *Ex p.* BIGNOLD (1838), 3 Deac. 151; 3 Mont. & A. 477; 7 L. J. Bcy. 35, Ct. of R.

Annotation:—**Folld.** Seaton *v.* Twyford (1870), 23 L. T. 648.

3469. Form of order—Memorandum lost.]—Form of order on the petition of an equitable mtgee., by deposit with written memorandum, where the memorandum has been lost.—*Re* GREGORY, *Ex p.* RODGERS (1843), 3 Mont. D. & De G. 297; 1 L. T. O. S. 151, Ct. of R.

3470. —— Bankrupt transferee of legal mortgage.]—Special form of order on the petition of an equitable mtgee. by deposit, bkpt. being a transferee of a legal mtge. in fee of lands.—*Re* VAUGHAN, *Ex p.* POWELL (1847), De G. 405, Ct. of R.

3471. —— What order may provide—As regards conduct of sale.]—When an equitable mtgee. applies to the ct. to realise his security, the conduct of the sale is in the discretion of the ct. As a general rule, where the security is sufficient, the conduct of the sale will be given to the trustee, but where the security is insufficient, the conduct of the sale will be given to the mtgee. In either case the costs, charges, & expenses of the trustee, properly incurred, will be a first charge upon the proceeds of sale.—*Re* JORDAN, *Ex p.* HARRISON (1884), 13 Q. B. D. 228; 53 L. J. Q. B. 554; 33 W. R. 153; *sub nom. Re* JORDAN, *Ex p.* LLOYD'S BANKING CO., 50 L. T. 594; 1 Morr. 41.

3472. —— —— —— Petitioning creditors also assignees.]—A petition stated that in Jan., 1826, M. had lent to L. £300 on the security of a note of hand & on a deposit of title deeds. Before any payment M. died, having appointed petitioners his exors. In Nov., 1826, petitioners issued a commission against L., under which they were chosen assignees. The petition prayed that the premises might be sold, etc. The application was *ex p.*, as the characters of exors. & assignees were blended, & it was desirable that the sale should take place under the immediate direction of the ct.:—*Held:* an order should be made as prayed for the sale, & an account of what was due to petitioners for principal & interest, & for the application of the purchase-money, & the comrs. should name a solr., whose costs were to come out of the estate, who, as if he were sole assignee, were to attend the taking of the account.—*Re* LEVETT, *Ex p.* COWDRY & PITT (1827), 2 Gl. & J. 272.

Annotations:—**Folld.** *Re* Corless, *Ex p.* Lees (1832), 2 Deac. & Ch. 360, Ct. of R.; *Re* Joy, *Ex p.* Greenwood (1832), 1 Deac. & Ch. 542, Ct. of R.

3473. —— —— —— Whether reserved biddings allowed to assignees—Sale of mortgaged estates.]—A reserved bidding was allowed to assignees, on the sale of an estate, which had been mortgaged by bkpt.—*Re* DUCKETT, *Ex p.* ELLIS (1833), 3 Deac. & Ch. 297, Ct. of R.

3474. —— —— —— —— Sale of life policies by equitable mortgagee.]—A petitioning creditor's debt amounted to £16,000. Three life policies, of the value of £500, had been deposited with him by way of equitable mtge., & he obtained an order for their sale, with leave to bid. Bkpt.'s assignees applied for leave to fix a reserved bidding. The ct. refused the application, but was prepared to give them leave to bid.—*Re* SKINNER, *Ex p.* BARNARD (1833), 3 Deac. & Ch. 291.

3475. —— —— —— One solicitor concerned for both assignees & creditor.]—The common order was made for the sale of mortgaged premises, with leave to bid, & costs out of the proceeds, but the same solr. being concerned for the assignees & the equitable mtgee., who was one of them:—*Held:*

another solr. should be appointed to conduct the sale.—*Re* JOHNSON, *Ex p.* ROLFE (1832), Mont. 515; 1 Deac. & Ch. 77, Ct. of R.

3476. —— —— Sale of leaseholds—Whether trustee entitled to indemnity in respect of covenants.]—An equitable mtgee. of leasehold property prayed that the assignees might be directed to sell the property & for leave to bid at the sale. The assignees contended that so much of the prayer of petition related to a sale could not be granted, as the premises being leasehold, & if the assignees meddled with the property, though even for the purpose of joining in a sale, they would become responsible for any breach of the covenants of the lease as between themselves & the lessor, & that if the ct. did grant that part of the prayer asking a sale, it ought at least to order petitioner to indemnify the assignees against the breach of any of the covenants in the lease:—*Held:* the Ct. of Review could not impose any terms on petitioner, as it was in the option of the assignees either to accept or reject the lease, & if they took it, they must also take all the responsibility attaching to it, & the utmost the ct. could do was to give the assignees a reasonable time to consider whether they would accept or reject the lease.

The petition having stood over in order that the assignees might have time to elect, & the assignees not having come to any determination:—*Held:* the assignees had had a reasonable time to come to a decision & the usual order should be made.

If the assignees choose to have the conduct of the sale they may, but if they decline, then the equitable mtgee. may conduct it (SIR G. ROSE).—*Re* COLLINS & PRIOR, *Ex p.* FLETCHER (1832), 1 Deac. & Ch. 318, 356; 1 L. J. Bcy. 44, Ct. of R.

3477. What judgment for foreclosure must contain—As to official receiver's right to redeem.]—A mtgor. was adjudicated bkpt., & the mtgee. assessed the value of his security under 1883 Act, Sched. II. The debt amounted to £4,566 10*s.* 1*d.* & the assessed valuation of the mtge. security was £3,500. The mtgee. commenced a foreclosure action against the official receiver & subsequent incumbrancers. Upon motion for judgment in default of pleading:—*Held:* the judgment for foreclosure ought to show on the face of it that the official receiver was entitled to redeem the mortgaged property at a sum less than that at which the subsequent incumbrancers were entitled to redeem the mortgaged property.—KNOWLES *v.* DIBBS (1889), 60 L. T. 291; 37 W. R. 378.

Annotation:—**Consd.** Sanguinetti *v.* Stuckey's Banking Co., [1896] 1 Ch. 502.

3478. Costs of application.]—On a petition by an equitable mtgee. to have the mortgaged premises sold & to prove for the difference, where the necessity of the application is created by the defect of petitioner's title, the expenses of it, & of all fair inquiries into the validity of the security must be satisfied out of the proceeds of the sale, unless the assignees by an unnecessary & vexatious resistance call for a deviation from that practice.—*Ex p.* GARBUTT (1814), 2 Rose, 78, L. C.

3479. —— Form of order agreed between parties.]—On a petition for the sale of an equitable mtge., counsel for the petition stated that pettioner & resp. assignees had agreed out of ct. as to the order to be taken, except as to the costs, which the agreement left for the ct. to decide:—*Held:* (1) as the petition was necessary by the conduct of the assignees, arising from a mistaken view of their rights, they could claim nothing beyond costs out of bkpt.'s general estate; (2) costs as between party & party should be given to each party out of their respective funds.—*Re* GOUGH, *Ex p.* BATE (1839), Mont. & Ch. 58; 4 Deac. 46, Ct. of R.

See, also, Nos. 3555–3557, *post.*

Liability of assignees selling by auction for auction duty.]—*See* REVENUE.

See, generally, Part XVI., *post.*

C. Proof on Bills deposited as Security.

See Part VIII., Sect. 4, sub-sect. 3, F. (*b*) ii., *ante.*

D. Proof on Guarantees.

See Part VIII., Sect. 4, sub-sect. 3, D. (*b*), *ante.*

SUB-SECT. 5.—APPLICATION OF SECURITY OR ITS PROCEEDS.

See, also, Sub-sect. 6, *post.*

A. In General.

See 1914 Act, s. 66 (2).

3480. General rule.]—A creditor holding a security is entitled to apply it in discharge of whatever liability of bkpt. he may think fit.—*Re* BULMER, *Ex p.* JOHNSON (1853), 3 De G. M. & G. 218; 22 L. J. Bcy. 65; 21 L. T. O. S. 109; 1 W. R. 341; 43 E. R. 86, L. C.

Annotation:—**Folld.** *Re* Foster & Hinings, *Ex p.* Dickin (1875), 24 W. R. 221.

3481. Bill of exchange.]—A depositary of a bill has a right to avail himself of his pledge to its utmost extent in point of proof, & to his fullest & most complete indemnity at the time of proving.—*Re* FOWLER, *Ex p.* MARTIN (1814) 2 Rose, 87.

Annotation:—**Folld.** *Re* Penfold, *Ex p.* Ramsbottom (1835), 4 Deac. & Ch. 198, Ct. of R.

3482. Security held for joint & separate debts.]—The joint estate of A. & B. & the separate estate of A. were largely indebted to X., who held security on property of A. for both debts. Upon the bkpcy. of A. & B. & the separate liquidation of A., the security having been realised:—*Held:* X. was entitled to apply the proceeds of the security in any way he thought fit, & also to make an application that a dividend should be declared upon the joint estate in the first instance.—*Re* FOSTER, *Ex p.* DICKIN (1875), L. R. 20 Eq. 767; 44 L. J. Bcy. 113; 33 L. T. 37; 24 W. R. 221.

3483. Proceeds of sale of security for further advances—Order of application.]—Petitioner & his partner advanced by way of loan to bkpt. £1,000 on the security of a promissory note, & subsequently lent to bkpt. further sums amounting to £500 on the security of (*inter alia*) the lease of his house & land at W. Petitioner claimed an account

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PART IX. SECT. 4, SUB-SECT. 5.—A.

3480 i. *General rule.*]—A creditor holding securities not specifically appropriated to any particular debts may apply them in discharge of whatever liabilities of bkpt. he may think fit.—*Re* GREER, *Ex p.* PROVINCIAL BANK (1877), I. R. 11 Eq. 502.—**IR.**

3480 ii. ——*Notes or bills discounted.*]—R. gave a security to M. & B. to indemnify them against having to pay, take up, or retire, any notes or bills indorsed or accepted by them for R. M. & B. indorsed notes for R.'s accommodation, which were discounted by pltf. bank, & while several of them were outstanding R., M. & B. all became insolvent:—*Held:* as to the extent of such accommodation paper as the bank held they were entitled to have the proceeds of the security applied to retire the notes, in priority to other creditors; but in respect of any notes held by the bank which had been given by M. & B. in liquidation of the debts due them, the bank could only prove against the estates of the insolvents.—MOLSONS BANK *v.* BLAKENEY (1878), 25 Gr. 513.—**CAN.**

j. *First towards loss through guarantee given for bankrupt.*]—A person holding a lien over a portion of a bkpt.'s estate in security of advances made to him, & against risks & loss through a cautionary obligation undertaken for bkpt., was entitled to apply the security in the first instance to extinguish his loss through the cautionary obligation.—JAMIESON *v.* FORREST (1875), 2 R. (Ct. of Sess.) 701.—**SCOT.**

Sect. 4.—Proof by secured creditors: Sub-sect. 5, A., B., C. & D.]

of the lease, fixtures, etc.:—*Held:* the leasehold premises & fixtures, etc., should be sold by public auction under the direction of the assignees, & the proceeds applied in payment of costs & then in discharge of the sum due to petitioner, the surplus to go to the official assignee of bkpt.—*Re* MULLEN, *Ex p.* HEATHCOAT (1849), Fonbl. 42; 14 L. T. O. S. 226.

3484. First towards unprovable debt—Then towards provable debt.]—Although no proof can be made for unliquidated damages, yet, if the demand is partly of that nature, & partly liquidated, as the difference of price on a resale, a secured creditor may apply his security first to the former, & then to the latter, & prove for the residue.—*Ex p.* HUNTER (1801), 6 Ves. 94; 31 E. R. 955.

Annotations:—**Folld.** *Re* Bulmer, *Ex p.* Johnson (1853), 3 De G. M. & G. 218, L. C. **Mentd.** *Re* Fox & Jacobs, *Ex p.* Discount Banking Co. of England & Wales, [1894] 1 Q. B. 438.

3485. —— —— —.]—A secured creditor has a general right to allocate his security to that part of his debt, in respect of which he has no right of proof.—*Re* FOX & JACOBS, *Ex p.* DISCOUNT BANKING CO. OF ENGLAND & WALES, [1894] 1 Q. B. 438; 63 L. J. Q. B. 191; 69 L. T. 657; 42 W. R. 351; 10 Morr. 295; 10 R. 70.

3486. —— —— **Security taken after notice of act of bankruptcy—Party granting security ignorant.**]—Bankers, with the knowledge of an act of bkpcy. committed by their customer, took a guarantee from a surety on his behalf, to secure to a given amount all sums then, or thereafter, to become due from the customer. The surety had no notice of the act of bkpcy., & afterwards paid to the bankers the full sum for which he was guarantee, without specifying to which portion of the bankers' debt the payment was to be applied:—*Held:* such payment was to go in reduction of that portion of the bankers' debt which was provable under the fiat, & not of that which was not provable.—*Re* MASON, *Ex p.* SHARP (1844), 3 Mont. D. & De G. 490; 8 Jur. 1012, Ct. of R.

3487. Mortgages of several properties to secure distinct debts—Application of surplus on some to deficiencies on others—Application for sale before proof.]—Where several estates have been mortgaged for different debts to the same mtgee., who applies for a sale prior to proving his debt, the proceeds of each mtge. must be applied to its particular debt, & the surplus funds of one estate cannot be applied to make good the deficiency of another estate.—*Re* NEWTON, *Ex p.* BIGNOLD (1836), 2 Deac. 66; 3 Mont. & A. 9; 6 L. J. Bcy. 65, Ct. of R.

Annotation:—**Mentd.** *Re* Weibking, *Ex p.* Ward, [1902] 1 K. B. 713.

B. Interest.

See, now, 1914 Act, s. 66.

3488. Against what interest security may be applied—Interest to date of commission.]—If a mtge. is not adequate to the payment of principal & interest, the interest of the mtge. is only to be calculated to the date of the commission in bkpcy. —*Ex p.* HERCY (1702), unreported, cited in 1 Cooke's Bankrupt Laws, 8th ed., p. 206.

Annotation:—**Folld.** *Re* Lancaster, *Ex p.* Kensington (1835), 1 Deac. 58.

3489. —— —— —.]—A mtge. upon a bkpt.'s estate being deficient, the mtgee. proving the remainder of his debt, under the commission, cannot charge interest beyond the date of the commission.—*Ex p.* BADGER (1798), 4 Ves. 165; 31 E. R. 85, L. C.

Annotations:—**Distd.** *Re* Lancaster, *Ex p.* Kensington (1835), 1 Deac. 58. **Consd.** *Re* London, Windsor & Greenwich Hotels Co., Quartermaine's Case, [1892] 1 Ch. 639. **Mentd.** *Re* Savin (1872), 27 L. T. 466, L. JJ.

3490. —— —— **Subsequent interest.**]—Interest on debt stops at the date of the fiat, & a creditor cannot apply his security in the first place in payment of subsequent interest & then prove for his debt, which he otherwise might, namely, his original debt & interest up to the date of the fiat, but must, in the absence of a contract entitling him thereto, apply the security in reduction of the provable debt.—*Re* COURTNEY, *Ex p.* POLLARD (1840), 1 Mont. D. & De G. 264; 4 Jur. 1018, Ct. of R.

Annotation:—**Consd.** *Re* Lightfoot (1851), 18 L. T. O. S. 54.

PART IX. SECT. 4, SUB-SECT. 5. —B.

3488 i. *Against what interest security may be applied—Interest to date of sequestration.*]—A secured creditor who has valued his security & proved for the balance of his debt, is not entitled as against the official assignee to retain out of the proceeds of realisation of the security interest on the debt accrued due after the date of the sequestration order.—*Re* MANSON, *Ex p.* OFFICIAL ASSIGNEE (1897), 18 N. S. W. B. 38. —AUS.

k. —— *Interest after date of petition in insolvency.*]—The old rule in insolvency cases of not allowing interest on debts after filing the petition is now set aside, & where there is a surplus, interest will be allowed in insolvency as well as in bkpcy.—*Re* SLATOR (1869), 3 I. L. T. Jo. 138.—IR.

3490 i. —— *Interest from date of sequestration.*]—A mtge. bond securing interest as well as capital entitles the mtgee., in the event of the mtgor.'s insolvency, to a preference for interest accruing due between the date of sequestration & the date of payment. —ROOTH & WESSELS *v.* BENJAMIN'S TRUSTEE (1905), T. S. 624.—S. AF.

l. —— *From date of valuation—At 5 per cent.*]—Where a secured creditor puts a value on his security, interest runs from the date of assessment at the rate of 5 per cent.—*Re* BURGESS (1888), 23 L. R. Ir. 5.—IR.

m. —— *To date of payment.*]—A mtgee. from a person adjudicated an insolvent under Provincial Insolvency Act, 1907, is entitled, as a secured creditor to receive out of the proceeds of the sale of the mortgaged property his principal, interest & costs, & he is entitled to interest up to the date of payment.—JUGAL KISHORE *v.* BANKIM CHANDRA (1919), I. L. R. 41 All. 481.—IND.

n. —— *Interest on arrears of annuity.*]—J. by his will gave his wife E. an annuity of $2,000 a year, & charged it on his estate. After his death E., C. & M., two daughters, & W. & G., two sons, entered into an agreement whereby the annuity was charged on certain property, & the sons covenanted to pay it, & the exors. of J. transferred all their interest as exors. in all the estate of J. to the sons, subject to the charge. Subsequently all parties joined in borrowing $16,000 on mtge. of part of the property for the purpose of reconstructing the buildings, the annuity being postponed to the mtges. W. & G. afterwards became insolvent, & B. became assignee in insolvency. The annuity fell into arrear for several years, & E. died, having made a will by which she devised all her estate to C. & M., who brought an action against B. to have a lien declared on the property for the amount of the arrears of the annuity. On a reference to the master he found that they had the right to maintain the action, & settled the amount of the annuity due, & allowed interest for the six years preceding action brought:—*Held:* R. S. O. 1877, c. 50, ss. 266 & 267, was not applicable to cases where a recovery was sought against deft.'s estate, & except under extraordinary circumstances upon particular grounds suggested of hardship or peculiarity, interest was not to be allowed upon the arrears of an annuity.—SNARR *v.* BADENACH (1885), 10 O. R. 131.—CAN.

o. —— *Interest for one year in addition to current year.*]—The holder of a mtge. bond is entitled in preference on debtor's sequestration, not to full arrears of interest which may be due on the bond, but only for interest for one year in addition to that for the current year.—*Re* MEIRING, CLOETE *v.* ALING (1834), 2 M. 318, 336.—S. AF.

p. —— —— *Where rule applies.*]—The rule confining preference for interests on a mtge. bond to interest for a year & current year applies only where there is competition amongst creditors.—GUARDIAN ASSURANCE CO. *v.* HIGH SHERIFF (1903), 20 S. C. 170. —S. AF.

q. —— *On judgment obtained during pendency of matter.*]—It is the established practice of the Ct. of Bkpcy. not to allow interest on a judgment registered as a mtge., during the pendency of the matter in which it is proved for, without very special circumstances.—*Re* SUFFERN (1894), 29 I. L. T. 39.—IR.

3491. —— —— ——.]—In pursuance of an arrangement between trustees & their *cestuis que trust*, an equitable mtge. was given to the latter for sums due by the trustees, & the trustees paid interest on the sums up to the time of their bkpcy. The ct. allowed interest at the same rate to be continued from the date of the bkpcy., although no mention of interest was made in the memorandum given by the trustees upon the equitable mtge. being made.—*Re* SOLLY, *Ex p.* MEYER (1845), 4 L. T. O. S. 399, Ct. of R.

3492. —— —— ——.]—Incumbrancers on bkpt.'s property under an agreement for security had enforced their lien against the assignees in a Ch. suit, in which the subject of the security had been sold, & the proceeds applied in reduction of the debt:—*Held:* in proving for the residue, the mtgees. were entitled to set off the income of the property accruing due after the bkpcy. against the interest upon the debt since the same period.—*Re* BARKER, *Ex p.* PENFOLD (1851), 4 De G. & Sm. 282; 64 E. R. 834.

Annotation:—**Consd.** *Re* London, Windsor & Greenwich Hotels Co., Quartermaines' Case, [1892] 1 Ch. 639.

3493. —— —— **Interest to date of sale.**]—The mtgees. of a bkpt. are entitled to interest only to the date of the fiat, & not to the date of the sale.—*Re* LIGHTFOOT (1851), 18 L. T. O. S. 54.

3494. —— —— **Provision for capitalisation of interest during life of third party.**]—Bkpt. mortgaged his interest in an estate, of which his father was tenant for life, the mtge. providing for the redemption of the debt six months after the death of the father, together with interest at 5 per cent. capitalised at compound interest "by means of half-yearly rests" until the death of the father, with interest on that aggregate capital sum from the father's death. The bkpcy. took place three years before the father's death, & the mtgees. claimed to prove the aggregate sum due under the covenant at the death of the father less the value of their security:—*Held:* to the extent to which the aggregate sum included interest subsequent to the bkpcy. the proof must be disallowed.—*Re* FANE, *Ex p.* HOPE, [1888] W. N. 231, C. A.

Annotation:—**Mentd.** *Re* London, Windsor & Greenwich Hotels Co., Quartermaine's Case, [1892] 1 Ch. 639.

3495. —— —— **Sale of security deferred.**]—Where there has been an order made for the sale of mortgaged property, & the sale is afterwards deferred, the mtgee. is entitled to apply the rents & profits in reduction of the interest accruing subsequent to the order of sale & up to the time of taking the account.—*Re* PENFOLD, *Ex p* RAMSBOTTOM (1835), 4 Deac. & Ch. 198; 2 Mont. & A. 79; 4 L. J. Bcy. 33, Ct. of R.

Annotations:—**Consd.** *Re* Barker, *Ex p.* Penfold (1851), 4 De G. & Sm. 282; *Re* Lightfoot (1851), 18 L. T. O. S. 54; *Re* London, Windsor & Greenwich Hotels Co., Quartermaine's Case, [1892] 1 Ch. 639. **Reid.** *Re* Lancaster, *Ex p.* Kensington (1835), 1 Deac. 58. **Mentd.** *Re* Savin (1872), 7 Ch. App. 760, L. JJ.

3496. —— —— —— **At request of bankrupt assignees.**]—Factors held goods of bkpt., on which they had a lien in respect of advances. They had deferred the sale at the request of bkpt. before the bkpcy., & of the assignees afterwards, in the expectation of a rising market:—*Held:* they were entitled to apply the proceeds in payment of interest accruing after the bkpcy., & to prove for the balance of the principal, without deduction in respect of the interest so received.—*Re* LANCASTER, *Ex p.* KENSINGTON (1835), 1 Deac. 58; 2 Mont. & A. 300; 5 L. J. Bcy. 4, Ct. of R.

Annotation:—**Distd.** *Re* Savin (1872), 7 Ch. App. 761, n.

3497. —— **Interest to date of receiving order.**]—A secured creditor cannot increase the amount of his proof by applying the proceeds of the realisation of his security to the payment of interest on his debt, accruing after the date of the receiving order.—*Re* BONACINO, *Ex p.* DISCOUNT BANKING CO. (1894), 1 Mans. 59; 10 R. 147.

3498. —— **Interest to date of deed of inspectorship.**]—A debtor executed a deed of inspectorship under 1861 Act, & under Liquidation Act, 1868 (c. 68), a scheme was settled, under which the ct. ascertained the value of the securities held by the secured creditors, which value was to be taken by those creditors in part discharge of their debts, & they were to be at liberty to prove for the deficiency:—*Held:* the value must be taken as a discharge *pro tanto* of the principal & interest due at the date of the deed, & not in discharge of any subsequent interest, so that the balance only of such principal & interest due at the date of the deed could be proved under the deed.—*Re* SAVIN (1872), 7 Ch. App. 760; 42 L. J. Bcy. 14; 27 L. T. 466; 20 W. R. 1027, L. JJ.

Annotations:—**Folld.** *Re* London, Windsor & Greenwich Hotels Co., Quartermaine's Case, [1892] 1 Ch. 639. **Consd.** *Re* Pearce, [1909] 2 Ch. 492, C. A. **Mentd.** *Re* Hofmann, *Ex p.* Carr (1879), 11 Ch. D. 62, C. A.; *Re* Browne & Wingrove, *Ex p.* Ador, [1891] 2 Q. B. 574, C. A.

3499. —— **Interest at higher rate than five per cent.**]—For the purposes of dividend a proof was tendered against debtors' estate for a debt due, plus interest at a higher rate than the 5 per cent. limited by 1890 Act, s. 23, credit being given for the assessed value of a security. The creditors allocated a sufficient part of the assessed value of the security to the amount of interest in question, & claimed to prove for the whole unpaid balance, less only the balance of the assessed value of the security after satisfying the claim for interest:—*Held:* they were entitled to do so, as s. 23 had not altered the rights of secured creditors.—*Re* FOX & JACOBS, *Ex p.* DISCOUNT BANKING CO. OF ENGLAND & WALES, [1894] 1 Q. B. 438; 63 L. J. Q. B. 191; 69 L. T. 657; 42 W. R. 351; 10 Morr. 295; 10 R. 70.

C. Security not held by Creditor proving—The Rule in Waring's Case.

See Part XX., Sect. 5, sub-sect. 3, D., *post.*

D. Other Cases.

3500. Security realising more than estimated value—Policy of insurance becoming payable—No intention of redeeming.]—P., being indebted to

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PART IX. SECT. 4, SUB-SECT. 5.—D.

3500 i. *Security realising more than estimated value—Costs of mortgagee.*]—A. bank holding title-deeds of a bkpt. deposited with them as security filed a charge on foot of their security, & before same was heard, filed a proof of debt, & therein valued their security. On the hearing of the charge, an order was made declaring the amount of the valuation well charged upon the proceeds of the sale of the lands, & also declaring the bank entitled to their costs. The lands were sold for more than the valuation:—*Held:* the bank were entitled to be paid their costs out of the surplus proceeds of the sale remaining after the payment of the amount at which they had valued their security.—*Re* LOVE (1882), 9 L. R. Ir. 6.—**IR.**

3500 ii. —— *Surplus applicable to deficiency on security held for separate debt.*]—Where a creditor has different securities for the same debt, & in his proof values them separately, & there is an excess realised upon one security, & a deficiency upon the other, the official assignee is only entitled to the excess, if any, in the aggregate sum realised over the aggregate valuation.—*Re* BAYLDON, *Ex p.* BANK OF AUSTRALASIA (1875), 1 V. L. R. 10.—**AUS.**

3500 iii. —— *Whether surplus applicable to subsequent unsecured advance.*]—A. assigned to B., in security for a debt of £500, a policy of insurance on his own life for £1,000 with power, in case of his death, & the debt being then unpaid, to uplift & recover the contents, but taking B. bound to hold count & reckoning for whatever sums he might recover under the policy, &

Sect. 4.—Proof by secured creditors: Sub-sect. 5, D.; sub-sect. 6, A.]

K., gave him a policy of insurance on his own life as security. K. estimated the value of his security at £200, & proved for the balance of his debt. The trustee was satisfied with the value put upon the security, & he did not offer to redeem, & it was admitted that he had no intention of doing so. K. intended to retain the policy, & continue to pay the premiums. Before any premium was paid P. died:—*Held:* the balance of the fund, after deducting the estimated value of the security, must be paid to the trustee.—*Re* PALETHORPE, *Ex p.* KING (1875), L. R. 20 Eq. 273; 44 L. J. Bcy. 92; 32 L. T. 505; 23 W. R. 681.

Annotations:—**Consd.** *Re* Ker, *Ex p.* Bagshaw (1879), 13 Ch. D. 304, C. A.; Bolton *v.* Ferro (1880), 42 L. T. 529; Rainbow *v.* Juggins (1880), 5 Q. B. D. 138.

See, now, 1914 Act, Sched. II., rr. 13, 18.

3501. —— Debtor entitled to surplus—Composition agreement.]—The effect of 1870 Rules, r. 272, read together with 1869 Act, s. 126, is that in composition proceedings under s. 126 a secured creditor, who proves for the balance of his debt after deducting the assessed value of his security, & afterwards realises the security, must pay to debtor any surplus realised above the assessed value, after allowing interest upon the assessed value from the assessment until the realisation.—SOCIÉTÉ GÉNÉRALE DE PARIS *v.* GEEN (1883), 8 App. Cas. 606; 53 L. J. Ch. 153; 49 L. T. 750; 32 W. R. 97, H. L.

Annotation:—**Mentd.** Pearce *v.* Bullard, King, [1908] 1 Ch. 780.

See, also, No. 3943, *ante, &, generally,* Part XIII., Sect. 9, *post.*

3502. Costs of defending extent in aid.]—An equitable mtgee. will not be allowed out of the proceeds of sale the costs of defending an extent in aid.—*Re* STEPHENS, *Ex p.* STEPHENS (1834), 2 Mont. & A. 31.

Annotation:—**Dbtd.** *Re* Hofmann, *Ex p.* Carr (1879), 11 Ch. D. 62, C. A.

3503. Towards costs of application for leave to bid.]—The costs of an application of a mtgee., for leave to bid at the sale, will not be allowed out of the proceeds, unless the assignees consent.—*Ex p.* —— (1843), 3 Mont. D. & De G. 339.

See 1914 Act, Sched. II., r. 13, 1915 Rules, rr. 75–79.

3504. Towards cost of defending action brought against creditor—Not towards costs of appeal in such action.]—*Re* HOFMANN, *Ex p.* CARR, No. 3422, *ante.*

3505. In repayment of composition paid to other creditors by secured creditors.] — Bkpt. having mortgaged two fishing boats to some fish-salesmen to secure his current account with them, & having subsequently failed in his business, the mtgees. offered to pay his creditors a composition, which nearly all the creditors agreed to accept, &, after having notice that debtor had committed an act of bkpcy., they paid the composition in good faith to the assenting creditors, believing that they were entitled under their mtge. to add the money so paid to their security. They then sold the fishing boats, & claimed to retain the balance of the proceeds of sale, after paying themselves the amount due on their mtge. at the date of the act of bkpcy., on account of the composition paid to the creditors. The official receiver applied that the balance might be paid over to him:—*Held:* the mere fact that the mtgees. were not familiar with the working of the bkpcy. law was not a ground for precluding the official receiver from insisting on his right to treat the balance as part of debtor's estate, & the money ought to be paid over to him.—*Re* HALL, *Ex p.* OFFICIAL RECEIVER, [1907] 1 K. B. 875; 76 L. J. K. B. 546; 97 L. T. 33; 23 T. L. R. 327; 51 Sol. Jo. 292; 14 Mans. 82, C. A.

Annotations:—**Refd.** *Re* Phillips, [1914] 2 K. B. 689. **Mentd.** Tapster *v.* Ward (1909), 101 L. T. 503, C. A.

3506. Towards repayment of insurance premiums advanced.]—P. was adjudicated bkpt. K. & Co., who had various debts & various securities, sent in their proof as secured creditors, lumping together their debts & securities & claiming to prove for the balance. The securities consisted of (1) a vendor's lien on ship shares, & (2) a mtge.

to impute same in extinction of the debt, & on payment of the debt to retrocess A. or his exors., & to pay any balance of the funds recovered. A. subsequently granted bond to B. for another debt, of £700, but the bond bore no reference to the former transaction, or to the policy of insurance, & it was not alleged by B. that the second advance was made on the faith of the previous assignation. A. died, & the balance due under the policy, after payment to B. of the £500 debt, was consigned under reservation of all claims. In a competition between B. & the trustee on A.'s estate, which was sequestrated:—*Held:* B.'s title to the policy was limited to a security of the £500 debt, & he had no right to retain it, or the balance of the contents, in security or extinction of the subsequent debt.—NATIONAL BANK OF SCOTLAND *v.* FORBES (1858), 21 Dunl. (Ct. of Sess.) 79; *sub nom.* FORBES *v.* ROBB, NATIONAL BANK OF SCOTLAND *v.* FORBES, 31 Sc. Jur. 50.—**SCOT.**

3500 iv. —— *Right to surplus.*]—The official assignee, after a secured creditor, who had valued his security & proved for the balance, had received a dividend on his claim, claimed an assignment of the security at the creditor's valuation. The creditor claimed to revalue. The property comprised in the security was subsequently sold by consent:—*Held:* the official assignee was not entitled to the difference between the valuation & the principal sum.—HUMPHREY *v.* LOBB (1875), 13 N. S. W. S. C. R. 1.—**AUS.**

s. *Towards general costs of administration.*]—Appcts., secured creditors, in proving upon an insolvent estate valued their securities at the full amount of their claim, "without prejudice to such valuation being afterwards corrected & without prejudice to the amount of the said debt in other respects." The trustees in their distribution account awarded appcts. on their proof of debt a less sum, leaving a deficiency, & contended that as appcts. had become concurrent creditors for the amount of this deficiency they were liable as contributories upon a contribution account for the costs of the administration of the estate:—*Held:* the trustees were not entitled to place appcts. upon the list of contributories.—AFRICAN MUTUAL TRUST & ASSURANCE CO., LTD. *v.* RAUBENHEIMER'S TRUSTEES (1912), C. P. D. 439.—**S. AF.**

t. ——.]—After sequestration of a debtor's estate his trustee took possession of certain assets pledged to G. subject to G.'s rights. G. was prepared to take over the pledged assets in satisfaction of the debt. G. thereafter proved against the insolvent estate for the amount of his debt in respect of the goods handed over to the trustee & offered to pay the costs of realisation:—*Held:* G. was only liable to pay those costs & the trustee was not entitled to frame a contribution account against him.—GOLD *v.* LIPMAN'S TRUSTEE (1914), T. P. D. 639.—**S. AF.**

u. ——.]—A bondholder is entitled to the proceeds of property specially mortgaged after all costs in realising same have been paid. When the trustee had deducted costs & charges connected with the sequestration & ordinary administration from the amount realised by the sale of the mortgaged property, the ct. ordered his account to be amended accordingly.—ROSENBLATT & DE BEER *v.* JONES' TRUSTEE (1907), 10 H. C. 109.—**S. AF.**

a. —— *When secured creditor proves for balance of debt.*]—Where a trustee had awarded to a bondholder the amount of the proceeds of the property specially mortgaged & he had proved under the general clause for the balance still due to him, he was liable under such proof for a proportionate share of the general costs of sequestration.—SLATER'S TRUSTEE *v.* SMITH & CO. (1886), 4 S. C. 135.—**S. AF.**

3506 i. *Towards repayment of insurance premiums advanced.*]—A mtgee., after sequestration of mtgor.'s estate, gave notice to the trustee that a premium was payable on the insurance policy of the mortgaged premises. The trustee in reply told the creditor that his proper course was to pay the premium & claim against the estate by ordinary proof of debt. The creditor paid the amount & claimed it as part of the costs of administration paid by him on behalf of the estate:—*Held:* the mtgee. was entitled to the repayment of the premium by the trustee.—WHALES' TRUSTEE *v.* EARLY (1909), 3 Buch. A. C. 474.—**S. AF.**

of policies, a debt, & freeholds. The trustee asked for details of value, & (1) was assessed at £1,325, & the property in (2) at £2,481, making in the aggregate £3,806. The trustee did not object to the proof being made for a lump sum, nor did he require the separate values of the securities to be assessed in the proof, but he admitted the proof to rank for the amount claimed less the aggregate assessed value of the securities. Subsequently a scheme for a composition was approved, & on payment of the composition the bkpcy. was annulled & the outstanding estate of P. was ordered to revest in him. A subsequent incumbrancer on the freeholds included in mtge. (2) having claimed to redeem:—*Held:* K. & Co. were entitled to be repaid all premiums paid by them on the life policies from the date of the receiving order with interest from the same date.—*Re* PEARCE, [1909] 2 Ch. 492; 78 L. J. Ch. 784; 101 L. T. 300; 16 Mans. 265, C. A.

See, further, Nos. 3548, 3549, *post*.

SUB-SECT. 6.—DEDUCTION OF SECURITY—AMOUNT OF PROOF.

A. Security by way of Charge over Property of which Bankrupt not sole beneficial Owner.

3507. Security not over sole property of bankrupt—Proof for full amount of debt—Without deduction of security.]—The deduction of a security is never made in bkpcy. except when it is the property of bkpt.—*Re* LEIGH & ARMSTRONG, *Ex p.* PARR (1811), 18 Ves. 65; 1 Rose, 76; 34 E. R. 242, L. C.

Annotation:—**Mentd.** *Re* Deane, *Ex p.* Goldsmid (1857), 1 De G. & J. 257, L. JJ.

3508. —— —— ——.]—Bkpt., previous to the commission against him, procured persons to assign an interest in copyhold premises as security to a creditor of his:—*Held:* the creditor might prove under the commission, without delivering up such security.—*Re* GOODMAN, *Ex p.* GOODMAN (1818), 3 Madd. 373; 56 E. R. 542.

Annotation:—**Mentd.** *Re* Plummer & Wilson, *Ex p.* Shepherd (1841), 2 Mont. D. & De G. 204, L. C.

3509. —— —— ——.]—Partners executed a mtge. on their joint property to secure money due & further advances, & by the mtge. deed they jointly & severally covenanted to repay the amount due. On their bkpcy.:—*Held:* (1) a creditor, who had a security on bkpt.'s estate was not entitled to prove, without selling or giving up his security; (2) if the security was on the estate of a third person, he might prove his whole debt against the estate of bkpt., & apply himself to his security for the deficiency, not receiving more than 20*s.* in the pound; (3) the mtgee. was entitled to prove against the separate estate of each of bkpts.—*Re* PLUMMER & WILSON, *Ex p.* SHEPHERD (1841), 2 Mont. D. & De G. 204; 1 Ph. 56; 11 L. J. Ch. 25; 5 Jur. 1147; 41 E. R. 552, L. C.

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b. *Towards costs of pending foreclosure proceedings.*]—A mtgee., after notice from the assignee in bkpcy. of the mtgor. requiring him to sell the mortgaged premises, prosecuted his foreclosure action:—*Held:* he was entitled to the costs of the suit, the notice from the assignee not having offered to pay him the costs incurred up to the time of its service on him.—BERNARD *v.* SADLIER (1841), 4 I. Eq. R. 61.—**IR.**

c. *Towards payment of rent & rates—Due in respect of mortgaged premises.*]—On a sale of mortgaged property under an order of the ct. it was agreed that the net proceeds of the sale should be distributed under the order of the ct.; the conditions of sale provided that the rent & other outgoings should be paid up to the last gale day preceding the sale:—*Held:* the amount of rent due up to the last gale day, & municipal & non-municipal rates, were proper debits against the proceeds of the sale, & should not be charged against the general estate of bkpt.—*Re* GREENE, [1900] 2 I. R. 433; 33 I. L. T. 165.—**IR.**

d. —— ——.]—Where the thing pledged was a lease, & the pledgee had paid the rents accruing due & municipal rates:—*Held:* these were necessary expenses incurred by him in the preservation of the lease, for which he was entitled to a preference on the pledgor's insolvency.—SMITH *v.* FARRELLY'S TRUSTEE (1904), T. S. 949.—**S. AF.**

e. *Not towards costs of repairs.*]—The expense of repairs to mortgaged property belonging to an insolvent estate must be borne by the mtgees. who authorise the repairs. It is no answer to show that the property was enhanced by the repairs to the full value of the money spent.—LOUW & DUMMER *v.* FAGAN (1914), C. P. D. 630; W. R. 506.—**S. AF.**

f. —— *Or loss in carrying on business.*]—Where the trustees, without obtaining the necessary authority, incurred expenditure in refurnishing, improving & renovating hotel premises & loss in carrying on the business:—*Held:* their action in deducting the amount of such loss from the proceeds of the sale of the property would be an interference with the rights of the second mtgees., & their account should be amended by striking out such deduction.—ROSENBLATT & DE BEER *v.* JONES' TRUSTEE (1907), 10 H. C. 109.—**S. AF.**

g. *Towards debts incurred by subsequent trading with creditor.*]—C. held a policy of insurance on the life of M. as security for his debt. M. presenting a petition of arrangement, C. valued his securities, including the policy valued at £90, & proved for the balance. M.'s proposal to pay instalments was accepted & confirmed, but he made default in payment of the third instalment, & thereupon presented a second petition for arrangement, & proposed a composition in cash. The proposal was accepted & confirmed. C. filed a proof expressly including the amount of the first proof, & crediting the composition instalments paid, the balance being the price of goods supplied since the first arrangement. With his proof, he filed a release or waiver, by which it was agreed that he should make no claim for the composition payable in respect of his debt, but that it should be taken on M.'s application for a certificate that the resolution had been carried into effect as regards C. M. carried out his proposal as to the other creditors, obtained his certificate, & subsequently paid C. the composition on the amount of his proof. After M.'s death his administratrix offered C. the £90. C. had continued to trade with & give credit to M., who had become indebted to C. on the new account, & C. claimed to hold the policy as security, not only for the £90, but also for the entire unpaid balance of the old debt, & for the amount due on the new account, alleging an agreement with M. to that effect:—*Held:* on the evidence as to the old debt, C. had not established the existence of the alleged agreement, but he was entitled to hold the policy as security for the amount due on the new trading account, in addition to the £90.—MAHALM *v.* M'CULLAGH & SCOTTISH AMICABLE LIFE ASSURANCE SOCIETY (1891), 27 L. R. Ir. 431; 29 L. R. Ir. 496.—**IR.**

PART IX. SECT. 4, SUB-SECT. 6.—A.

3507 i. *Security not over sole property of bankrupt—Proof for full amount of debt—Without deduction of security.*]—The only security which a creditor seeking to make his debtor insolvent is obliged to offer to give up or value is a security held by him over that debtor's estate.—*Re* STEVENSON (1893), 19 V. L. R. 660.—**AUS.**

k. *Security over property of third person—Proof for full amount of debt—Without deduction of security.*]—A creditor can prove against a bkpt. estate for the whole amount of his debt, without deducting the value of a security held by him over the property of a third person, provided he does not receive in all more than the full amount of his debt.—*Re* WOOD, *Ex p.* BANK OF NEW ZEALAND (1882), 1 N. Z. L. R. 161.—**N.Z.**

l. —— *Creditor need not value security—If he does, may prove for balance.*]—A creditor proving his claim in an insolvent estate is not bound to mention or to value any security held by him against third parties, but may do so & prove against the insolvent estate for the balance.—KURANDA *v.* MASTER OF SUPREME COURT (1917), T. P. D. 300.—**S. AF.**

m. —— *Third party primarily liable—Creditor must value security.*]—Under Assignments Act, R. S. O., 1897, c. 147, s. 20, if, as between debtor & the third party, the latter is primarily liable, & debtor only secondarily liable, the creditor must put a specified value upon his security. The substance not the form of the transaction is to be looked at to ascertain whether the third party is primarily liable; & if it be found that he is, debtor is then only secondarily liable.—GLANVILLE *v.* STRACHAN (1898), 29 O. R. 373.—**CAN.**

Sect. 4.—Proof by secured creditors: Sub-sect. 6, A. & B.]

Annotations :—**Consd.** Rolfe & Bank of Australasia *v.* Flower, Salting (1866), L. R. 1 P. C. 27. **Apld.** *Re* Turner, *Ex p.* West Riding Union Banking Co. (1881), 19 Ch. D. 105, C. A. **Consd.** *Re* Hart, *Ex p.* Caldicott (1884), 25 Ch. D. 716, C. A. **Mentd.** *Re* Jobson, *Ex p.* Thornton (1858), 3 De G. & J. 454, L. JJ.; Midland Banking Co. *v.* Chambers (1868), L. R. 7 Eq. 179.

3510. —— —— —— Wife's estate.] — Bkpt. & his wife executed a power of appointment of the wife's estate to a creditor, as a security for a debt due from bkpt. :—*Held :* the creditor might prove for the whole debt, without giving up the security, it being incumbent on him to recover what he could from bkpt.'s estate, before he resorted to the property of the wife.—*Re* HICKLIN, *Ex p.* HEDDERLY (1842), 2 Mont. D. & De G. 487, Ct. of R.

3511. —— —— —— Joint adventure.] — A. & Co., Glasgow merchants, agreed with B. & Co., London merchants, to enter into a joint adventure for the purchase of cotton in America, with a view to realise a profit by importing cotton into England & disposing of it in the Liverpool market. To raise a fund for the purchase of the cotton, B. & Co., with the privity of A. & Co., applied to C. & Co., to ascertain the terms on which C. & Co. would grant a credit on their agent in New York. The terms being satisfactory, a credit was given to B. & Co. by C. & Co. on their New York agent to the amount of £20,000, & A. & Co. executed jointly with B. & Co. a guarantee to secure to C. & Co. the repayment of that amount by bills of exchange, which, according to the terms of the guarantee, were drawn by B., & accepted by B. & Co. in favour of C. & Co. Cotton was purchased to the value of £20,000, & about the time that the shipment arrived in the port of Liverpool, A. & Co., having reason to suspect the solvency of B. & Co., & fearing eventually to become solely liable for the amount of the guaranteed acceptances, persuaded B. & Co. to consent that the bales of cotton, when landed, should be handed over to E. & Co., of Liverpool, to be by them sold, & the proceeds specifically applied in payment of the bills when they fell due. In conformity with such arrangement, E. & Co. received the cotton, but before any proceeds were available to meet the acceptances, B. & Co. became bkpt. C. & Co. applied, that the comrs. of B. & Co.'s bkpcy. might be ordered to admit C. & Co. to prove the amount of the bills of exchange against the estate of B. & Co., the acceptors, without prejudice to C. & Co.'s lien on the cotton in the custody of E. & Co. :—*Held :* the comrs. ought to admit the proof without deduction.—*Re* BENTLEY, *Ex p.* WILSON (1838), 2 Jur. 67, Ct. of R.

3512. —— —— —— ——.]—A firm in Charleston applied to a firm in Liverpool to raise the necessary funds for the purchase of cotton in America for sale in England, at the risk of certain speculators for whom they acted, & the Liverpool firm applied to an English bank for an advance for that purpose. An arrangement was made, under which the Charleston firm drew upon an American branch of the bank for the amount required, purchased the cotton, consigned it to the Liverpool firm, drew bills upon that firm, & indorsed them to the bank. At the same time the cotton was consigned to the Liverpool firm, who accepted the bills drawn upon them by the Charleston firm, & the bills of lading were indorsed by the Charleston firm to the bank as security for their advance. Afterwards the Liverpool & Charleston firms became insolvent. The value of the cotton was insufficient to cover the acceptances of the Liverpool firm :—*Held :* the transaction was a joint adventure of the Charleston & Liverpool firms, & they were jointly interested in the cotton, & the bank could prove against the estate of the Liverpool firm for the sum advanced without giving up their security.—*Re* FRASER, TRENHOLM & Co., *Ex p.* ENGLISH & AMERICAN BANK (1868), 4 Ch. App. 49 ; *sub nom. Re* PRIOLEAU, *Ex p.* ENGLISH & AMERICAN BANK, 19 L. T. 302, L. JJ.

Annotation :—**Mentd.** *Re* Turner, *Ex p.* West Riding Union Banking Co. (1881), 19 Ch. D. 105, C. A.

—— —— —— Separate security for joint debt.]—*See* Part XI., Sect. 6, *post.*

—— —— —— Joint security for separate debt.]—*See* Part XI., Sect. 6, *post.*

3513. —— —— —— Security unauthorised investment.]—A partner in a bank drew out part of a balance standing to the account of trustees of a will, under which he was interested, without the authority of the trustees, & invested it upon a mtge., which was an unauthorised security. On the bkpcy. of the bankers :—*Held :* the *cestuis que trust* were entitled to prove for the whole of the balance, without giving up the mtge.—*Re* BIDDULPH, *Ex p.* BIDDULPH, *Ex p.* BARNEWALL (1849), 3 De G. & Sm. 587 ; 64 E. R. 618.

See 1914 Act, Sched. II., rr. 10–18.

3514. —— —— Subject to deduction in certain events.] — At the hearing of a suit instituted by the wife of bkpt. for redemption of a mtge. executed by the husband & wife of the wife's real estate, the assignees of bkpt., who were co-defts. with the mtgee., disclaimed their right to redeem, & a decree was made giving the first equity of redemption to the wife. After such decree, the comr. in bkpcy. having allowed the mtgee. to prove against the estate of bkpt. for the full amount of his principal & interest :—*Held :* the disclaimer of the assignees operated only in acceleration of the wife's right to redeem, but if she did not exercise the right, then, the purpose for which the disclaimer was given having ceased to exist, the assignees' equity of redemption would continue as before, & the mtgee. could only be admitted to prove, subject to the condition that in the event of the bill being dismissed as against him, the interest of bkpt. in the mortgaged premises should be sold, & proof admitted for the residue of the mtge. debt, after deducting the proceeds, or, in the event of redemption by the wife, the proof should be admitted subject to same being expunged, or remaining wholly or partially for the benefit of the person paying the mtge. debt. —*Re* GLEAVES, *Ex p.* PAINE (1863), 3 De G. J. & Sm. 458 ; 32 L. J. Bcy. 65 ; 8 L. T. 190 ; 9 Jur. N. S. 701 ; 11 W. R. 553 ; 46 E. R. 712, L. C.

3515. Security over property alleged to belong to bankrupt's wife—Subsequently proved to belong to bankrupt—Proof for balance—After deducting proceeds of sale of security.]—Bkpt. obtained a further advance from a creditor on his wife mortgaging property, which bkpt. represented as belonging to her separate estate. Bkpt. joined in the mtge. After the bkpcy. the trustee obtained a declaration that the mortgaged property formed part of bkpt.'s estate, & that his wife was his nominee. The creditor, who had sold the property under the powers in the mtge., sought to prove the full amount of his debt, on the ground that the trustee was estopped from denying that the mortgaged property was the separate property of the wife :—*Held :* there was no estoppel against the trustee, & proof could only be made for the balance due, after giving credit for the amount

realised by the sale.—*Re* COOKSEY, *Ex p.* PORTAL & Co. (1900), 83 L. T. 435.

3516. Security over property devolving on bankrupt—Bankrupt taking no beneficial interest—Proof for full amount—Without deduction of security.]—A father & son made a joint & several bond to creditors, & the father made an equitable mtge. of part of his real estate as further security. The estate so mortgaged descended to the son, but subject to the father's debts which exceeded his assets. The son afterwards became bkpt.:—*Held:* *primâ facie* the creditor could not prove his whole demand without deducting the value of the mtge. security, but as no beneficial interest in the property descended to the son, the case was an exception to the general rule, & the fact that the debts which exhausted the father's assets were debts due from a partnership, which existed between the father & son, & were provable in the bkpcy., did not in the special circumstances of the case restore the general rule.—*Re* TAYLOR, *Ex p.* TURNEY (1844), 3 Mont. D. & De G. 576; 2 L. T. O. S. 476, Ct. of R.

B. Security by way of Deposit of Bills of Exchange and Promissory Notes.

3517. General rule.]—The rule, that a creditor seeking to prove in bkpcy. must give up or deduct the value of the securities he holds from the amount of his proof, holds good in the case of bills of exchange & promissory notes deposited as a security only, & not by way of actual transfer.—*Re* EARLY & SMITH, *Ex p.* EARLY'S EXECUTORS (1866), 14 L. T. 296.

3518. ——.]—A secured creditor, who holds bills of exchange as collateral security, must set them out in his proof.—*Re* RUTHEN, *Ex p.* KIDD (1898), 5 Mans. 227.

As to whether bill deposited as security or otherwise.]—*See* Nos. 3371 *et seq.*, *ante*, No. 3526, *post.*

3519. Proof for balance remaining due—After sale of bill.]—A. & B., indebted to C. for goods sold, delivered to C. two bills of exchange in part payment of such debt, but they did not indorse the bills, nor did their names in any manner appear thereon. A. & B. became bkpts. before the bills became due, & all the parties on the bills became insolvent:—*Held:* the bills must be sold, & C. should receive the produce & prove the residue of his debt under the commission against A. & B.—*Re* LEWIS & POTTER, *Ex p.* SMITH (1789), 2 Cox, Eq. Cas. 209; 1 Cooke's Bankrupt Laws, 7th ed. p. 139; 30 E. R. 97, L. C.

Annotation:—**Refd.** *Re* Elder, *Ex p.* Alexander (1832), 1 L. J. Bcy. 90, Ct. of R.

3520. —— **After collecting as much as possible from bankrupt parties thereto.**]—A. having purchased goods of B., gave him an order on C., A.'s banker, to pay to B. a bill to the amount of the goods. C. accordingly gave to B. a draft on D., in London, payable three months after date to the order of B., which was accepted before the bill became due. A., C., & D. became bkpt.:—*Held:* B. must be considered as holding the bill as a pledge, which he must make available as far as he could against the estates of C. & D., & prove the deficiency against the estate of A.—*Ex p.* DICKSON (1789), 2 Cox, Eq. Cas. 194; 30 E. R. 90, L. C.

Annotation:—**Consd.** *Ex p.* Blackburne 1804), 10 Ves. 204, L. C.

3521. —— **After deducting value of bill.**]—Bkpt. being indebted to his bankers, some time before his bkpcy. lodged a promissory note indorsed by him with a third person, who deposited it with the bank as security for the debt due to them from bkpt. The note had not arrived at maturity when the bkpcy. occurred:—*Held:* the bankers were not entitled to prove for the full amount of their debt without giving up the note, but only for the difference between the amount secured by the note or the agreed value of the note & the amount of their debt.—*Re* SAMPSON & BARNARD, *Ex p.* GLOUCESTERSHIRE BANKING CO. (1861), 5 L. T. 216.

3522. —— —— **Bills merely deposited for collection.**]—C., a bkpt., previous to his bkpcy., agreed to deposit with L. bills at long dates, which bills L. was to receive when due, or otherwise dispose of in the course of business, in consideration whereof L. undertook to accept & pay C.'s bills at three months, charging him with interest on advances, etc., the surplus, if any, to remain to C.'s account:—*Held:* in the circumstances a deposit was not intended, & L. was entitled to prove for the whole amount of his debt, treating the bills as securities.—*Ex p.* TWOGOOD (1812), 19 Ves. 229; 34 E. R. 503, L. C.

Annotation:—**Consd.** *Re* Frith, *Ex p.* Schofield (1879), 48 L. J. Bcy. 122, C. A.

3523. Sum received on account of bill from party other than bankrupt—Before proof—Proof for balance.]—Goods were sold, to be paid for by bill at three months. The drawers & acceptors having become bkpt., before the bills were due:—*Held:* the vendors, who had received dividends under their commissions, were entitled to prove under a commission against the vendees, who had not indorsed the bills, the deficiency, as a debt; till that should be ascertained, a claim & dividends should be reserved for the whole.—*Ex p.* BLACKBURNE (1804), 10 Ves. 204; 32 E. R. 823, L. C.

Annotations:—**Follds.** *Re* Browne, *Ex p.* Rathbone (1818), Buck, 215. **Consd.** Rose *v.* Edwards (1836), 1 M. & W. 734. **Mentd.** Nicholl *v.* Thomas (1850), 2 Rob. Eccl. 157.

3524. —— —— ——.]—Where a bill is given as a security for a debt, the party has a right to prove his debt after deducting what he has received in respect of the bill.—*Re* BROWN, *Ex p.* RATHBONE, *Ex p.* MYERS (1818), 3 Madd. 134; Buck, 215; 56 E. R. 459.

PART IX. SECT. 4, SUB-SECT. 6.—B.

3523 i. *Sum received on account of bill from party other than bankrupt—Before proof—Proof for balance.*]—A debtor agreed with the A. Bank for a line of credit to be secured by the discount of certain bills which he had himself discounted, & which he indorsed & delivered to the bank. He also arranged with the M. Bank to discount his own notes to be secured by the deposit of his customers' notes as collateral. He made an assignment for the benefit of his creditors, being largely indebted to both banks. The banks contended that they were only bound to give credit in their proofs on the amount of their claims for sums received on the collateral securities up to the date of the assignment:—*Held:* a creditor was entitled to prove for the whole amount of his debt, & to take a dividend upon the whole, without prejudice to his rights against such securities he might hold, subject to the qualification that he must not ultimately receive more than 20s. in the pound. The state of the accounts, at the time the claim was put in, was that which formed the basis of the dividend sheet, & the amount was to be fixed by the assignee, as at that date. Any money received prior to that from collaterals was to be credited: that received afterwards from such sources need not be taken into account, unless it, with the dividend, brought up the amount received by the creditor to 100 cents on the dollar.—EASTMAN *v.* BANK OF MONTREAL (1885), 10 O. R. 79.—**CAN.**

3523 ii. —— —— ——.]—A creditor who by way of security for his debt holds a portion of the assets of his debtor, consisting of goods & promissory notes indorsed over to him for the purpose of effecting a pledge of the securities, is not entitled to be collocated upon the estate of such debtor in liquidation under a voluntary assignment for the full amount of his claim, but is obliged to deduct any sum of money he may have received from other parties liable upon such notes or which he may have realised upon the goods.—BENNING *v.* THIBAUDEAU (1890), 20 S. C. R. 110.—**CAN.**

Sect. 4.—Proof by secured creditors: Sub-sect. 6, B., C. & D.]

3525. —— —— Proof for full amount of debt.]—If bills amounting to £1,320 be delivered by the drawer to a creditor as collateral security for a debt of £4,000, & the drawer & acceptor become bkpt., but the estate of the acceptor proves solvent, the creditor is entitled to receive 20*s.* in the pound on the bills against the estate of the acceptor, & also prove the debt of £4,000 & receive dividends in liquidation of the remaining portion of his debt under the commission against the drawer.—*Re* PEIRSON & SAMMON, *Ex p.* SAMMON (1832), 1 Deac. & Ch. 564, Ct. of R.

Annotations:—**Mentd.** *Re* Bentley, *Ex p.* Brunskill (1835), 4 L. J. Bcy. 48, Ct. of R.; *Re* Firth, *Ex p.* Schofield (1879), 12 Ch. D. 337, C. A.

See 1914 Act, Sched. II., r. 18.

3526. —— After proof—Proof expunged—New proof for net sum due after sale of unpaid bills.]—Bankers, having proved the whole of their debt, exhibiting bills deposited with them as securities, afterwards received the amount of several of the bills. The proof was expunged, & the bills, remaining unpaid, were ordered to be sold, & a new proof to be made, deducting all that was received on account of the bills, considering them as mere pledges.—*Ex p.* BALDWIN (1797), cited 19 Ves. at p. 230; 34 E. R. 504.

3527. —— —— Reduction of proof & dividends—Return of excess dividends.]—Where a creditor, holding bills of exchange, proves their amount as his debt, with a statement that he holds the bills as security, & any of the bills are subsequently paid by the other parties to them, the amount so paid must be deducted from the proof & the dividends, or if the dividends have been paid upon the whole of the proof without such deduction, the assignees are not thereby concluded, for the Lord Chancellor will order them to be refunded. It makes no difference whether the bills have been deposited without indorsement, or have been indorsed by bkpt. to the creditor.—*Re* MOULSON, *Ex p.* BURN (1814), 2 Rose, 55, L. C.

Annotations:—**Consd.** *Re* Peirson & Sammon, *Ex p.* Sammon (1832), 1 Deac. & Ch. 564, Ct. of R.; *Re* Beaumont & Holt, *Ex p.* Carr (1837), 2 Deac. 273. **Mentd.** *Re* Bentley, *Ex p.* Brunskill (1835), 4 Deac. & Ch. 442, Ct. of R.; *Re* Morris, James *v.* London & County Banking Co., [1899] 1 Ch. 485, C. A.

3528. —— Before dividend declared—Reduction of proof & dividends.]—Where a party holds bills of exchange, indorsed by bkpt. as collateral security for his debt, if one of them is paid before the dividend declared, the proof must be reduced by the amount of the bill paid, & he will receive dividends on the remainder of his debt.—*Re* BENTLEY, *Ex p.* BRUNSKILL (1835), 2 Mont. & A 220; 4 Deac. & Ch. 442; 4 L. J. Bcy. 48, Ct. of R.

Annotation:—**Mentd.** *Re* Morris, James *v.* London & County Banking Co., [1899] 1 Ch. 485, C. A.

3529. —— After dividend received—Reduction of proof—Return of dividend.]—Where a creditor has made a proof, having as a security for his debt a bill of exchange, which is afterwards paid in full, but not till after the creditor has received dividends on his whole debt, the assignees cannot call on the creditor to return the dividends on the amount of the bill, but can only insist on a reduction of the proof.—*Re* BEAUMONT & HOLT, *Ex p.* CARR (1837), 2 Deac. 273; 3 Mont. & A. 64, Ct. of R.

See 1914 Act, Sched. II., r. 18.

See, also, Nos. 3182, 3183, *ante.*

C. Security by way of Guarantee.

3530. Surety holding security from principal debtor—Proof by creditor for full amount without deduction.]—Y. applied to his father-in-law, A., for a loan of £3,000. A. requested his bankers to credit Y.'s account with £3,000, giving them a promissory note for the amount. On being pressed by the bankers to pay the amount due on the note, A. applied to his solr., B., to pay off the amount, which he did, taking a joint & several promissory note for the amount from A. & Y. At the time of the original advance by the bankers, Y. had given to A. a mtge. on a policy to secure to him the repayment of the sum for which he was liable to the bankers. On the bkpcy. of Y. a proof for £3,000 was tendered by B. on the promissory note. No proof was tendered by A.:—*Held:* B. was entitled to prove for the £3,000 without any deduction of the value of the policy, & the ct. had no power to make S. give up for the benefit of the estate the security which he held.—*Re* YEWDALL, *Ex p.* BARNFATHER (1877), 46 L. J. Bcy. 109; 36 L. T. 841; 25 W. R. 741, C. A.

3531. Limited continuing guarantee—Payment received from surety—Proof for full amount.]—Merchants procured accommodation from bankers on entering with sureties into a covenant to pay the floating balance due from time to time up to a certain limited amount, subject to a proviso that in the event of the merchants' bkpcy., & in the event of the amount due exceeding at that time the fixed limit, any dividends received under the bkpcy. should be applied exclusively in payment of the excess, without the sureties being entitled to any part of the dividends until the whole of such excess was paid. Some of the sureties took from one of the principal debtors a counter-security & indemnity in respect of their liability under the covenant, but without the bankers having notice of the transaction. The merchants became bkpt., being indebted to the bankers beyond the limit fixed by the deed, &

3529 i. —— *After dividend received—No reduction of dividend.*]—A bank held, as security, a bond & certain bills in favour of the insolvent; in their proof of debt values were placed upon these securities & deducted in the usual manner for voting purposes. From the amount for which the bank appeared as a creditor in the third distribution account, filed by the trustee, the trustee deducted the amount of certain of the bills paid to the bank since the filing of the second distribution account, & awarded the bank the dividend payable under the third account, on the balance only. The trustee also deducted the dividends paid under the first & second accounts respectively in regard to the sum so received by the bank on the bills:—*Held:* so long as the amounts recovered by the bank, plus dividend, left a balance of indebtedness the bank was justified in claiming the dividend as well as any payments from debtors up to 20*s.* in the pound.—BANK OF AFRICA, LTD. *v.* CAMROODEEN & CO. (1912), 33 N. L. R. 105.—S. AF.

PART IX. SECT. 4, SUB-SECT. 6. —C.

n. *Limited guarantee—Payment by surety before bankruptcy—Proof for balance.*]—A cautioner for M.'s account at a bank wishing to terminate his liability, paid to the bank the whole sum for which he was liable at that date. He had obtained the whole sum which he paid to the bank with the exception of £400 by realising property belonging to M. which had been assigned to him in security for the sums due under his guarantee. The bank placed the money received from the cautioner in a special account in name of its agent & treated the interest on it as extinguishing *pro tanto* the interest falling due to the bank on the principal debt. On M. becoming bkpt., the bank claimed on his estate for the full amount of his indebtedness to it without deducting the sums paid by the cautioner:—*Held:* the payment by the cautioner having been made before the bkpcy. of M. the bank was only entitled to rank on M.'s estate for the balance of the principal debt after deduction of that payment.—MACKINNON'S TRUSTEE *v.* BANK OF SCOTLAND, [1915] S. C. 411; 1 S. L. T. 182.—SCOT.

3531 i. —— *Payment received from surety.*]—A creditor is entitled to retain receipts from a co-surety with the trader, in addition to the amount of the composition on his debt, provided he does not receive more than 20*s.* in the pound.—*Re* SCANLAN (1869), 3 I. L. T. Jo. 663.—IR.

the bankers received dividends on the whole debt, & recovered the amount secured by the deed from the sureties, two of whom were reimbursed by means of their counter-security out of the separate estate of one of bkpts. :—*Held :* the bankers were entitled to retain the whole amount so received by them.—*Re* FERNANDES, *Ex p.* HOPE (1844), 3 Mont. D. & De G. 720 ; 8 Jur. 1128, Ct. of R.

Annotations :—**Folld.** Midland Banking Co. *v.* Chambers (1869), 4 Ch. App. 398, L. JJ. **Mentd.** *Re* Rees, *Ex p.* National Provincial Bank of England (1881), 17 Ch. D. 98, C. A.

3532. —— —— ——.]—A bank permitted a customer to overdraw his account upon having a guarantee from a surety to the extent of £300, which guarantee provided that all dividends, compositions, & payments received on account of the customer should be applied as payments in gross, & that the guarantee should apply to & secure any ultimate balance that should remain due to the bank. The customer gave the surety a mtge. on part of his estate by way of indemnity. The customer compounded with his creditors by a deed, which provided for the administration of the assets as in bkpcy. His banking account was overdrawn £410. The mtge. was realised, & the surety paid the bank the £300 secured by it : —*Held :* the bank was not restricted to proof for the balance of £110, but was entitled to receive dividends on the whole £410, not receiving in the whole, including the £300, more than 20*s.* in the pound.—MIDLAND BANKING CO. *v.* CHAMBERS (1869), 4 Ch. App. 398 ; 38 L. J. Ch. 478 ; 20 L. T. 346 ; 17 W. R. 598, L. JJ.

Annotations :—**Consd.** Gray *v.* Seckham (1872), 7 Ch. App. 680, L. JJ. **Apld.** *Re* Melton, Milk *v.* Towers, [1918] 1 Ch. 37, C. A.

3533. —— —— ——.]—A bank held the guarantee of B. for their debtor's account, which provided that "the guarantee should extend to the repayment of all moneys which should at any time be due from debtor to the bank, & should be a continuing guarantee to the extent of £800," & "that the guarantee should not be considered as wholly or partially satisfied by the payment or liquidation at any time or times thereafter of any sums for the time being due, but should extend to & be a security for every & all future sum or sums of money at any time due to the bank thereon, notwithstanding any such payment or liquidation," & "that all dividends, compositions, & payments should be taken or applied as payments in gross, & that the guarantee should apply to secure any ultimate balance due to the bank." Debtor having filed a petition for liquidation, B. paid £800, the amount of his guarantee, to the bank :—*Held :* B. having by the guarantee contracted himself out of his original right in favour of the bank, the latter were entitled to prove for the whole amount of their debt, including the £800 paid by B.—*Re* SELLERS, *Ex p.* MIDLAND BANKING CO. (1878), 38 L. T. 395.

3534 —— —— ——.]—A customer gave to his bankers, as a security for the balance which might from time to time be due from him to them, the joint & several bond for £1,000 of himself & a surety, the liability of the surety being expressly limited to £500. There was a proviso in the bond that any dividends received by the bankers in the bkpcy. of the customer should not, so far as concerned the surety, go in discharge of his liability, but the bankers should notwithstanding be entitled to recover on the bond against the surety to the full extent of £500, or so much thereof as should, together with the dividends, amount to 20*s.* in the pound on the debt due by the customer to the bankers. The customer filed a liquidation petition, & the bankers proved for the debt due to them. Afterwards the surety paid the bankers £500, & proved for £500 :—*Held :* the bankers were entitled to retain their proof for the full amount. —*Re* REES, *Ex p.* NATIONAL PROVINCIAL BANK OF ENGLAND (1881), 17 Ch. D. 98 ; 44 L. T. 325 ; 29 W. R. 796, C. A.

3535. —— —— ——.]—A surety guaranteed a bank the payment of all sums of money, which then were or might thereafter from time to time become due or owing to the bank from their customer, S., but nevertheless the total amount recoverable from the surety was not to exceed £300. The guarantee was to be a continuing security, & any dividends, which the bank might receive on the bkpcy. of S., were not to prejudice their right to recover from the surety to the full extent of the guarantee any sums which, after the receipt of such dividends, might remain owing to them by S. S. became bkpt., & the bank, after receiving the £300, from the surety, claimed to prove in the bkpcy. for the full amount due to them from S. The trustee in bkpcy. contended that the proof ought to be reduced by the amount the bank had received from the surety :—*Held :* the bank were entitled to prove for their whole debt without any deduction.—*Re* SASS, *Ex p.* NATIONAL PROVINCIAL BANK OF ENGLAND, LTD., [1896] 2 Q. B. 12 ; 65 L. J. Q. B. 481 ; 74 L. T. 383 ; 44 W. R. 588 ; 12 T. L. R. 333 ; 40 Sol. Jo. 686 ; 3 Mans. 125.

Annotation :—**Consd.** *Re* Melton, Milk *v.* Towers, [1918] 1 Ch. 37, C. A.

Guaranteed annuities.]—*See* Nos. 3546 *et seq.*, *post.*

D. Security for Composition before Bankruptcy supervening.

3536. Bond assigned as part security for composition—Proof for balance of original debt—Without deduction of bond.]—A creditor having agreed to accept a composition for his debt, took bills for the amount of the composition, & also had a bond assigned to him as part security for the composition. The composition deed contained a clause that on default in payment of instalments, the composition should fall to the ground. Default was made & subsequently a fiat issued :—*Held :* the creditor might prove the balance of the original debt remaining due, & also retain the bond.—*Re* CHAMPION, *Ex p.* REAY (1834), 2 Mont. & A. 33 ; 4 Deac. & Ch. 525, Ct. of R.

Annotation :—**Consd.** *Re* Chitty, *Ex p.* Ellis (1835), 4 Deac. & Ch. 736, Ct. of R.

3537. Bills & other securities deposited—Proof for deficiency.]—Where bills or other securities are deposited as a security for payment of a composition, & the depositor becomes bkpt., the depositee cannot prove for his original debt, unless he delivers up the securities ; but he may have the securities sold or valued, & applied in payment

o. *Guarantee for drafts—Proof after ranking under voluntary trust.*—Two persons having granted a letter of guarantee for drafts by a third party, & one of such persons having granted another letter of guarantee to commence at a date subsequent to the first : the party for whom the letters were granted having become insolvent : —*Held :* the mode of ranking under a voluntary trust did not, after a considerable lapse of time, prevent a legal adjustment of the respective rights of the creditors ; & accordingly, notwithstanding the mode of ranking which had taken place under the voluntary trust, the creditors under the letters of guarantee were entitled to draw a dividend from the insolvent's estate corresponding to the full amount due to them, & to claim the deficiency thence arising from the granters of the letters.—HOUSTON'S EXECUTORS *v.* SPIER'S TRUSTEES (1835), 31 Fac. Coll. 711.—**SCOT.**

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of the composition, & prove for any deficiency. —*Re* CHITTY, *Ex p.* ELLIS (1835), 4 Deac. & Ch. 736; 2 Mont. & A. 370; 4 L. J. Bcy. 77, Ct. of R.

3538. Instalments secured by guarantee—Proof for original debt—After deducting sums received from either debtor or surety.]—Where creditors agree to accept a composition payable in instalments, some of which are guaranteed by a surety, if default is made in the payment of any one instalment, the creditors have a right to sue debtor, or to prove in his bkpcy., for the balance of their original debts, after deducting what they have received, either from debtor or the surety, in respect of the composition, & not merely for the amount of the unpaid instalments of the composition.—*Re* BEDELL, *Ex p.* GILBEY (1878), 8 Ch. D. 248; 47 L. J. Bcy. 49; 38 L. T. 728; 26 W. R. 768, C. A.

Annotations:—**Mentd.** Hood *v.* Newby (1882), 21 Ch. D. 605, C. A.; *Re* Barnes, *Ex p.* Quilter (1882), 30 W. R. 739, C. A.; *Re* Barnes, *Ex p.* Tilleard (1882), 30 W. R. 568.

E. Security for Bills of Exchange or Promissory Notes proved on.

3539. Proof against acceptor—Deduction in respect of security from drawer.]—Bills drawn & accepted by the same persons, as constituting distinct firms. Proof allowed against the acceptor, without deducting the value of a security from the drawer.—*Re* LEIGH & ARMSTRONG, *Ex p.* PARR (1811), 1 Rose, 76; 18 Ves. 65; 34 E. R. 242, L. C.

Annotation:—**Mentd.** *Re* Deane, *Ex p.* Goldsmid (1857), 1 De G. & J. 257.

3540. —— For accommodation—Deduction of proceeds of security.]—F. sold goods to W., a part of the price being paid by two bills & the goods remaining in F.'s hands as security for their payment. The bills not being paid when due, W. sent F. two other bills drawn on J. for which no consideration was given to J., the acceptor. Before those bills fell due both W. & J. became bkpt., & F. sold the goods for not a third of the price at which W. had bought them. F. having proved for the deficiency under W.'s commission:—*Held:* he might also prove the amount of the two bills under J.'s commission, without deducting the proceeds arising from the sale of the goods. —*Re* WOOD, *Ex p.* FAIRLIE BONHAM & Co. (1833), 3 Deac. & Ch. 285, Ct. of R.

3541. —— Proof for balance of bills after deducting value of goods.]—H. accepted bills of exchange to meet goods consigned to him. The acceptances were made payable "on delivery of the bills of lading." The bills of lading remained, with the bills of exchange, in the possession of the bank who had discounted the latter for the drawers. H. became bkpt.:—*Held:* the goods which the bank held as security for their debt were part of the acceptor's estate, & the bank could only prove for the amount due on the bills of exchange after deducting the value of the goods.—*Re* HOWE, *Ex p.* BRETT (1871), 6 Ch. App. 838; 40 L. J. Bcy. 54; 25 L. T. 252; 19 W. R. 1101, L. JJ.

Annotation:—**Folld.** *Re* Baumann, *Ex p.* Oriental Bank Corpn. (1874), 30 L. T. 803, L. JJ.

3542. —— Proof for balance of bills after deducting proceeds of goods less broker's commission—Deduction of bare expenses of realisation from proceeds.]—A Bombay firm drew bills upon a London firm, who accepted them against certain consignments. The Bombay firm pledged the bills & shipping documents with a bank under a letter of hypothecation, to which the London firm was not a party. The Bombay & London firms both became bkpt. The bank thereupon sold the goods, & sought to prove against the estate of the London firm for the balance due after deducting the proceeds of sale, less ½ per cent. broker's commission & 2½ per cent. merchant's commission:—*Held:* the London firm was not bound by the terms of the letter of hypothecation, & the bank were in the position of mtgees. or pledgees of the goods, & were entitled only to deduct from the purchase-money the bare expense of realisation, viz., the broker's commission, & to prove for the balance of the bills after deducting the proceeds of the goods, less the broker's commission.—*Re* BAUMANN & Co., *Ex p.* ORIENTAL BANK CORPN. (1874), 30 L. T. 803, L. JJ.

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3538 i. *Instalments secured by guarantee —Proof for original debt after deducting sums received from debtor—Election to enforce composition.*]—A debtor carried an arrangement for a composition, the last instalment being secured by the promissory note of debtor & a surety. The last instalment not having been paid, a creditor sued the surety on the promissory note, & recovered judgment, but was unable to realise anything under it. Debtor having died, in an action to administer his estate the creditor sought to prove for the amount of his original debt, giving credit for the amount of the first two instalments:—*Held:* he had elected to enforce the composition, & could only prove for the amount of the unpaid promissory note.—*Re* ROE, MANTON *v.* MAGRATH (1893), 31 L. R. Ir. 106.—**IR.**

3538 ii. —— ——.]—A debtor offered a composition after bkpcy. payable in three instalments, the last instalment being secured. Debtor failed to pay the second instalment, & the bkpcy. was ordered to continue:—*Held:* creditors must either give up the bills for the composition & prove for the full amount of their debts less the instalment received, or hold the bills & stand outside the bkpcy.—*Re* LARMOUR & HUSBAND (1910), 44 I. L. T. 87.—**IR.**

3538 iii. —— *Proof for original debt after deducting sums received from surety.*]—Though the holders of composition bills enforce their rights against the sureties, they can prove in a subsequent bkpcy. for unpaid dividends, as well as for a deficiency in one. They are not limited to proof of the amount of the composition unpaid, but can prove for the full original debt, giving credit for payments. Proceedings against the sureties are not an election which would oust their proof.—*Re* NAIRN, CUTHBERT & Co., *Ex p.* KING (1894), 28 I. L. T. 99.—**IR.**

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3539 ii. *Proof against acceptor—For balance of bills after deducting proceeds of goods.*]—C., in pursuance of a request from S. ordered a shipment of iron through his London agents, P., who drew against the shipment two bills of exchange on S. in favour of C. The bills were accepted by S. & discounted by C. with a bank, C. at the same time depositing with the bank, as collateral security, the bill of lading for the iron. Both S. & C. filed their petitions in the Insolvent Ct. & were adjudicated insolvents. In the schedule of S. the bank was inserted as a creditor in respect of the transaction for the amount of the bills. When the bills of exchange became due, they were duly presented for payment to the acceptors but were dishonoured & protested by the bank for non-payment, & on such non-payment the bank sold the shipment of iron for which it held the bills of lading:—*Held:* the bank was only entitled to prove for so much as was due to it on the bills of exchange after deducting the amount realised by the sale of the iron.—*Re* SHIBCHANDRA MULLICK (1871), 8 B. L. R. 30.—**IND.**

3539 ii. —— *Deduction in respect of sum received by discounter—In respect of security given by acceptor.*]—Bills drawn by P. were accepted by W., who gave P. a mtge. as collateral security. P., joined by W., assigned the mtge. to G., who discounted the bills for P., who subsequently got them discounted by a bank. W. became bkpt. The bank, holding W.'s acceptances for the entire debt, proved for the whole. G. made the mtge. available to the extent of £387:—*Held:* this sum must be deducted from the proof made by the bank, or else they should allow the assignees to proceed in their name against P., on foot of the bills.—*Re* WILSON, *Ex p.* PROVINCIAL BANK (1863), 15 Ir. Jur. 57. —**IR.**

Security in hands of parties other than creditor proving.]—*See* Part XX., Sect. 4, Sub-sect. 5, *post.*

3543. Proof against indorser—For full account—Without deduction of value of guarantee—Whole beneficial interest in guarantee in proving creditors.]—H. & Co. lent a sum of money, receiving from the borrower a promissory note for the amount of the loan, together with the guarantee of a co., who thereby undertook to pay "to H. & Co., or the holders of the promissory note for the time being," the amount of the note, if not paid at maturity. H. & Co. indorsed the promissory note, & handed it, together with the guarantee, to applts., their bankers, who gave them credit for the full amount of the note. The note was dishonoured at maturity, & H. & Co. became bkpts. Applts. sought to prove in the bkpcy. as unsecured creditors for the amount due to them by H. & Co.:—*Held:* all the beneficial interest in the guarantee must be taken to have passed to applts. so that they were not "persons holding a mtge., charge or lien on the property of the debtors, or any part thereof," & they were not secured creditors in respect of the contract of guarantee within 1883 Act, s. 168, & were entitled to prove as unsecured creditors for the full amount of their debt without deducting the value of the guarantee.—*Re* HALLETT & Co., *Ex p.* COCKS, BIDDULPH & Co., [1894] 2 Q. B. 256; 63 L. J. Q. B. 676; 70 L. T. 891; 38 Sol. Jo. 386; 1 Mans. 83; 9 R. 380, C. A.

Annotation:—**Consd.** Bradford Old Bank *v.* Sutcliffe, [1918] 2 K. B. 833, C. A.

3544. Proof against maker of promissory note—Granted for arrears of interest—Deduction of security for principal & interest.]—A creditor, to whom a bkpt. has made an assignment to secure a debt with interest, cannot, without giving up the security, prove upon a promissory note, part of the consideration for which consists of arrears of interest upon the secured debt.—*Re* CLARK, *Ex p.* CLARK (1841), 1 Mont. D. & De G. 622, Ct. of R.

See 1914 Act, s. 66 (2).

3545. Proof amended on ground of mistake of fact—Whether credit should be given for securities realised since first proof filed.]—A merchant in Bombay bought of a bank bills on their London branch for £25,000, giving for them £5,000 in cash & £20,000 in bills on a firm in London, consisting of himself & another person. The bank bills were all indorsed to the firm in London, & were all accepted. The merchant's bills were sent to the London branch of the bank & were accepted by the London firm. The bank was wound up, & the merchant & his partner each became insolvent, the London firm holding at the time of the winding-up bills to the amount of £19,000, & the bank having parted with the bills for £20,000. The trustees of the London firm had sent in a previous claim to prove for £5,000, taking that amount as the balance between the bills for £25,000 & the bills for £20,000, & not being aware that the bank had parted with the bills for £20,000. At the time of the previous claim the trustees held securities which had since been realised by them:—*Held:* notwithstanding the previous claim made by mistake, the trustees might prove for the £19,000, & the claim would be considered as made when the previous claim was made, so that the trustees representing the London firm were not bound to give credit for the money received by realising the security.—*Re* LONDON, BOMBAY & MEDITERRANEAN BANK, *Ex p.* CAMA (1874), 9 Ch. App. 686; 43 L. J. Ch. 683; 31 L. T. 234; 22 W. R. 809, L. JJ.

Annotation:—**Consd.** & **Folld.** Lovel *v.* Lovel (1881), 45 L. T. 252.

F. Security for Annuity proved on.

3546. Proof for value of annuity—Plus arrears—Less realised value of security.]—Where the grantor of an annuity secured by real property becomes a bkpt., & arrears of the annuity become due after the bkpcy., the real security will, on the petition of the grantee, be ordered to be sold, & the produce applied in satisfaction of so much of the arrears & value of the annuity, as same will extend to satisfy, & the grantee will be allowed to prove the residue under the commission.—*Re* KERNOT, *Ex p.* KEY (1816), 1 Madd. 426; 56 E. R. 157.

3547. —— —— ——.]—A. granted an annuity to B. secured by bond & warrant of attorney. Two years after he deposited a lease with B. as a further security for the payment of the annuity. A. became bkpt.:—*Held:* the subsequent security need not be memorialised, & the usual order was made for the sale of the lease, valuation of the annuity, etc., & for proof of the remainder of the value of the annuity.—*Re* PALMER, *Ex p.* PRICE (1818), 3 Madd. 132; 56 E. R. 459.

3548. —— —— **& costs—Less realised value of security.**]—Bkpt.'s real estate was pledged as security for an annuity, & sold by order of the ct. There were arrears due at the date of the commission, & arrears had subsequently accrued:—*Held:* the proceeds of sale, after payment of the costs, should be applied to the payment of the arrears due at the date of the commission, & then to the value of the annuity as ascertained, the creditor to prove for the deficiency.—*Re* JARMAN, *Ex p.* SLACK (1823), 1 Gl. & J. 346.

3549. —— —— **& premiums advanced by creditor—Less realised value of policy.**]—M. granted a redeemable annuity of £350 to T. for his life, in consideration of £2,450, & assigned to T. a policy of insurance for £2,500 on his own life. M. became bkpt.:—*Held:* the policy must be sold, & the residue, after payment of costs & expenses of sale, be applied in repayment of the premiums paid by T., & in respect of the value of the annuity & the arrears, any surplus to be paid to M.'s assignees, & if the proceeds proved insufficient, T. was at liberty to prove for the deficiency.—*Re* MORRAH, *Ex p.* TIERNEY (1830), Mont. 78.

See, further, Sub-sect. 5, D, *ante.*

3550. —— **Without deduction—Policy taken out & maintained by creditor.**]—Bkpt., in consideration of £7,000, granted an annuity of £924 14*s.* for his life, he to be at liberty to redeem the whole annuity for £7,000, & upon such repurchase of the annuity the grantee was to assign any policy or policies of assurance which he might have effected upon the life of bkpt. The grantee effected assurances, & the grantor became bkpt.:—*Held:* the grantee was entitled to prove for the value of the full amount of the annuity, without giving up the policies.—*Re* BURGHART, *Ex p.* VARNISH (1841), 1 Mont. D. & De G. 514; 10 L. J. Bcy. 50; 5 Jur. 489, Ct. of R.

See 1914 Act, Sched. II., rr. 13–18.

3551. —— —— **Guarantee secured by warrant of attorney.**]—A. & B., for a valuable consideration paid to them, joined with C., as their surety, in granting an annuity to D., & the three jointly, & any two of them separately, covenanted that the three, or some or one of them, should well & truly pay the annuity. A warrant of attorney, of even date with the indenture, was also given by the three as a collateral security, & it was thereby declared that the judgment to be entered up on

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the warrant of attorney should be considered as a further security to D. A. & B. afterwards became bkpts. :—*Held:* D. might prove against the estate of A. & B. for the value of the annuity.—*Re* KEASLEY, *Ex p.* PENNELL (1841), 2 Mont. D. & De G. 273; 5 Jur. 899; *sub nom. Re* KEARSLEY, *Ex p.* PENNELL, 10 L. J. Bcy. 77, Ct. of R.

G. Other Cases.

3552. Debt secured by—Reserved right of forfeiture of shares—Value of shares forfeited not deducted.]—A. was the proprietor of seventy-one shares in a joint-stock banking co., registered under Country Bankers Act, 1826 (c. 46), & he also kept a current banking account with the co. The co.'s deed of settlement provided that every proprietor of shares should on demand pay any debt owing from him to the co., & that the share or shares of every proprietor who, or whose assignees, should omit to do so, should be liable to be forfeited to the co. for the benefit of the other proprietors thereof, but that the forfeiture should not discharge the debt, which the proprietor or his assignees should continue liable to pay. A. in Nov., 1867, owed the co. £8,000 on his current account, which was partly secured by an equitable mtge. On Nov. 25 the directors served him with a notice to pay the balance due from him on or before Dec. 2, & that in default of payment his shares would be forfeited. On Nov. 28 A. filed a declaration of insolvency, & the next day he was adjudicated a bkpt. on the co.'s petition, & on Dec. 3 the directors of the co. passed a resolution forfeiting his shares absolutely for the benefit of the co. The co. having realised their mtge., tendered a proof against A.'s estate for the balance of the debt due from him. The comr. in bkpcy. held that proof could only be made for the balance due, after deducting the value of the forfeited shares :—*Held:* the proof must be admitted for the whole balance claimed, but without prejudice to the right of the assignees to question the validity of the forfeiture.—*Re* ANDREW, *Ex p.* RIPPON (1869), 4 Ch. App. 639; 20 L. T. 936; 18 W. R. 1, L. J.

Annotation :—**Consd.** *Re* Westbourne Grove Drapery & Furnishing Co. (1877), 25 W. R. 509.

3553. —— Lien under foreign law—Proof for full amount.]—The rule that a creditor proving under an English bkpcy. cannot take the benefit of the English law, without bringing into the common fund any part of bkpt.'s estate which he may have already received abroad, applies only to property obtained by process in the foreign country, not to property, to which the proving creditor is entitled by the law of the foreign country, *e.g.*, as manager of a mine in Venezuela, on which the Venezuelan law gives the manager a lien or charge for working expenses.—*Re* SOMES, *Ex p.* DE LEMOS (1896), 3 Mans. 131.

3554. —— Vendor's lien—Proof for deficiency.]—Upon the bkpcy. of the purchaser of a chattel, viz. timber felled :—*Qu.:* whether the vendor has a lien, & may prove the deficiency.—*Ex p.* GWYNNE (1806), 12 Ves. 379; 33 E. R. 143, L. C.

3555. —— —— ——.]—An application by the vendor, who had not conveyed, for a sale of the premises in discharge of his lien for the unpaid purchase-money, & to prove for any deficiency, was granted.—*Re* HART, *Ex p.* GYDE (1823), 1 Gl. & J. 323, L. C.

Annotation :—**Folld.** Hope *v.* Booth (1830), 9 L. J. O. S. K. B. 21.

See, also, No. 3386, *ante.*

3556. —— —— ——.]—Bkpt. had contracted to buy bank shares, the certificates of which were left in the hands of the vendor, as a security for payment of the greater portion of the purchase-money :—*Held:* the vendor was entitled, as in the case of an equitable mtgee., to an order for the sale of the shares, in satisfaction of the unpaid purchase-money, with liberty to prove for the difference.—*Re* BARLOW, *Ex p.* SHEPPARD (1841), 2 Mont. D. & De G. 431, Ct. of R.

3557. —— —— ——.]—A. agreed with B. by deed that he, A., would, on payment of £900, as thereinafter mentioned, grant, sell, & convey to B. the messuage, lands, & premises therein mentioned, & B. covenanted to pay the sum on or before Jan. 1 then next, or whenever a good title to the messuage, etc., should be tendered to him, but it was agreed that if B. should, on or before Jan. 1, be desirous that that sum should remain a charge on the premises, then B. might require same, so that upon the completion by A. of the conveyances, B. should execute to A. proper conveyances for securing the sum of £900 on the premises, with interest. Covenant by B. to pay the interest so long as the principal sum should remain unpaid. Proviso, that in case the interest should be in arrear thirty days next after same should have become due, B. should be considered as a tenant to A. of the messuage, lands, etc., from the date thereof, at the yearly rent of £40 10*s.*, payable on Apr. 16 & Oct. 16 in every year, & it should be lawful for A., his heirs & assigns, to enter & distrain, & to sell & dispose of the distress,

PART IX. SECT. 4, SUB-SECT. 6. —G.

p. *Debt secured by—Mortgage of life insurance policy—Covenant by debtor to pay premiums—Policy surrendered by mortgagee—Right to prove on covenant.*]—A debtor, before his bkpcy., mortgaged a policy of insurance to a bank of Ireland, to secure a debt, & covenanted to pay the premiums on the policy. Upon his bkpcy. :—*Held:* the bank were entitled under Bkpcy. Amendment Act, 1872, s. 47, to have the value of their interest in the covenant to keep the policy alive ascertained, & to prove for & receive a dividend upon the value, as well as to retain the surrender value of the policy, but not to receive in all more than 20*s.* in the pound on the secured debt.—*Re* LAW, *Ex p.* BANK OF IRELAND (1876), 10 I. L. T. 11.—**IR.**

q. —— —— —— *Not provable after valuation of security—In addition to proof for unsecured balance.*]—Upon the bkpcy. of a debtor who has, previously to his bkpcy., mortgaged to a creditor a policy of assurance upon his own life, & entered into a contemporary covenant with the creditor to pay premiums on such policy during his life, the creditor cannot prove in the bkpcy. for the estimated value of the covenant, under Bkpcy. (Ireland) Amendment Act, 1872, s. 47, in addition to proving for the unsecured balance of the amount due to him by bkpt. after deducting the estimated value of the security.—DEERING *v.* BANK OF IRELAND (GOVERNOR & CO.) (1886), 21 I. L. T. 1.—**IR.**

s. —— *Chattel mortgage—Proof in subsequent assignment for creditors—After debtor discharged in insolvency proceedings.*]—A debtor who had obtained a final discharge in insolvency under 1875 Act subsequently made a common law assignment for the benefit of creditors of all his property in trust to pay expenses, etc., & to apply the balance in payment of the debts of the assignor *pro ratâ* without preference or priority :—*Held:* pltf., the holder of a chattel mtge. who had been aware of the previous proceedings but had not been scheduled, was entitled to sue for the whole debt, & to share in the estate proportionately under the deed for the whole, & was not bound to value his security & rank for the balance only.—BEATY *v.* SAMUEL (1881), 29 Gr. 105.—**CAN.**

t. *Debtor trading as two firms—Creditor of both firms—Deduction of security for debt of one—In proof against the other.*]—A single individual carried on business at two places under different co. firms, & separate sequestrations of the two firms were awarded :—*Held:* as there was but one estate to be disposed of in both sequestrations, it was no objection that in the affidavit of a creditor lodged in one of the sequestrations, describing bkpt. carrying on business under the two firms as indebted to him, the value of the obligation of the other firm was deducted.—CULLEN *v.* M'FARLANE (1842), 4 Dunl. (Ct. of Sess.) 1522.—**SCOT.**

or otherwise to deal with same, in like manner as in distresses for rent, reserved by lease, to the end that A. might be fully paid & satisfied the interest & costs. B. gave due notice that he would require the purchase-money to remain a charge on the premises for five years; he was let into possession & received the rents, & in July, 1828, became bkpt., & half a year's interest being in arrear for more than thirty days, A. distrained on the tenants then in possession of the premises. The assignees paid the amount of the distress. On Oct. 16, 1828, after bkpt. had obtained his certificate, another half year's interest became due, & an action of covenant was brought against bkpt. to recover same. He pleaded the bkpcy. generally:—*Held:* the agreement was substantially an agreement for a purchase of the premises, & the unpaid vendor was entitled to have the estate resold, & the produce & interest applied in payment of the purchase-money, & to prove against the estate for the residue, & the claim for interest was a debt provable under the commission, & barred by the certificate.—HOPE *v.* BOOTH (1830), 1 B. & Ad. 498; 9 L. J. O. S. K. B. 21; 109 E. R. 872.

See 1914 Act, s. 66 (2).

See, further, Sect. 4, sub-sect. 4, B., *ante*.

3558. —— Assignment of contingent interest—Assignee insuring against contingency—Proof for debt less sum recovered from insurance.]—A contingent interest was assigned to secure in part a debt exceeding the value of the interest. The assignee insured against the contingency, & upon its taking effect, received the sum insured. Upon the bkpcy. of his debtor:—*Held:* the sum so recovered must be deducted from his proof.—*Re* EMMETT, *Ex p.* ANDREWS (1816), 2 Rose, 410.

Annotations:—**Folld.** Henson *v.* Blackwell (1845), 14 L. J. Ch. 329. **Consd.** Dobson *v.* Land (1850), 8 Hare, 216.

3559. —— Equitable mortgage—Mortgage satisfying distress for rent—Proof for deficiency.]—An equitable mtgee. of leasehold property must satisfy a distress for rent out of the proceeds of the sale & can only prove for the deficiency, although occasioned by the payment of the rent.—*Re* CROSS, *Ex p.* COCKS (1833), 3 Deac. & Ch. 8, Ct. of R.

3560. —— —— Mortgagee assessing value of security—Proof for balance.]—An equitable mtgee. obtained a common decree for administration of his deceased debtor's estate, & sent in a claim for the whole amount of his debt. When the certificate of debts came to be settled the mistake was pointed out, & the chief clerk required pltf. to put a value on his security. He did so, & was admitted as a creditor for the balance, £28. The estate was then believed to be insolvent, but the fact had not been formally established. After the certificate had become binding, pltf. took out a summons asking that the property might be sold, & that he might be allowed to prove for the deficiency. A sale was ordered, & the summons directed to stand over. The property sold for much less than the value set upon it, & the summons was then brought on again:—*Held:* by Jud. Act, 1875 (c. 77), s. 10, 1870 Rules, r. 101, was made applicable to the case, & pltf. could only stand as a creditor for £28.—*Re* HOPKINS, WILLIAMS *v.* HOPKINS (1881), 18 Ch. D. 370; 45 L. T. 117; 29 W. R. 767, C. A.

Annotations:—**Distd.** *Re* McMurdo, Penfield *v.* McMurdo, [1902] 2 Ch. 684, C. A. **Mentd.** Couldery *v.* Bartrum (1881), 19 Ch. D. 394, C. A.

Part X.—Mutual Credit and Set-off in Bankruptcy.

SECT. 1.—APPLICATION OF THE DOCTRINE.

See, now, 1914 Act, s. 31.

SUB-SECT. 1.—IN GENERAL.

3561. Creation of statute—1869 Act, s. 39.]—*Held:* the above sect. established an absolute statutory rule, & the fact that one party held a lien or security for his debt would not affect the operation of the rule.—*Re* DEVEZE, *Ex p.* BARNETT (1874), 9 Ch. App. 293; 43 L. J. Bcy. 87; 29 L. T. 858; 22 W. R. 283, L. C. & L. JJ.

Annotations:—**Refd.** *Re* Vaughan, *Ex p.* Fletcher (1877), 6 Ch. D. 350, C. A.; *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.

3562. —— 1883 Act, s. 38.]—The law regulating the adjustment of cross-claims between bkpt. & his creditors was statute law, & was to be found exclusively in the above sect. (BIGHAM, J.).—*Re* DAINTREY, *Ex p.* MANT, [1900] 1 Q. B. 546; 69 L. J. Q. B. 207; 82 L. T. 239; 7 Mans. 107, D. C.; *affd.*, [1900] 1 Q. B. 571, C. A.

Annotations:—**Refd.** *Re* Taylor, *Ex p.* Nowell, [1910] 1 K. B. 562, C. A. **Mentd.** Lord *v.* G. E. Ry. Co., [1908] 2 K. B. 54, C. A.; Tilley *v.* Bowman, [1910] 1 K. B. 745.

SUB-SECT. 2.—IN WHAT CIRCUMSTANCES.

A. Actual Bankruptcy.

3563. Firm not bankrupt—One partner not bankrupt.]—Three partners, A., B. & C., delivered bills to D. for a special purpose. A. & B. became bkpts. In an action by their assignees against D. for the proceeds of the bills:—*Held:* C. not having been made bkpt., this was not a case of mutual credit within 5 Geo. 2, c. 30, s. 28, so as to entitle deft. to set off the bills against a debt due to him from A., B. & C.—STANIFORTH *v.* FELLOWES (1814), 1 Marsh. 184; 2 Rose, 151.

Annotations:—**Folld.** New Quebrada Co. *v.* Carr (1869), L. R. 4 C. P. 651.

3564. —— Only one partner bankrupt.]—To an action for calls by a limited co. against three partners jointly interested, defts. pleaded set-off. One of defts. was a bkpt.:—*Held:* as the other partners were not bkpt., there were no "mutual debts or mutual credits" that could be set off.—NEW QUEBRADA CO. *v.* CARR (1869), L. R. 4 C. P. 651; 38 L. J. C. P. 283; 17 W. R. 859.

3565. —— Assignments for benefit of separate creditors by several partners.]—In order to establish a right of set-off there must be an actual bkpcy., & assignments for the benefit of their separate creditors by the several partners of a firm are not sufficient to establish the right of set-off against their trustees, or to bind the joint estate.—LONDON, BOMBAY & MEDITERRANEAN BANK *v.* NARRAWAY (1872), L. R. 15 Eq. 93; 42 L. J. Ch. 329; 27 L. T. 572; 21 W. R. 318.

Annotation:—**Refd.** *Re* London, Bombay & Mediterranean Bank (1874), 22 W. R. 471.

PART X. SECT. 1, SUB-SECT. 1.

a. *In Canada.*]—Difference between Insolvent Acts, 1869, s. 124, & 1875, s. 107, as to set-off & English 1869 Act, s. 39, remarked upon.—MASON *v.* MACDONALD (1880), 45 U. C. R. 113.—**CAN.**

b. *In Scotland.*]—The law of Scotland on the subject of compensation & retention in bkpcy. is, in effect, very nearly, if not precisely, the same as the law of England with respect to mutual credit.—MCKINNON *v.* ARMSTRONG (1877), 2 App. Cas. 531; 36 L. T. 482, H. L.—**SCOT.**

Sect 1.—Application of the doctrine: Sub-sect. 2, B. (a) & (b).]

B. Debit and Credit in same Right.

(a) Joint and Several Debtors and Creditors.

3566. Creditor of bankrupt—Debtor to bankrupt & another jointly.]—A separate commission of bkpcy. issued against one partner & the other paid the joint debts. A debtor to the partnership, being also a separate creditor of bkpt., was allowed upon petition to set off against bkpt.'s share of the joint debt, & to prove for the residue of his separate debt, the solvent partner consenting to receive his share.—*Ex p.* QUINTIN (1798), 3 Ves. 248; 30 E. R. 994, L. C.

Annotations:—**Refd.** *Ex p.* Twogood (1805), 11 Ves. 517; Addis *v.* Knight (1817), 2 Mer. 117.

3567. —— ——.] — Separate commission of bkpcy. Relief in the nature of set-off against a separate creditor of bkpt., indebted to the partnership to a greater amount, refused.—*Ex p.* TWOGOOD (1805), 11 Ves. 517; 32 E. R. 1189.

Annotations:—**Refd.** Addis *v.* Knight (1817), 2 Mer. 117. **Mentd.** *Re* Early & Smith, *Ex p.* Early's Exors. (1866), 14 L. T. 296.

3568. —— ——.]—For twenty years defts. had been accustomed to settle each year the balance between the goods supplied to them by a firm & the goods supplied by them to the several members of that firm. Upon the firm's liquidation in bkpcy., defts. sought to set off the amounts due for goods supplied to the separate members against the amount of goods received from the firm. There was no agreement, either express or implied, to make the firm liable for the debts of the separate members:—*Held:* there could not be mutual dealings within 1869 Act, in the absence of such agreement.—TYSO *v.* PETTIT (1879), 40 L. T. 132, D. C.

3569. —— —— **Bankrupt believed to be sole partner—Goods not supplied for firm purposes.**]—The trustee in bkpcy. of a firm sued for the price of goods sold & delivered. Deft. counterclaimed to set off the price of goods, which, not for the firm purposes, were supplied to a partner, whom he believed to be the only partner:—*Held:* deft. had no right of set-off.—BAKER *v.* GENT (1892), 9 T. L. R. 159; 37 Sol. Jo. 133.

3570. —— —— **Bankrupt held out & believed to be sole partner.**]—Bkpts., F. & P., had traded in partnership. P. had sold goods to deft. who thought P. was trading alone. F. had allowed P. to deal in a manner only consistent with the fact that he was the sole partner. In an action by bkpt.'s trustee in bkpcy. for goods sold & delivered:—*Held:* deft. could set off a separate debt due from P.—HARPER *v.* MARTEN (1895), 11 T. L. R. 368, C. A.

Annotation:—**Mentd.** Bevan *v.* National Bank, Bevan *v.* Capital & Counties Bank (1906), 23 T. L. R. 65.

3571. —— **Debtor jointly with others to bankrupt.**]—Part owners of a ship cannot set off their proportions of a debt to bkpt. on that account against the debts due by bkpt. to them severally.—*Ex p.* CHRISTIE (1804), 10 Ves. 105; 32 E. R. 783.

Annotation:—**Mentd.** Green *v.* Briggs (1848), 6 Hare, 395.

3572. —— —— **Fraud.**]—Bankers directed by A. to lay out money in navy annuities, did not do so, but represented that they had, making entries & accounting for the dividends accordingly, & they took a joint promissory note from A. under that supposition, & B., her brother, to secure a debt from him to them. The assignees under the bkpcy. of the bankers having sued B. alone on the note, an order was made for proof of the balance, setting off the debt upon the note.—*Ex p.* STEPHENS (1805), 11 Ves. 24; 32 E. R. 996, L. C.

Annotations:—**Consd. & Expld.** *Ex p.* Hanson (1806), 12 Ves. 346, L. C. **Consd.** *Ex p.* Blagden (1815), 19 Ves. 465, L. C. **Expld.** Addis *v.* Knight (1817), 2 Mer. 117. **Apld.** Vulliamy *v.* Noble (1817), 3 Mer. 593, L. C. **Expld.** Rawson *v.* Samuel (1841), Cr. & Ph. 161, L. C.; Jones *v.* Mossop (1844), 3 Hare, 568; Middleton *v.* Pollock, *Ex p.* Knight & Raymond (1875), L. R. 20 Eq. 515. **Refd.** *Re* Wise, *Ex p.* Staddon (1843), 12 L. J. Bcy. 39; Strong *v.* Foster (1855), 17 C. B. 201.

3573. —— —— ——.]—V., a customer of the banking house of D. & Co., transferred to N., a partner in the firm, a sum of stock by way of security for money borrowed of them, & gave notes for the amount, payable on the stock being retransferred to him. He paid off those notes, & afterwards borrowed a further sum on the joint note of himself & his son, without calling for a retransfer. The stock so transferred having been blended with other stock, of which N. was in like manner possessed by way of security for other customers, was sold by the partnership, & the produce applied to the use of the partnership, except a small balance still remaining in the name of N. D., another of the partners, afterwards died, & the partnership was carried on without any alteration of firm till the surviving partners became bkpt. On the bill of V. against the assignees of bkpts., & against the representatives of D.:—*Held:* he was entitled to the stock remaining in the name of N., the other creditors in respect of stock transferred having been satisfied their demands, as being sufficiently appropriated; to set off, against the joint note of himself & his son, so much of the money received by the partnership out of the sale of the remainder of the stock as was equal to the amount of such joint note; to prove the residue as a debt against the estate of bkpts.; & to receive from D's. estate the amount of the deficiency.—VULLIAMY *v.* NOBLE (1817), 3 Mer. 593; 36 E. R. 228.

Annotations:—**Expld. & Distd.** Middleton *v.* Pollock, *Ex p.* Knight & Raymond (1875), L. R. 20 Eq. 515. **Refd.** Jones *v.* Mossop (1844), 3 Hare, 568; Lodge *v.* Pritchard (1863), 1 De G. J. & Sm. 610. **Mentd.** Braithwaite *v.* Britain (1836), 1 Keen, 206; Winter *v.* Innes (1838), 4 My. & Cr. 101; Chapman *v.* Beckinton (1842), 3 Q. B. 703.

3574. —— —— **One account merely security for other.**]—A., on entering into partnership with B., borrowed his stipulated capital from his bankers on B. joining as security. The partnership opened an account with the bankers, who became bkpt. The balance on the joint account arising from the loan was against A. & B., but A.'s private account was in his favour:—*Held:* A. & B. might set off such private balance against the joint debt, which was nothing more than a security for the separate one.

In equity the creditor who has such a security cannot resort to it, without allowing what he has received from the separate debts (LORD ELDON, C.).

PART X. SECT. 1, SUB-SECT. 2.—B. (a).

3571 i. *Creditor of bankrupt—Debtor jointly with others to bankrupt.*]—A judgment debtor, against whom sequestration was brought, claimed to defeat petitioning creditors' debt in respect of unpaid calls by setting off a joint debt due from them to him:—*Held:* the joint debt could not be set off against the separate debt.—*Re* SLOSS, *Ex p.* ROBISON BROTHERS, CAMPBELL & SLOSS, LTD. (1893), 19 V. L. R. 710.—**AUS.**

3571 ii. —— ——.]—In 1847, an order to supersede a commission of bkpcy. was made with costs, to be paid by petitioning creditors. Before those costs were paid the party was discharged, in 1849, as an insolvent:—*Held:* the assignee in the insolvency matter, who had been a petitioning creditor in the bkpcy. matter, took the costs under the order of 1847 subject to the lien of the solr. who had obtained it, & could not be allowed to set off against that lien a debt due to himself by the insolvent when those costs were incurred.—*Re* PETTICREW, *Ex p.* ORR (1850), 1 I. Ch. R. 102.—**IR.**

—*Re* CASTLE & POWELL, *Ex p.* HANSON (1811), 18 Ves. 232; 1 Rose, 156; 34 E. R. 305, L. C.

3575. —— —— Joint debt security for separate debt due by creditor to bankrupt.]—A set-off in bkpcy. was allowed of a debt of bkpts. to one partner separately against a joint debt of him & his partner on their bond to secure the separate debt of the former.—*Ex p.* HANSON (1806), 12 Ves. 346; 33 E. R. 131; *subsequent proceedings* (1811), 18 Ves. 232, L. C.

Annotations:—**Expld.** Addis *v.* Knight (1817), 2 Mer. 117. **Distd.** Vulliamy *v.* Noble (1817), 3 Mer. 593, L. C. **Apld.** *Re* Sikes, *Ex p.* Hippins (1826), 2 Gl. & J. 93, L. C. **Distd.** Strong *v.* Foster (1855), 17 C. B. 201. **Refd.** Jones *v.* Mossop (1844), 3 Hare, 568. **Mentd.** *Re* Chambers, *Ex p.* Bernasconi (1828), 2 Gl. & J. 381.

3576. —— —— Transfer of credit after stoppage by bankrupt.]—A. & B. had a joint account at their bankers', & A. had also a separate account at the same bank. The bankers suspended payment; at that time the joint account of A. & B. was indebted to the bankers, but the bankers were indebted to A. upon his separate account. A. assigned his balance to his firm, & the firm gave notice to the bankers to transfer the balance of A.'s account to their joint account. The bankers did not comply, & became bkpts. Their assignees brought an action against A. & B. for the balance due upon their joint account. A. & B. filed a bill to restrain the proceedings at law:—*Held:* the bankers, after a suspension of payment, could not transfer or set off one account against another, & A. & B. had no right to be relieved from the proceedings at law.—WATTS *v.* CHRISTIE (1849), 11 Beav. 546; 18 L. J. Ch. 173; 13 L. T. O. S. 297; 13 Jur. 845; 50 E. R. 928.

Annotation:—**Mentd.** Farley *v.* Turner (1857), 5 W. R. 666.

3577. Creditor jointly with others of bankrupt—Debtor to bankrupt.]—If A., a debtor of bkpt. is also his creditor in as much as bkpt. owes money to a partnership in which A. is a partner, A. cannot set off a debt owed by bkpt. to the partnership against the amount which he, A., owes to bkpt.—*Ex p.* RILEY (1731), Kel. W. 24; 25 E. R. 476.

3578. —— ——.]—J. apprenticed his son to bkpt. two years before his bkpcy., & agreed to pay a premium of £200. J. was in partnership with T., & bkpt. owed them a joint debt exceeding the amount of the apprentice fee due from J. to bkpt.:—*Held:* J. could not set off the apprentice fee against the joint debt due from bkpt. to J. & T.—*Re* PESTELL, *Ex p.* SOAMES (1833), 3 Deac. & Ch. 320, Ct. of R.

3579. —— —— Debt to bankrupt originally joint but subsequently becoming separate.]—A. had a joint demand against B. & C., who were also creditors of A. B. by letter having made himself separately liable to A. on account of the demand originally joint:—*Held:* he could not either at law or in equity set off the joint debt due from A. to himself & C.—*Re* FISHER, *Ex p.* Ross (1817), Buck, 125, L. C.

3580. —— —— Fraud.]—P., the solr. of K. & R., trustees of a settlement, received on their behalf £4,000, & represented that he had invested the whole of it on mtge. He did invest on mtge. two sums of £2,200 & £850, part thereof, but he never invested the balance of £950. The debt of £2,200 was, with the knowledge of K. & R., paid off & received by P., & retained by him for reinvestment, but no reinvestment was ever made. P. died insolvent:—*Held:* there was no rule allowing a debt due to joint creditors, contracted by fraud, to be set off against a separate debt due from one of the joint creditors, & neither of the sums of £2,200 & £950 could be set off against a separate debt due from K.—MIDDLETON *v.* POLLOCK, *Ex p.* KNIGHT & RAYMOND (1875), L. R. 20 Eq. 515; 44 L. J. Ch. 618.

3581. —— —— Debtor sole surviving creditor.]—A debt due to deft. as a surviving partner may be set off against a demand on him in his own right.—SLIPPER *v.* STIDSTONE (1794), 5 Term Rep. 493; 101 E. R. 277.

3582. Creditor of bankrupt & others jointly—Debtor to bankrupt.]—Debtor by bond to the separate estate of a deceased partner was not allowed in equity to set off his bond debt in respect of acceptances, for which he had become liable to the partnership estate, & which were proved by him under a joint commission of bkpcy.

As at law a joint cannot be set off against a separate demand, the same rule prevails in equity (GRANT, M.R.).—ADDIS *v.* KNIGHT (1817), 2 Mer. 117; 35 E. R. 885.

3583. —— —— Relation between bankrupt & joint debtors severed.]—J. & W. carried on business as W. & Co., & a bank advanced to the partners jointly the sum of £11,000. On Sept. 20, 1909, W. retired, & by the deed of dissolution W. assigned his interest to J., & an account was to be taken of W.'s share as on Dec. 31, & such share when ascertained was to be credited to him in the books of the firm & was to remain a loan to the firm for ten years, at 5 per cent., & if on the taking of such account the assets of the firm were found to be insufficient to meet its liabilities, W. was to pay J. a half part of such deficiency. J. & W. subsequently became bkpt., & the two bkpcies. were consolidated. The trustee of the separate estate of J. claimed a sum on current account at the bank in the name of the firm, but the bank claimed to set off against that claim the joint liability of J. & W. for £11,000:—*Held:* as the partnership was dissolved as from Sept. 20, 1909, & not from Dec. 31, the bank's claim failed.—*Re* JANE, *Ex p.* TRUSTEE (1914), 110 L. T. 556, C. A.

(*b*) *Insurance Broker and Bankrupt Underwriter.*

3584. Policy in own name—Del credere commission—Set-off.]—A broker with a commission *del credere* may set off, under the general issue, a loss upon a policy happening before bkpcy., to an action by the assignees of bkpt., for premiums upon various policies underwritten by him, & for which he had debited the broker.—GROVE *v.* DUBOIS (1786), 1 Term Rep. 112; 99 E. R. 1002.

Annotations:—**Apld.** Bize *v.* Dickason (1786), 1 Term Rep. 285. **Distd.** Cumming *v.* Forester (1813), 1 M. & S. 494. **Consd.** Koster *v.* Eason (1813), 2 M. & S. 112; Morris *v.* Cleasby (1813), 1 M. & S. 576; Baker *v.* Langhorn (1816), 2 Marsh. 215; Peele *v.* Northcote (1817), 1 Moore, C. P. 178. **Refd.** Minett *v.* Forrester (1811), 4 Taunt. 541; Parker *v.* Smith (1812), 16 East, 382; Brisbane *v.* Dacres (1813), 5 Taunt. 143; Beckwith *v.* Bullen & Hancock (1858), 27 L. J. Q. B. 162. **Mentd.** Houghton *v.* Matthews (1803), 3 Bos. & P. 485; Mayor *v.* Simeon (1810), 3 Taunt. 497; Gall *v.* Comber (1817), 7 Taunt. 558; Gabriel *v.* Churchill & Sim, [1914] 3 K. B. 1272, C. A.

3585. —— —— ——.]—Where bkpt. has underwritten a policy to a broker acting under a commission *del credere*, & a loss upon the policy happens before, but is not adjusted till after the bkpcy., the broker may deduct the amount of the loss from the debt which he owes to the estate of bkpt., & if by mistake, he pays all that is due to the assignees without deducting such money, he may recover it from the assignees as money had & received to his use.—BIZE *v.* DICKASON (1786), 1 Term Rep. 285; 99 E. R. 1097.

Annotations:—**Consd.** Peele *v.* Northcote (1817), 1 Moore, C. P. 178. **Refd.** Koster *v.* Eason (1813), 2 M. & S. 112. **Mentd.** Stevens *v.* Lynch (1810), 12 East, 38; Brisbane *v.* Dacres (1813), 5 Taunt. 143; Gall *v.* Comber (1817), 7

3582 i. *Creditor of bankrupt & others jointly—Debtor to Bankrupt.*]—HOTCHKIS *v.* ROYAL BANK (1876) 3 Pat. App. 618 H.L. —SCOT.

Sect. 1.—*Application of the doctrine: Sub-sect.* 2, *B.* (*b*) *&* (*c.*)]

Taunt. 558: *Re* Bentley, Dear & Richardson, *Ex p.* Wilson (1841), 1 Mont. D. & De G. 586, Ct. of R.

3586. —— —— ——.] — Insurance brokers effected policies of assurance, some in the name & on account of their own firm, & others in the name of their own firm but on account of their principals, for whom they acted under a *del credere* commission, without the knowledge of the underwriters. In an action for premium by the assignees of one of the underwriters, who had become bkpt.:—*Held:* deft. might set off losses & returns due on all such policies as were effected in the name of their own firm, such losses & returns having become due on those policies before the time when bkpt. stopped payment, though they had never been adjusted by bkpt., but only by the other underwriters between the time of his stopping payment & committing the act of bkpcy., on which adjustment defts. had given their principals credit for the amount.—KOSTER *v.* EASON (1813), 2 M. & S. 112; 105 E. R. 324.

Annotations:—**Consd.** Parker *v.* Beasley (1814), 2 M. & S. 423. **Distd.** Baker *v.* Langhorn (1816), 4 Camp. 396, N. P. **Folld.** Davies *v.* Wilkinson (1828), 4 Bing. 573; Lee *v.* Bullen (1858), 8 E. & B. 693, n. **Refd.** Morris *v.* Cleasby (1816), 4 M. & S. 566. **Mentd.** Thomson *v.* Redman (1843), 2 Dowl. N. S. 1028; Luckie *v.* Bushby (1858), 13 C. B. 864; Xenos *v.* Wickham (1863), 14 C. B. N. S. 435, Ex. Ch.

3587. —— **No del credere commission—Set-off.**]—Brokers effected policies of assurance on goods on account of their principals but in their own names, & accepted bills drawn on them on account of the goods, which were consigned to them, & lost before arrival. In an action brought by the assignees of the underwriter, since a bkpt., for premiums:—*Held:* the brokers might set off such losses, although they had not any commission *del credere*, & the losses were not adjusted.—PARKER *v.* BEASLEY (1814), 2 M. & S. 423; 105 E. R. 438.

Annotations:—**Folld.** Davies *v.* Wilkinson (1828), 4 Bing. 573; Lee *v.* Bullen (1858), 27 L. J. Q. B. 161.

3588. —— —— ——.] — Deft., an insurance broker, being sued by the assignees of an underwriter, for premiums due to bkpt. for subscribing certain policies, claimed to set off against such demand a loss that had happened on goods, on which bkpt. had underwritten a policy effected in the name of deft.:—*Held:* although the goods were not the property of deft., & the insurance was effected by him by order of his principals, yet, as the policy was in deft.'s own name & he had a lien on it for money due to him from his principals, to a greater amount than the set-off claimed, he was entitled to the set-off.—DAVIES *v.* WILKINSON (1828), 4 Bing. 573; 1 Moo. & P. 502; 6 L. J. O. S. C. P. 121; 130 E. R. 889.

3589. Policy in own name as agent—Del credere commission—Set-off.]—In an action by the assignees of an underwriter against brokers for premiums due to bkpt. the brokers may set off a loss, which occurred before bkpcy., on a policy underwritten by bkpt., & effected by them in their own names, "&/or as agents," for a principal for whom they were acting on a *del credere* commission, without bkpt.'s knowledge.—LEE *v.* BULLEN (1858), 8 E. & B. 692, n.; 27 L. J. Q. B. 161; 4 Jur. N. S. 557; 120 E. R. 258.

Annotations:—**Refd.** Beckwith *v.* Bullen (1858), 8 E. & B. 683; Xenos *v.* Wickham (1863), 14 C. B. N. S. 435, Ex. Ch.

3590. —— **No del credere commission—No set-off.**]—A., as agent for various persons, but not receiving a *del credere* commission, effected various insurances for his principals with B., an underwriter, upon which insurances various losses & returns of premium were due. B. became bkpt. In an action by his assignees against A. for the amount of premiums:—*Held:* A. could not set off the amount of the losses, or of the returns of premium.—WILSON *v.* CREIGHTON (1782), 3 Doug. K. B. 132; 99 E. R. 576.

Annotations:—**Distd.** Bell *v.* Auldjo (1784), 4 Doug. K. B. 48. **Consd.** Goldschmidt *v.* Lyon (1812), 4 Taunt. 534.

3591. —— —— ——.]—An insurance broker, who is indebted to the effects of bkpt. underwriter for premiums, cannot, without an especial authority, set off against that debt sums due from the underwriter for return of premium, whether the returns became due before the bkpcy. or after the bkpcy.—MINETT *v.* FORRESTER (1811), 4 Taunt. 541; 2 Rose, 158; 128 E. R. 441.

Annotations:—**Folld.** Parker *v.* Smith (1812), 16 East, 382. **Distd.** Davies *v.* Wilkinson (1828), 4 Bing. 573. **Refd.** Goldschmidt *v.* Lyon (1812), 4 Taunt. 534; Houston *v.* Robertson (1816), 6 Taunt. 448; Elgood *v.* Harris, [1896] 2 Q. B. 491.

3592. —— —— ——.]—In an action by the assignees of an underwriter, against defts., insurance brokers, for the balance of an adjusted account between bkpt. & defts., & also for premiums of insurance on policies underwritten by bkpt. with them as brokers before the bkpcy., the brokers are not entitled to deduct for returns of premium due on policies, the premiums of which policies formed a part of the adjusted account, but the events entitling them to such returns were not known till after such adjustment, nor can they deduct for returns of premium on some of the policies for the premiums of which the action is brought, the events entitling them to which returns happened before the bkpcy., but the returns were not adjusted, nor can they deduct for returns on other policies for the premiums of which the action is brought, the events entitling them to which returns happened since the bkpcy. but before the commencement of the action, the brokers not having a commission *del credere*, nor being personally interested in any of the insurances.—PARKER *v.* SMITH (1812), 16 East, 382; 2 Rose, 120; 104 E. R. 1133.

Annotations:—**Consd.** Elgood *v.* Harris, [1896] 2 Q. B. 491. **Mentd.** Houstoun *v.* Robertson (1816), 2 Marsh. 138.

3593. —— —— ——.]—A broker, who is indebted to the assignees of bkpt. for premiums due to them upon policies subscribed by bkpt. before his bkpcy., is not entitled to set off returns of premium due upon the arrival of ships which have arrived

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PART X. SECT. 1, SUB-SECT. 2.—B. (b).

c. Second insurance by broker—Set-off of premiums under first & second insurance.]—S., who had underwritten policies to a large amount, of which the risks were undetermined, became bkpt. No part of the premiums on the policies had at that time been paid. The brokers, conceiving their contracts of insurance with S. to be no longer binding, made second insurances on the same subjects, & in settling with S.'s trustee gave S. credit for the premiums in the policies he had underwritten, but placed to his debit the premiums paid for the second insurances, alleging the right to apply the premiums unpaid towards making such second insurances, the first insurances having failed. According to opinions of English counsel the bkpcy. of the underwriter, while the risk was undetermined, did not entitle the insured to retain the premium, but he must pay the premium to bkpt. estate:—*Held:* (1) if the re-insurances were made for behoof of S.'s estate, they were ineffectual, not having been made with the concurrence of S.'s trustee, & if they were double insurances, S.'s estate could not be charged with the expense thereof as that would create an undue preference; (2) there was no consensus of debit & credit entitling the broker to retain or apply the premiums in his hands to second insurances, & defenders must pay the balances due by them without deduction of the premiums paid or other expenses incurred in connection with the reinsurances.—SELKRIG *v.* PITCAIRN & SCOTT (1808), 14 Fac. Coll. 187.—SCOT.

since the bkpcy.—GOLDSCHMIDT *v.* LYON (1812), 4 Taunt. 534 ; 128 E. R. 438.

Annotation :—**Refd.** Houstoun *v.* Robertson (1816), 6 Taunt. 448.

3594. —— —— ——.]—In an action by the assignees of an underwriter against a broker for premiums due to bkpt. :—*Semble :* the broker cannot set off a loss on a policy effected by him as agent, without a commission *del credere*, where there has been no adjustment, though the loss took place before the bkpcy.—BAKER *v.* LANGHORN (1816), 6 Taunt. 519 ; 4 Camp. 396 ; 2 Marsh. 215 ; 128 E. R. 1136.

3595. Policy in name of principal—Del credere commission—No set-off.] — A broker effected policies of assurance in the name of his principal under a *del credere* commission. In an action by the underwriter to recover premiums :—*Held :* the broker could not set off losses which happened on those policies, although the losses claimed were total, & the broker had accounted for them with his principal.—CUMMING *v.* FORESTER (1813), 1 M. & S. 494 ; 105 E. R. 185.

Annotations :—**Distd.** Peele *v.* Northcote (1817), 1 Moore, C. P. 178. **Refd.** Morris *v.* Cleasby (1816), 4 M. & S. 566 ; Thomson *v.* Redman (1843), 2 Dowl. N. S. 1028 ; Luckie *v.* Bushby (1853), 13 C. B. 864.

3596. —— —— ——.] — Insurance brokers effected policies of assurance in the name & on account of their principals, for whom they acted under a *del credere* commission, without the knowledge of the underwriters. In an action for premium by the assignees of one of the underwriters, who had become bkpt. :—*Held :* deft. could not set off losses & returns due on such policies.—KOSTER *v.* EASON (1813), 2 M. & S. 112 ; 105 E. R. 324.

Annotations :—**Consd.** Parker *v.* Beasley (1814), 2 M. & S. 423. **Distd.** Baker *v.* Langhorn (1816), 4 Camp. 396. **Folld.** Davies *v.* Wilkinson (1828), 4 Bing. 573 ; Lee *v.* Bullen (1857), 8 E. & B. 693, n. **Refd.** Morris *v.* Cleasby (1816), 4 M. & S. 566. **Mentd.** Thomson *v.* Redman (1843), 2 Dowl. N. S. 1028 ; Luckie *v.* Bushby (1853), 13 C. B. 864 ; Xenos *v.* Wickham (1863), 14 C. B. N. S. 435.

3597. —— —— —— **Policy delivered to principal.**]—A broker, indebted for premiums of insurance on policies subscribed by an underwriter who had since become bkpt., had a *del credere* commission on one of the policies, effected in the name, not of the broker, but of the assured, & expressed in the body thereof, whereon a loss happened before the bkpcy. The broker was not intrusted with the custody of the policy :—*Held :* though the broker paid the loss to the assured before the commission, he could not set off that loss against the premiums due to the assignees of bkpt.—PEELE *v.* NORTHCOTE (1817), 7 Taunt. 478 ; 1 Moore, C. P. 178 ; 129 E. R. 192.

(c) Other Cases.

3598. General rule.]—Mutuality is an essential characteristic of every claim which falls within the mutual credit sects. of 1883 Act.—*Re* MID-KENT FRUIT FACTORY, [1896] 1 Ch. 567 ; 65 L. J. Ch. 250 ; 74 L. T. 22 ; 44 W. R. 284 ; 40 Sol. Jo. 211 ; 3 Mans. 59.

Annotations :—**Consd.** Monkwearmouth Flour Mills Co. *v.* Lightfoot (1897), 13 T. L. R. 327 ; *Re* Daintrey, *Ex p.* Mart, [1900] 1 Q. B. 546, C. A. ; Tilley *v.* Bowman, [1910] 1 K. B. 745. **Distd.** *Re* Thorne, [1914] 2 Ch. 438.

3599. ——.]—Money which under a bkpcy. becomes payable to the trustee by petitioning creditor because it was payable to debtor, comes *primâ facie* within 1883 Act, s. 38, but not if it is money which upon bkpcy. becomes payable to the trustee in his rights as trustee, & not by virtue of it being payable to the debtor.

In Oct., 1908, debtor holding debenture stock in petitioning creditor co. claimed to be entitled to set it off against petitioning creditor's debt. In Nov. following, but before the bkpcy. petition was disposed of, a receiver was appointed on behalf of another creditor of the debtor's interest in the debenture stock :—*Held :* an essential change was effected by the appointment of the receiver, & thenceforward there were no mutual credits between petitioning creditor & debtor.—*Re* A DEBTOR, *Ex p.* PEAK HILL GOLDFIELD, LTD., [1909] 1 K. B. 430 ; 78 L. J. K. B. 354 ; 100 L. T. 213 ; 16 Mans. 11, C. A.

3600. Creditor of bankrupt—Debtor to assignees—Debt accruing before bankruptcy.]—The stat. for setting off one debt against another does not extend to assignees under a commission of bkpcy., so as to enable deft., in an action by assignees for goods sold and delivered by bkpt. before his bkpcy., to set off money due from bkpt. under a bond given before bkpcy.—RYALL *v.* LARKIN (1746), 1 Wils. 155 ; 95 E. R. 547.

Annotation :—**Dbtd.** Ridout *v.* Brough (1774), 1 Cowp. 133.

3601. —— —— ——.]—The stats. of set-off extend to assignees under a commission of bkpcy. so as to enable deft., in an action by assignees, to set off a debt due from bkpt. before bkpcy.—RIDOUT *v.* BROUGH (1774), 1 Cowp. 133 ; 98 E. R. 1006.

3602. —— —— **For goods bought after bankruptcy.**]—In an action by assignees for goods sold & work done since the bkpcy. :—*Held :* deft. might set off a claim for a debt due from bkpt.

PART X. SECT. 1, SUB-SECT. 2.—B. (c).

3598 i. *General rule.*]—A. drew a bill of exchange in favour of B., who indorsed it over to C., who was indebted to pltfs. C. presented the bill for acceptance, & it was noted for non-acceptance. Pltfs. wanting the money due from C., he indorsed the note over to them. A. became a bkpt., & the assignees refused to pay the amount to pltfs. alleging that C. was indebted to bkpt. in more than the amount of the bill, & that the bill being indorsed over, after being noted for non-acceptance, they were entitled to that defence against the indorsees :—*Held :* the set-off & mutual credits clause did not operate in favour of the assignees against pltfs., but would as against C., because he was a party to the drawing of the bill.—VICKARS *v.* TUBET (1800), Rowe, 710.—IR.

3600 i. *Creditor of bankrupt—Debtor to assignees—Proceeds of sale received by auctioneer.*]—B. died in Aug., 1884, indebted to T., an auctioneer, to the amount of £199. B.'s exors., through their agent, employed T. in Sept., 1884, to sell the movables in the estate, which T. did, & realised £491. After the sale it was discovered that B. had been insolvent at his death & his estate was surrendered. T., who had not made any claim upon the estate, sought to set off £199 of the proceeds in his hands against the debt due to him, & to pay the balance to the trustee of B.'s estate :—*Held :* he was bound to hand over the whole amount of the proceeds, & to prove on the estate as a concurrent creditor.—BRINK'S TRUSTEE *v.* THERON (1885), 4 S. C. 25.—S. AF.

3600 ii. —— —— *Sums recovered by solicitor in action.*]—M. employed C. as his attorney in an action, in which he obtained judgment with costs. M. was also indebted to C. for previous legal expenses. Before the amount of the judgment could be recovered M. became insolvent, & C. then obtained the amount on instructions received from M.'s trustees :—*Held :* C. was not entitled to set-off against the amount so obtained by him, his previous claims against insolvent, but must prove for the same in the ordinary manner.—MURTHA'S TRUSTEE *v.* COGHLAN (1883), 1 H. C. 511.—S. AF.

3600 iii. —— —— *Balance due on general account.*]—A mtgor. & mtgee. dealt together without having had any settlement of accounts. At the date of the former's insolvency there existed a right of set-off in favour of the mtgor. for the balance due him on their general dealings :—*Held :* such right passed to his official assignee.—COURT *v.* HOLLAND (1881), 29 Gr. 19.—CAN.

3600 iv. —— —— *Purchase by mortgagee of mortgaged property registered in bankrupt's name.*]—A., the holder of a mtge. bond over property registered in the name of S., purchased the property at a sale in S.'s insolvent estate. Thereafter S.'s trustee sued A. for the purchase price :—*Held :* A. was entitled to set off the amount of her bond against the purchase price.—SMILES' TRUSTEE *v.* SMILES (1913), C. P. D. 739.—S. AF.

Sect. 1.—*Application of the doctrine: Sub-sect.* 2, *B.* (*c*).]

before the bkpcy.—ANON. (1774), Lofft, 608; 98 E. R. 824.

3603. —— —— Right of action on policy for loss after bankruptcy.]—The benefit of a policy of insurance, previous to the bkpcy. of the insured, upon a loss after it, passes, & gives a right of action to the assignees, not capable of set-off against a debt from bkpt.—*Re* HEARN, *Ex p.* BLAGDEN (1815), 19 Ves. 465; 2 Rose, 249; 34 E. R. 589, L. C.

Annotations:—**Consd.** Beyer *v.* Adams, *Re* Law, Hopetoun's Claim (1857), 30 L. T. O. S. 9. **Refd.** Cheery *v.* Boultbee (1839), 4 My. & Cr. 442; *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, C. A.

3604. —— —— Costs of nonsuit obtained against bankrupt—Against costs of judgment obtained by assignees against creditor.]—A. brought an action against B. to recover the price of a horse. A. was afterwards declared bkpt., & B. obtained judgment as in case of a nonsuit. The assignees of A. afterwards sued B. for the same cause of action, & obtained a verdict:—*Held:* the costs in the former action could not be set off against the damages & costs of the latter.—WEST *v.* PRYCE (1825), 2 Bing. 455; 10 Moore, C. P. 154; 3 L. J. O. S. C. P. 95; 130 E. R. 382.

3605. —— —— Action on note belonging to bankrupt's wife before marriage.]—In an action by assignees on a promissory note made to bkpt's. wife before her marriage, deft. cannot set off a debt due to him from bkpt.—YATES *v.* SHERRINGTON (1843), 11 M. & W. 42; 12 L. J. Ex. 216; 152 E. R. 708; *revsd.* on another point *sub nom.* SHERRINGTON *v.* YATES (1844), 12 M. & W. 855, Ex. Ch.

3606. —— —— As administrators de bonis non of original creditor.]—A. was indebted on bond to B. B. died, leaving C. his sole next of kin, who obtained letters of administration of his estate. The estate of B. after all debts, etc., were paid, left a clear residue exceeding the amount of the bond debt. A. became surety for C. by joining in promissory notes. C. became an insolvent debtor, & A. was compelled to pay the notes. C. died, & the assignees under his insolvency took out letters of administration *de bonis non* of B., & sued A. on the bond:—*Held:* A. might set off the sums which he had been compelled to pay as surety for C. against the bond debt.

The obligor in a bond, becoming surety for advances to the obligee, & being, after the insolvency of the obligee, compelled to pay the debt for which he had become surety, is entitled to set off the sum so paid against the amount due upon the bond.—JONES *v.* MOSSOP (1844), 3 Hare, 568; 13 L. J. Ch. 470; 8 Jur. 1064; 67 E. R. 506.

Annotations:—**Consd.** *Re* Willis, Percival, *Ex p.* Morier (1879), 12 Ch. D. 491, C. A. **Refd.** Freeman *v.* Lomas (1851), 9 Hare, 109; Cochrane *v.* Green (1860), 9 C. B. N. S. 448; Middleton *v.* Pollock, *Ex p.* Nugee (1875), L. R. 20 Eq. 29.

3607. —— —— Claim under disclaimed lease—Rent due under lease not disclaimed.]—In 1840, A. being lessee of a warehouse & cellar under a demise from B., & also lessee under C. of other adjoining property, comprising *inter alia* a vault, D. became tenant from year to year to A. of the warehouse, cellar, & vault, at an annual rent of £185, made up of £140 for the warehouse & cellar, & £45 for the vault. On Oct. 27, 1845, A. became bkpt., £92 10*s.* being at that time due as rent from D. to bkpt. The assignees, upon being appointed, elected to take the property held under B., & on Feb. 26, 1846, elected not to take the property held under C. At Christmas, 1845, rent to the amount of £114 7*s.* 6*d.* became due from A. to C., for which amount, on Feb. 19, 1846, C. distrained upon the goods in the vault held by D., who, to relieve himself of that distress, paid that sum to C. An action having subsequently been brought by the assignees of A. against D. to recover the above sum of £92 10*s.* & £35 for a quarter's rent due at Christmas for the warehouse & cellar:—*Held:* D. was not entitled to set off the sum so paid by him to C.—GRAHAM *v.* ALLSOPP (1848), 3 Exch. 186; 18 L. J. Ex. 85; 12 L. T. O. S. 373; 154 E. R. 809.

Annotations:—**Consd.** Jones *v.* Morris (1849), 3 Exch. 742. **Mentd.** O'Donoghue *v.* Coalbrook & Broadoak Co. (1872), 26 L. T. 806, Ex. Ch.

3608. —— —— Debts incurred after bankruptcy.]—A trading firm assigned their estate, stock, debts due to the firm, etc., to trustees, upon trust for sale & distribution, with power to carry on the business, but the trustees did not thereby undertake to discharge the liabilities of the firm. The deed of assignment contained a proviso making it void, if the firm became bkpt. before a certain day. Pltfs., who were at the date of the assignment creditors of the firm, afterwards became indebted to the trustees, who continued to carry on the business. The firm becoming bkpt. before the day named:—*Held:* pltfs. had no right to a set-off, but the result would have been different, if pltfs., instead of creditors, had been debtors at the date of the assignment, & had afterwards become creditors of the trustees.—HUNT *v.* JESSEL (1854), 18 Beav. 100; 2 W. R. 219; 52 E. R. 40.

See, now, 1914 Act, s. 31.

3609. —— —— Arrears of rent—Outgoing valuation.]—Bkpt. was tenant of a farm upon the terms that, at the expiration of the tenancy, he should be paid by the landlord allowances for tillages & cultivation according to the custom of the country. His trustee did not disclaim the tenancy, but carried on the business of the farm for the benefit of the creditors, until the tenancy was determined by notice to quit. The estate was sufficient to indemnify the trustee against any personal liability in respect of the tenancy. In an action to recover the value of tillages & cultivation by the trustee during his tenancy, according to the custom:—*Held:* the landlord was not entitled to set off rent, accrued due before the bkpcy., against the trustee's claim.—ALLOWAY *v.* STEERE (1882), 10 Q. B. D. 22; 52 L. J. Q. B. 38; 47 L. T. 333; 47 J. P. 55; 31 W. R. 290, D. C.

Annotation:—**Consd.** *Re* Wilson, *Ex p.* Hastings (1893), 10 Morr. 219.

3610. —— —— —— ——.]—Bkpt. was tenant of a farm in Norfolk, & at the bkpcy. was under notice to quit, owing arrears of rent. His trustee did not disclaim the tenancy, & on its expiration a valuation of the growing crops, etc., was made between the landlord, & the trustee as outgoing tenant. The arrears of rent exceeded the amount of the valuation:—*Held:* the landlord could not set off the rent against the valuation, but, under the custom of the county, the amount payable by the landlord was the balance of the valuation after deducting the arrears of rent.—*Re* WILSON, *Ex p.* HASTINGS (LORD) (1893), 62 L. J. Q. B. 628; 10 Morr. 219; 5 R. 455.

Annotations:—**Mentd.** *Re* Howell, *Ex p.* Mandleberg, [1895] 1 Q. B. 844; Rochester *v.* Le Fanu, [1906] 2 Ch. 513.

See, also, Nos. 3643, 3646, 3647, *post.*

3611. —— —— Property in hands of creditor passing to trustee by relation back.]—Two of three partners, affecting, but without authority, to bind the firm by deed, assigned a debt due to them from a correspondent abroad, without his privity, to a

creditor at home, & afterwards by direction of such correspondent drew a bill of exchange in the name of the firm upon his agent in England, which was accepted, payable to their own order for the amount of the debt. The two partners, having in the meantime committed acts of bkpcy., indorsed such bill to the creditor of the firm in part satisfaction of his debt, & afterwards separate commissions were sued out against the two partners, who were declared bkpts., & their affects assigned, the other partner being all the time abroad :—*Held :* (1) by such indorsement of the bill by the two after acts of bkpcy. committed by them, though before the commission issued, nothing passed to the creditor, for bkpt. partners had by relation ceased at the time of such indorsement to have any control over the joint stock as partners, & could not bind either the property of their assignees or of their solvent partner ; (2) the solvent partner might join with the assignees of the other two in maintaining an action for money had & received to recover back from the creditor the amount of the bill received by him from the acceptor, & such creditor could not set off a greater demand which he had upon the joint firm, though represented by the different pltfs.—THOMASON *v.* FRERE (1809), 10 East, 418 ; 103 E. R. 834.

Annotations :—**Mentd.** Drayton *v.* Dale (1823), 3 Dow. & Ry. K. B. 534 ; Lacy *v.* Woolcott (1823), 2 Dow. & Ry. K. B. 458 ; Craven *v.* Edmondson (1830), 4 Moo. & P. 622 ; Burt *v.* Moult (1833), 1 Cr. & M. 525 ; *Re* Houghton, *Ex p.* Robinson (1833), 1 Mont. & A. 18 ; Goldsmid *v.* Raphael (1836), 5 L. J. C. P. 329.

3612. ——— ——— Bill of costs due to solicitor.]—Debtor deposited money with his solr. for a special purpose, & on debtor's bkpcy. it passed to the trustee by relation back :—*Held :* it could not be set off against unpaid costs, as there had been no mutual credits, one sum being due by the solr. to the trustee, & the other by debtor to the solr.—*Re* POLLITT, *Ex p.* MINOR, [1893] 1 Q. B. 455 ; 62 L. J. Q. B. 236 ; 68 L. T. 366 ; 41 W. R. 276 ; 9 T. L. R. 195 ; 37 Sol. Jo. 217 ; 10 Morr. 35 ; 4 R. 253, C. A.

Annotations :—**Distd.** *Re* Charlwood, *Ex p.* Masters, [1894] 1 Q. B. 643. **Apld.** *Re* Simonson, *Ex p.* Ball, [1894] 1 Q. B. 433. **Consd.** *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, C. A. **Apld.** *Re* A Debtor, *Ex p.* Peak Hill Goldfield, [1909] 1 K. B. 430, C. A. **Refd.** Lister *v.* Hooson, [1908] 1 K. B. 174, C. A. ; *Re* Thorne, [1914] 2 Ch. 438. **Mentd.** Davis *v.* Petrie (1905), 93 L. T. 511.

3613. —— Debtor in corporate capacity to bankrupt—Loan to director of company—Right to stop transfer of stock.]—An insurance co. lent money to a director, who was also a stockholder. He became bkpt. :—*Held :* the co. could not refuse to transfer the stock to his assignees till payment of the loan, the case not being within the mutual credit clause, as bkpt. had a fixed permanent interest in the stock, & the loan was without regard thereto, & as the loan was a loan by the co. as private persons, for which they could not stop bkpt.'s stock, which he held as a member of the co. in their corporate capacity.—MELIORUCCHI *v.* ROYAL EXCHANGE ASSURANCE CO. (1728), 1 Eq. Cas. Abr. 8 ; 21 E. R. 833.

Annotation :—**Distd.** Ryall *v.* Rowles (1750), 1 Ves. Sen. 348.

3614. —— Debtor to bankrupt—Two separate accounts with same bank.]—Harbour & river comrs. kept separate accounts with the same banker for the harbour & river departments. The banker became bkpt. The comrs. had a credit balance on one account & a debit balance on the other :—*Held :* there was only one account of banker & customer between the bank & the comrs., & they were entitled to prove for the amount due on the balance of the two accounts.—*Re* LANGMEAD, *Ex p.* PEARCE (1841), 2 Mont. D. & De G. 142, Ct. of R.

3615. ——— ——— ———.]—A corpn., in addition to the ordinary functions of a municipal corpn., performed those of managers of baths & washhouses under Baths & Washhouses Act, 1846 (c. 74), & also those of a local board of health under Public Health Act, 1848 (c. 63), & kept at pltf.'s bank three separate accounts, corresponding to those three classes of transactions. At the time of pltf.'s suspending payment, there was due to bkpt. on the account of the municipal affairs of the corpn. a large sum of money, & there was due from pltf. to defts., in respect of the local board of health account, a similar sum :—*Held :* defts. might set off those claims one against the other, inasmuch as though the accounts were separate, defts. were debtors in the one & creditors in the other, & in the same right.—PEDDER *v.* PRESTON CORPN. (1862), 12 C. B. N. S. 535 ; 31 L. J. C. P. 291 ; 6 L. T. 540 ; 9 Jur. N. S. 496 ; 10 W. R. 773 ; 142 E. R. 1251.

Annotation :—**Refd.** Anthony *v.* Beacon Markets Co. (1872) 26 L. T. 979, Ex. Ch.

3616. ——— ——— Bill drawn by creditor & discounted by bankrupt.]—The drawer of a bill of exchange discounted it with his banker, who became bkpt. before the maturity of the bill, having a cash balance of the drawer in his hands. A petition by the drawer & acceptor, that the assignees might be restrained from proceeding at law on the bill, upon payment to them of the difference between the cash balance & the bill, was dismissed.—*Re* KENSINGTON, *Ex p.* BURTON, FRANCO & COREA (1812), 1 Rose, 320, L. C.

Annotation :—**Distd.** Bolland *v.* Nash (1828), 8 B. & C. 105.

3617. ——— ——— Bill drawn by bankrupt dishonoured—Transaction closed.]—On Jan. 2, 1832, defts.' bankers, received from B. a bill of exchange for £760, drawn by M., on his partners, indorsed by him to B., & by B. to defts. On the 6th the bill became due, & M. having failed the same day, the bill was dishonoured. On the 7th defts., who then had in their hands sufficient assets of B. to cover the bill, returned it to B. with a receipt for the amount indorsed on it, & having on the 2nd entered the bill to the credit of B. now entered it as a debit. Defts., were also the acceptors of a bill for £1,000, drawn by B., indorsed to M., & due on Jan. 12. On the 9th B. sent back the £760 bill to defts., with instructions to carry into effect views expressed by B. in a letter addressed to defts. on the 6th in anticipation of M.'s failure. That letter was as follows :—" We think that you would be entitled to retain the £1,000 as a set-off for the £760 ; at all events we will trust to your doing the best for us in this matter." In an action brought against defts. by the assignees of M. on the £1,000 bill, the jury having found that the transaction between defts. & B. on the £760 bill was closed on the 7th :—*Held :* they could not set off that bill against the £1,000 bill.—BELCHER *v.* LLOYD (1833), 10 Bing. 310 ; 3 Moo. & S. 822 ; 3 L. J. C. P. 39 ; 131 E. R. 924.

Annotation :—**Consd.** McKinnon *v.* Armstrong (1877), 2 App. Cas. 531, H. L.

3618. ——— Cestui que trust of debtor to bankrupt.]—A benefit building society borrowed a sum of money from its bankers upon the joint & several promissory note of two of its trustees & a director. The bankers at the time of their bkpcy. held the note, & there was also a balance in their hands to the credit of the society upon current account :—*Held :* the society was entitled to set off the amount of its balance against

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the sum due upon the note.—*Re* DAVIES, *Ex p.* CLENNELL (1861), 9 W. R. 380.

3619. —— Principal debtor to bankrupt in debt in surety's name—Accommodation bill drawn by creditor accepted by surety & debtor & discounted with bankrupt.]—A. having accepted bills for the accommodation of B., the latter discounted them with his bankers. The bankers became bkpts. before the bills were due, being indebted to B. in a cash balance exceeding the amount of the bills. Upon the joint petition of A. & B.:—*Held:* the assignees were not entitled to sue A. upon the bills; & the bills ought to be delivered to B., in part discharge of the balance due to him.—*Re* SIKES & WILKINSON, *Ex p.* HIPPINS & HARRISON (1826), 2 Gl. & J. 93; 4 L. J. O. S. Ch. 195, L. C.

Annotations:—**Refd.** *Re* Royal British Bank, *Ex p.* Banes (1857), 28 L. T. O. S. 296. **Mentd.** Strong *v.* Foster (1855), 17 C. B. 201; Duncan, Fox *v.* North & South Wales Bank (1880), 6 App. Cas. 1, H. L.

3620. —— Debtor to bankrupt as county treasurer—Two separate accounts with same bank—Both accounts treated as one.]—G., a county treasurer, used to pay the county money into the B. Bank, but kept his private account at the N. & P. Bank, & carried over the police rates to that account by cheques drawn on the B. Bank. In Feb., 1869, he opened a separate account with the N. & P. Bank, headed "Police Account." Some of the items to his credit in that account could be traced as having come from county funds, but most of them could not. The cheques which he drew upon it were all headed "Police Account," & appeared to have been drawn only for county purposes. For the purposes of interest the N. & P. Bank treated the accounts as one account, & the interest on the balance in his favour was carried to the credit of his private account. At the time when the police account was opened, the manager of the bank knew that G. was county treasurer, & understood that he had been in the habit of paying county money into the bank. On Apr. 8, 1870, G. absconded, his private account being overdrawn, & the police account being in credit:—*Held:* the bank was not entitled to set off the one account against the other, but the county magistrates were entitled to recover the balance standing to G.'s credit on the police account.—*Re* GROSS, *Ex p.* KINGSTON (1871), 6 Ch. App. 632; 40 L. J. Bcy. 91; 25 L. T. 250; 19 W. R. 910, L. JJ.

Annotations:—**Consd.** Bailey *v.* Finch (1871), L. R. 7 Q. B. 34; Greenwell *v.* National Provincial Bank (1883), Cab. & El. 56. **Refd.** *Re* Mawson, *Ex p.* Hardcastle (1881), 44 L. T. 523. **Mentd.** Coleman *v.* Bucks & Oxon Union Bank, [1897] 2 Ch. 243; Bank of New South Wales *v.* Goulburn Valley Butter Co., [1902] A. C. 543, P. C.; Cuthbert *v.* Robarts, Lubbock (1908), 100 L. T. 62.

3621. —— Debtor to bankrupt in right of third party.]—The owner of a cargo insured it against marine risks. He subsequently executed a deed of inspectorship under 1869 Act. A partial loss having occurred, he sued the underwriters on behalf of third parties, who had made advances on the shipping documents:—*Held:* the underwriters could not set off a debt due to them from pltf.—DE MATTOS *v.* SAUNDERS (1872), L. R. 7 C. P. 570; 27 L. T. 120; 1 Asp. M. L. C. 377.

3622. Creditor of bankrupt in right of third party—Debtor to bankrupt—Bankrupt's bill procured to provide set-off.]—Third persons holding the acceptance of a trader, who was known to be in bad circumstances, agreed with defts., as a mode of covering the amount of the bill, that it should be indorsed to them, & that they should purchase goods of the trader, which were to be paid for by a bill at three months' date, or made equal to cash in three months, before which time the trader's acceptance would be due, but without communicating to the trader that they were the holders of his acceptance. The trader having become bkpt., & his assignees having brought *assumpsit* to recover the value of the goods sold & delivered to defts:—*Held:* the latter could not set off bkpt.'s acceptance, which they did not hold in their own right, but in effect for such other persons.—FAIR *v.* M'IVER (1812), 16 East, 130; 104 E. R. 1038.

Annotations:—**Distd.** Mayer *v.* Nias (1823), 1 Bing. 311. **Expld. & Apld.** Belcher *v.* Lloyd (1833), 10 Bing. 310. **Apld.** Lackington *v.* Combes (1839), 6 Bing. N. C. 71. **Expld. & Apld.** Forster *v.* Wilson (1843), 12 M. & W. 191. **Folld.** London, Bombay & Mediterranean Bank *v.* Narraway (1872), L. R. 15 Eq. 93. **Refd.** Bradbury *v.* Anderton (1834), 5 Tyr. 152; Groom *v.* West (1838), 1 Per. & Dav. 19. **Mentd.** *Re* Davies, *Ex p.* Cleland (1867), 2 Ch. App. 808, L. J.

3623. —— —— ——.]—To an action at the suit of assignees of bkpt. for £48, the price of a phaeton, which deft. had purchased from bkpt. for cash on delivery, deft. pleaded that, before & at the time of the delivery of the phaeton, & of the bkpcy., bkpt. was indebted to deft. in the sum of £48 upon a bill of exchange drawn by E. upon & accepted by bkpt., payable to H., & by H. indorsed to deft. Pltfs. replied that bkpt. had accepted the bill for a debt due from him to H., & that, after the bill became due & was dishonoured, H. indorsed it to deft. without consideration, in order that deft. might purchase the phaeton, setting off the amount of the bill, & then hand over the phaeton to H. On special demurrer:—*Held:* the replication was a good answer to the claim of set-off.—LACKINGTON *v.* COMBES, (1839) 6 Bing. N. C. 71; 8 Scott, 312; 9 L. J. C. P. 101; 133 E. R. 28.

3624. —— —— ——.]—Previously to the date of winding up of a bank, it had indorsed for value certain acceptances of a firm to which it was liable:—*Semble:* the bank could subsequently restore the right of set-off by a conditional agreement, under which the indorsees reindorsed the bills to the bank for the purpose of establishing the right, the bank & such indorsees to share in the benefit to be obtained by the set-off.—LONDON, BOMBAY & MEDITERRANEAN BANK *v.* NARRAWAY (1872), L. R. 15 Eq. 93; 42 L. J. Ch. 329; 27 L. T. 572; 21 W. R. 318.

Annotation:—**Refd.** *Re* London, Bombay & Mediterranean Bank (1874), 22 W. R. 471.

3625. —— —— Bankrupt's notes received partly in payment of debts—Partly as trustee.]—Defts. being indebted to their bankers, who afterwards became bkpts., received from their customers on the day of the bankers' stopping payment, but without notice of an act of bkpcy., notes of bkpts., in part payment of antecedent debts, on condition of debiting themselves with so much only as they should receive from the assignees upon the notes. They also received from other parties notes of bkpts. for which they were to pay so much only as they should receive from the assignees for such notes. An action for money lent having been brought by the assignees of bkpts. against defts.:—*Held:* defts. had a beneficial interest in the first description of notes, & might set them off, but they could not set off the second description of notes, as they held them merely as trustees.—FORSTER *v.* WILSON (1843), 12 M. & W. 191; 13 L. J. Ex. 209; 152 E. R. 1165.

Annotations:—**Apld.** *Re* Davies, *Ex p.* Cleland (1867), 2 Ch. App. 808, L. J. **Refd.** Bailey *v.* Finch (1871), L. R. 7 Q. B. 34. **Mentd.** Boddington *v.* Castelli (1853), 17 Jur. 781, Ex. Ch.; Campanari *v.* Woodburn (1854), 15 C. B. 400.

3626. —— —— Creditor having beneficial interest—Accounts ordered to ascertain amount.]—A., being about to convey his estate to trustees for sale, to pay off incumbrances, & to pay him over the residue, obtained advances of the auctioneer intended to be employed, to be repaid out of the deposits. The estate was conveyed to the trustees, the sale took place, & the auctioneer received deposits to a greater amount than his advances The auctioneer became bkpt. :—*Held :* A. was entitled to an equitable set-off of deposits against his debt to bkpt.'s estate, according to the amount in which, on taking the account, A. should appear to be in reality interested beneficially in the surplus of the proceeds of the sales, & if he was not so interested, then the deposits were the money of the trustees.—ALVANLEY *v.* LEWIS (1831), 1 L. J. Ch. 55.

3627. —— —— ——.]—N. & C. were exors. of a will & trustees of the residuary real & personal estate of testator, who died in 1859. N. & F. were tenants for life of the residuary estate in equal shares. In Jan., 1873, C. was residing abroad, & N., being about also to go abroad, gave to P., the solr. of the exors. & trustees, an authority on behalf of both trustees to receive the rents of the real estate & pay the outgoings. Under that authority P. received the rents, & at his death a considerable sum was due from him in respect thereof. P.'s estate proved insolvent, & the usual creditor's decree was made for administration. Subsequently to the decree F. assigned to N. all F.'s interest in the sum due from P. N. was indebted to A. & B., as trustees for P., in a sum the repayment of which was secured by a mtge. of real estate belonging to N., & that sum was paid into ct. in the suit to a separate account, under an order made without prejudice to any question as to set-off. N. afterwards presented a petition claiming to be entitled to set off the debt due from P. against the mtge. debt, & seeking to have the amount of the debt due from P. paid out of the fund standing to the separate account :—*Held :* the debt due from P., being either due to both trustees & exors., or if due to N. alone, due to him in his character of trustee & exor., could not be set off against a debt due from him individually.—MIDDLETON *v.* POLLOCK, *Ex p.* NUGEE (1875), L. R. 20 Eq. 29 ; 44 L. J. Ch. 584 ; 33 L. T. 240 ; 23 W. R. 766.

Annotation :—**Refd.** *Re* Jones, Christmas *v.* Jones, [1897] 2 Ch. 190.

See, further, EXECUTORS & ADMINISTRATORS ; SET-OFF & COUNTERCLAIM.

3628. —— —— —— Bankrupt's debt assigned to trustee for creditor before bankruptcy.]—Debtor, before his bkpcy., covenanted to pay a sum of money due to his father to a trustee, to whom the father had assigned it, & under the declared trusts debtor took a reversionary interest : —*Held :* the trustee could prove for the whole amount, & debtor's interest could not be made available to the estate by way of set-off.—*Re* WELCH, *Ex p.* STONE (1873), 8 Ch. App. 914 ; 42 L. J. Bcy. 73, L. JJ.

Annotations :—**Consd.** Simpson *v.* Henning (1875), L. R. 10 Q. B. 406 ; *Re* Laine & Longman, *Ex p.* Berner & Neilson (1886), 56 L. J. Q. B. 153. **Distd.** *Re* Chapman, *Ex p.* Parker (1887), 35 W. R. 595. **Refd.** Banco de Portugal *v.* Waddell (1880), 28 W. R. 477, H. L. ; *Re* Browne & Wingrove, *Ex p.* Ador, [1891] 2 Q. B. 574, C. A.

3629. —— —— Trustee for drawer of bill.]—To a declaration by the holder against the acceptor of several bills of exchange, deft. pleaded, by way of equitable defence, that the drawers became bkpt., & that pltf. received £425 as a dividend from their estate on account of the bills, & as to that sum was suing only as trustee for the drawers. The plea claimed to set off a debt due to deft. from the drawers :—*Held :* deft. was entitled to the set-off claimed, & the plea was *pro tanto* a good defence.—THORNTON *v.* MAYNARD (1875), L. R. 10 C. P. 695 ; 44 L. J. C. P. 382 ; 33 L. T. 433.

Annotations :—**Expld.** Solomon *v.* Davis (1883), Cab. & El. 83. **Apld.** Alcoy & Gandia Ry. & Harbour Co. *v.* Greenhill (1897), 76 L. T. 542. **Mentd.** Galula *v.* Pintus (1911), 16 Com. Cas. 185.

3630. —— —— Funds deposited on trust account —Same due by bankrupt.]—A trustee in bkpcy. paid a sum into the bank of C. & Co., who placed it to his credit on account of the estate. C. & Co. were creditors of bkpts., & had proved. Afterwards C. & Co. filed their petition, & their trustees claimed to set off the debt owing to their estate against the sum deposited :—*Held :* there was no mutual credit between the two estates, & consequently no right of set-off.—*Re* DAY & SONS, *Ex. p.* YOUNG (1879), 41 L. T. 40 ; 27 W. R. 942.

Annotation :—**Mentd.** Watkins *v.* Lindsay (1898), 67 L. J. Q. B. 362.

3631. —— Jointly with another—Debtor to bankrupt—Whole beneficial interest not absolutely in creditor.]—An exorship. account was kept with bankers in the joint names of the two exors., who were brother & sister. The brother, who was the residuary legatee under the will, kept another account of his own with the bankers. At the bkpcy. of the bankers there was a balance standing to the credit of the joint account, but the other account was overdrawn. Securities had been set apart to answer the legacies bequeathed by the will, & testator's debts & funeral & testamentary expenses had been paid, but the exors. were jointly liable for rates & taxes & for a solr.'s bill of costs :—*Held :* the one account could not be set off against the other, & the rules of equitable set-off or mutual credit could not apply, unless the brother was so much the person solely beneficially interested in the balance of the joint account that a Ct. of Equity, without any terms or any further inquiry, would have compelled the sister to transfer the account into the brother's name alone.—*Re* WILLIS, PERCIVAL & Co., *Ex p.* MORIER (1879), 12 Ch. D. 491 ; 49 L. J. Bcy. 9 ; 40 L. T. 792 ; 28 W. R. 235, C. A.

Annotation :—**Consd.** *Re* Hett, Maylor (1894), 10 T. L. R. 412.

3632. Creditor of bankrupt as executor—Debtor to bankrupt—Funds transferred to executorship account — Beneficial interest in creditor.] — A banking firm became bkpt. At the time of the stoppage deft. had an account which was overdrawn. Deft. was the sole exor. of A. who had left a balance of about £600 in the hands of the bank. That balance was at once transferred by the bank from the account of A. to the account of deft., "exor. of the late A." Before the bkpcy. deft. had drawn out & paid in various sums, leaving a balance in deft.'s favour. Deft. was sole residuary legatee by A.'s will. There were pecuniary legacies which deft. had paid at the date of the bkpcy., but there was a sum of £800 to be invested for the benefit of certain persons, & an annuity of £100, charged on the real & personal estate ; & at the date of the bkpcy. deft. had not specifically provided for those bequests, but had in his hands, besides the balance in the bank, other personal assets of testatrix & after providing for those bequests, there would have been a surplus of £1,900, to which deft. was entitled as residuary legatee. Pltf., the trustee in the bkpcy., having brought an action against deft. to recover the amount of his overdrawn account, deft. sought to set off the balance in his favour on the exorship.

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account:—*Held:* (1) the transfer of the balance of deceased's account to the account of deft., as exor., was equivalent to deft. drawing out the whole amount & paying the same amount into a fresh account, & created a personal debt for money lent between deft. & the bank; & (2) the effect of it being opened as an exorship. account was to affect the bank with notice if there were any equities attaching to the fund, but in the circumstances there were no such equities as to prevent deft. treating the balance as a fund to which he was beneficially as well as legally entitled, & he was entitled to set it against pltf.'s claim.—BAILEY *v.* FINCH (1871), L. R. 7 Q. B. 34; 41 L. J. Q. B. 83; 25 L. T. 871; 20 W. R. 294.

Annotation:—**Expld. & Distd.** *Re* Willis, Percival, *Ex p.* Morier (1879), 12 Ch. D. 491, C. A.

Creditor of bankrupt severally—Debtor to bankrupt jointly with another.]—*See* Nos. 3571 *et seq.*, *ante.*

Creditor of bankrupt jointly with another—Debtor to bankrupt severally.]—*See* Nos. 3577 *et seq.*, *ante.*

3633. Creditor of bankrupt in wife's right—Debtor to bankrupt—Debt due to creditor's wife dum sola.]—A debt due from bkpt. to a married woman *dum sola* cannot be set off against a debt from her husband to bkpt.—*Re* HEARN, *Ex p.* BLAGDEN (1815), 19 Ves. 465; 2 Rose, 249; 34 E. R. 589, L. C.

Annotations:—**Mentd.** Cherry *v.* Boultbee (1839), 4 My. & Cr. 442; Beyer *v.* Adams, *Re* Law, Hopetoun's Claim (1857), 30 L. T. O. S. 9; *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, C. A.

3634. Debtor to bankrupt—Creditor of assignees—Debts incurred by assignees after bankruptcy.]—HUNT *v.* JESSEL, No. 3608, *ante.*

3635. —— Cestui que trust of creditor of bankrupt—Holding whole beneficial interest.]—An adjudication having been made against deft., his trustee in bkpcy. sold part of the estate, & paid the proceeds into a bank to an account which he kept as such trustee. The bank knew the circumstances, & also that an appeal against the adjudication was pending. The bank afterwards became bkpt., & subsequently the adjudication against deft. was annulled on the ground that no act of bkpcy. had been committed. The trustee in bkpcy. of the bank having brought an action against deft. for a debt due to the bank before deft's. bkpcy.:—*Held:* deft. could set off equitably the money paid by his trustee into the bank.—BAILEY *v.* JOHNSON (1872), L. R. 7 Exch. 263; 41 L. J. Ex. 211; 27 L. T. 714; 20 W. R. 1013, Ex. Ch.; *affg.* S. C. (1871), L. R. 6 Exch. 279.

Annotations:—**Distd.** *Re* Day, *Ex p.* Young (1879), 41 L. T. 40. **Expld.** *Re* Willis, Percival, *Ex p.* Morier (1879), 12 Ch. D. 491, C. A. **Refd.** Crew *v.* Terry (1877), 2 C. P. D. 403. **Mentd.** Johnson *v.* Emerson (1871), L. R. 6 Exch. 329; Alloway *v.* Steere (1882), 47 J. P. 55.

3636. —— —— ——.]—A. co. contracted to construct a railway in one of the Philippine Islands. The construction was carried on by L. their manager there. By the law of the Philippine Islands a public co. was not recognisable, & an account was opened on behalf of the co. in the name of L. for the purposes of the co. & contained entries relating to the co.'s business only, & all the money paid into it was that of the co. In pursuance of a verbal arrangement made in 1888 between one of the directors of the co. & the bank, it was agreed that the bank should give credit to the co. in Manila (not at any one time to exceed £15,000), & that the advances under the credits should be made as follows:—viz., that drafts drawn in the name of the co. by their agent in Manila upon the co. in London should be purchased by the branch bank at Manila at the current rate of exchange & the proceeds be credited to the co. L. also had a private account of his own at the bank. A petition for the winding up of the co. was presented & a compulsory order made. At the date of the commencement of the liquidation there was standing to the credit of the Manila account some $53,420 but that was subsequently reduced to some $31,450, L. having drawn cheques to meet certain existing liabilities of the co., which cheques were duly honoured by the bank, notwithstanding notice of the liquidation, & L. instructed the bank to hold the balance at the disposal of the liquidator. The bank had considerable claims against the co., for which they had proved in the winding up, claiming to set off as against the amount due to them the $31,450 forming the balance of the account. An application by the official liquidator of the co. for an order for payment to him of such balance was resisted by the bank on the ground that the balance, although standing in the name of L., was really the money of the co.:—*Held:* the account as between the bank & the co. was in fact the account of the co., & any peculiarity in L.'s position did not affect the relative position of the bank & the co. arising out of the direct bargain or agreement subsisting between them, & the application failed.—*Re* HETT, MAYLOR & CO., LTD. (1894), 10 T. L. R. 412.

SUB-SECT. 3.—TO WHAT DEBTS—"MUTUAL DEBTS."

3637. Debt of such nature as could not be brought into general account.]—*Held:* 5 Geo. 2, c. 30, extended to all mutual debts, though independent of, & not relative to the mutual credit between bkpt. & other persons in the course of trade, & though the debts were of such a nature as could not be brought into a general account.—RYALL *v.* ROWLES (1750), 1 Ves. Sen. 348; 1 Atk. 165; 27 E. R. 1074.

Annotations:—**Mentd.** Row *v.* Dawson (1749), 1 Ves. Sen. 331; West *v.* Skip (1749), 1 Ves. Sen. 239; Doddington *v.* Hallet (1750), 1 Ves. Sen. 497; Ward *v.* Turner (1752), 2 Ves. Sen. 431; *Ex p.* Dumas (1754), 2 Ves. Sen. 582; *Ex p.* Shank (1754), 1 Atk. 234; Worseley *v.* Demattos (1758), 1 Burr. 467; Wilson *v.* Day (1759), 2 Burr. 827; Mason *v.* Vere (1779), 2 Wm. Bl. 1309; Falkener *v.* Case (1781), 1 Bro. C. C. 125; Atkinson *v.* Maling (1788), 2 Term Rep. 462; Plumb *v.* Fluitt (1791), 2 Anst. 432; Gordon *v.* East India Co. (1797), 7 Term Rep. 228; Lingham *v.* Biggs (1797), 1 Bos. & P. 82; Evans *v.* Bicknell (1801), 6 Ves. 174; Jones *v.* Gibbons (1804), 9 Ves. 407; Horn *v.* Baker (1808), 9 East, 215; Taylor *v.* Plumer (1815), 3 M. & S. 562; *Re* Frazer, *Ex p.* Monro (1819), Buck, 300; Hartley *v.* Smith (1819), Buck, 368; Storer *v.* Hunter (1824), 3 B. & C. 368; Dearle *v.* Hall (1828), 3 Russ. 1, 48, L. C.; *Re* Severn, *Ex p.* Colville (1830), 9 L. J. O. S. Ch. 56; Hubbard *v.* Bagshaw (1831), 4 Sim. 326; *Re* Severn. *Ex p.* Tennyson (1832), Mont. & B. 67, L. C.; Buck *v.* Lee (1834), 1 Ad. & El. 804; *Re* Ogden, *Ex p.* Lloyd (1834), 2 L. J. Bcy. 108; Gardner *v.* Lochlan (1838), 4 My. & Cr. 129; Reeves *v.* Capper (1838), 5 Bing. N. C. 136; *Re* Gye & Hughes, *Ex p.* Reynal (1841), 2 Mont. D. & De G. 443; Belcher *v.* Capper (1842), 4 Man. & G. 502; Etty *v.* Bridges (1843), 2 Y. & C. Ch. Cas. 486; Belcher *v.* Bellamy (1848), 2 Exch. 303; Beckham *v.* Drake (1849), 13 Jur. 921, H. L.; Bartlett *v.* Bartlett (1857), 1 De G. & J. 127; *Re* Brooke, *Ex p.* Scott (1857), 29 L. T. O. S. 314; *Re* Selby, *Ex p.* Probyn (1857), 28 L. T. O. S. 258; *Re* Body, *Ex p.* Staner (1859), 33 L. T. O. S. 244; *Re* Buller, *Ex p.* Wornald (1860), 2 L. T. 544; North *v.* Gurney (1861), 1 John. & H. 509; Grainge *v.* Warner, *Re* Grainge (1865), 6 New Rep. 219; Donald *v.* Suckling (1866), 7 B. & S. 783; Cooke *v.* Hemming (1868), L. R. 3 C. P. 334; *Re* Bainbridge, *Ex p.* Fletcher (1878), 8 Ch. D. 218; *Re* West of England & South Wales District Bank, *Ex p.* Dale (1879), 11 Ch. D. 772; *Re* Hallett's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696, C. A.; Colonial Bank *v.* Whinney (1886), 11 App. Cas. 426, H. L.; *Re* Patrick, Bills *v.* Tatham (1890), 63 L. T. 752, C. A.; *Re* Richards, Humber *v.* Richards (1890), 45 Ch. D. 589; Thomas *v.* Searles, [1891] 2 Q. B. 408, C. A.; English & Scottish Mercantile Investment Trust *v.* Bruntol, [1892] 2 Q. B. 1; *Re* Wyatt, White *v.* Ellis, [1892] 1 Ch. 188, C. A.; Ward *v.* Dunscombe, [1893] A. C. 369, H. L.;

Sharman *v.* Mason, [1899] 2 Q. B. 679; Rose *v.* Buckett, [1901] 2 K. B. 449, C. A.; Glegg *v.* Bromley (1911), 81 L. J. K. B. 334.

3638. Obligation to pay after death.]—Bkpt. at the time of his bkpcy. was indebted to W. in respect of money received by him as agent, & misapplied. W. had purchased of bkpt. an annuity for her life, in consideration of a sum payable at her death, & died after the bkpcy.:—*Held:* the representatives of W. were not entitled to set off the consideration of the annuity against the debt due from bkpt.—WHITAKER *v.* HALL (1822), 1 Gl. & J. 213.

Annotations:—**Consd.** *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, C. A. **Mentd.** Hanson *v.* Keating (1844), 4 Hare, 1; Gibson *v.* Goldsmid (1854), 1 Jur. N. S. 1, L. JJ.

3639. ——.]—An annuity of £200 a year was sold in consideration of £2,000 to be paid by the exors. of the grantee within six months of her death. The grantor became bkpt.:—*Held:* the grantee could prove for the value of the annuity, but as it was impossible to anticipate the £2,000 payable by her exors. after her death, it could not be made a matter of set-off.—*Re* FRY, *Ex p.* WHITAKER (1812), 1 Rose, 301.

3640. Regimental debt due from colonel—Against pay & allowances received by agent for regiment.]—By power of attorney, the colonel of a regiment appointed an agent to receive from the Paymaster-General of the Forces the pay & allowances of the officers & men of the regiment. The agent having received a sum of money from the Paymaster-General under such authority, became bkpt., the colonel being then indebted to him for clothing furnished to the regiment:—*Held:* the agent having received the money in his character of agent to the colonel, the latter was entitled to set off, in an action brought by the assignees, for a sum due for clothing, the money received from the Paymaster-General by the agent before his bkpcy.—KNOWLES *v.* MAITLAND (1825), 4 B. & C. 173; 6 Dow. & Ry. K. B. 312; 107 E. R. 1024.

Annotation:—**Distd.** Dalhousie *v.* Chapman (1829), 7 L. J. O. S. K. B. 233.

3641. Dividends & salary due at bankruptcy.]—The directors of a co. assigned their salaries & shares to the co. to secure debts due from them on their private accounts, & empowered the co. to direct the treasurer to retain their salaries & dividends, & sell their shares, for payment of their debts. One of the directors became bkpt., but the power given to the co. had not been exercised, & his shares still remained in his name:—*Held:* the co. had a right to set off, against bkpt.'s debt, the dividends & salary due to him at his bkpcy.—NELSON *v.* LONDON ASSURANCE Co. (1825), 2 Sim. & St. 292; 57 E. R. 358.

Annotations:—**Distd.** *Re* Pearse, *Ex p.* Littedale (1855), 6 De G. M. & G. 714, L. C. & L. JJ.; Deering & McQuestion *v.* Hibernian Joint Stock Banking Co. (1868), 16 W. R. 578.

3642. Payments improperly made for signing composition deed.]—Payments improperly made, as the consideration for signing a composition deed, may be deducted, or set off, from a proof made under a subsequent fiat for a subsequent debt.—*Re* GREEN, *Ex p.* MINTON (1834), 3 Deac. & Ch. 688; 1 Mont. & A. 440, Ct. of R.

3643. Payments made by execution creditor to bankrupt's landlord—To relieve goods levied on from distress.]—A. levied an execution against B., & while in possession of the goods, the landlord distrained them for rent, which A. paid, to relieve the goods from the distress. B. became bkpt., having committed an act of bkpcy. before the levy, by which A.'s execution was defeated, & the assignees possessed themselves of the goods:—*Held:* the rent paid by A. to the landlord was so much money had & received by the assignees to their use, & A. was entitled to set it off in account with the assignees.—*Re* JERMYN, *Ex p.* ELLIOTT (1838), 3 Deac. 343, Ct. of R.

3644. Value of annuity.]—In 1827 petitioner purchased an annuity from bkpt. secured by bond. In 1846, a fiat issued against bkpt., & his assignees commenced an action against petitioner on a bill of exchange accepted by petitioner. Petitioner pleaded a set-off for the value of the annuity:—*Held:* the comr. should value the annuity & take all accounts between the parties & ascertain whether petitioner had any & what right of proof, or whether anything & what was due from him to the estate, & admit proof or let petitioner pay accordingly.—*Re* KENNEDY, *Ex p.* LAW (1846), De G. 378; 8 L. T. O. S. 236; 11 Jur. 112, Ct. of R.

3645. Statute-barred debt.]—A sum of money was deposited with a banker by a customer in the ordinary way. No payment of principal or interest

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PART X. SECT. 1, SUB-SECT. 3.

d. *General rule.*]—"Mutual debts" mean practically debts due from either party to the other for liquidated sums, or money demands which can be ascertained with certainty at the time of pleading.—ROYAL TRUST Co. *v.* HOLDEN (1915), 8 W. L. R. 500; 21 B. C. R. 185; 22 D. L. R. 660.—**CAN.**

3638 i. *Obligation to pay after death.*]—In an antenuptial contract, a husband bound himself & his heirs to pay the wife, in case of survivance, "£1,000 sterling for mournings, & for aliment to the first term of Whitsunday or Martinmas after his death" when the conventional stipulations in her favour, including a locality out of his estate became prestable, "& £500 more for furniture" & those sums were declared to be payable "at the first term of Whitsunday or Martinmas after his decease." As a counterpart of the husband's obligation, the wife conveyed to him the whole of her fortune including the fee of a sum liferented by her mother, & held in trust for the wife till the termination of the liferent. The husband's stipulations in the contract were not fulfilled, in consequence of his having died insolvent, & a creditor having expeded confirmation to his movable estate, including the sum in question:—*Held:* neither the trustee nor the wife could plead retention of the sum against the creditor, on the ground of non-implement of the husband's obligation, in respect it was merely an obligation undertaken by him to pay, but without binding him to invest, or to lay out the stipulated sums in security for behoof of his wife.—BOSWELL *v.* MILLER & OGILVY (1846), 18 Sc. Jur. 210.—**SCOT.**

3642 i. *Payments improperly made for signing composition deed.*]—A person, who was not, at the time, himself a creditor, at the instance of debtor, signed a composition deed on behalf of a creditor, but without his privity, on the allegation to the other creditors that he was authorised to do so, & advanced money of his own to pay that creditor in full, which money, so advanced, was after repaid by debtor:—*Held:* the assignee of debtor, who became bkpt., was entitled to set off the amount of such repayment by debtor against a claim of a distinct debt made under the commission by the person who had so advanced the money.—*Re* CURWEN, *Ex p.* FOWLER (1836), 4 Ir. L. Rec. N. S. 254.—**IR.**

e. *Arrears of annuity charged on property—Against sums spent on improvements on such property.*]—J., by his will, gave his wife, E., an annuity, & charged it on his estate. After his death E., C. & M. two daughters, & W. & G., two sons, entered into an agreement, whereby the annuity was charged on property, & the sons covenanted to pay it, & the exors. of J. transferred all their interest as exors. in all the estate of J. to the sons, subject to the charge. Subsequently all parties joined in borrowing $16,000 on mtge. of part of the property for the purpose of reconstructing the buildings, the annuity being postponed to the mtges. W. & G. afterwards became insolvent, & B. became assignee in insolvency. The annuity fell into arrear for several years, & E. died having made a will by which she devised all her estate to C. & M., who brought an action against B. to have a lien declared on the property for the amount of the arrears of the annuity:—*Held:* a large set-off claimed by deft. over & above the $16,000 for sums expended by the sons in reconstructing the buildings was property disallowed.—SNARR *v.* BADENACH (1885), 10 O. R. 131.—**CAN.**

f. *Sums due to insured—Against premiums due to underwriter.*]—Premiums due to an underwriter, who has become bkpt., may be retained in compensation of debts due by him to the insured, notwithstanding the transaction had been managed in the ordinary way, by the intervention of a broker.—KIRK & GRIEVE *v.* BENNET (1812), 17 Fac. Coll. 32.—**SCOT.**

Sect. 1.—*Application of the doctrine: Sub-sect.* 3.]

was made for more than six years:—*Held:* the assignees of the customer, who had become bkpt., were not entitled to set off such sum against an overdraft by bkpt. in another account with the same banker.—POTT *v.* CLEGG (1847), 16 M. & W. 321; 16 L. J. Ex. 210; 8 L. T. O. S. 493; 11 Jur. 289; 153 E. R. 1212.

Annotations:—**Mentd.** Cooke *v.* Seeley (1848), 17 L. J. Ex. 286; *Re* Gibson & Sturt, *Re* St. Albans Bank (1850), 15 L. T. O. S. 95; Tassell *v.* Cooper (1850), 9 C. B. 509; Farley *v.* Turner (1857), 5 W. R. 666; Seymour *v.* Brecon Corpn. (1860), 29 L. J. Ex. 243; R. *v.* Hassall (1861), 9 W. R. 708, C. C. R.; Garnett *v.* M'Kewan (1872), L. R. 8 Exch. 10; Goodwin *v.* Robarts (1875), 44 L. J. Ex. 157, Ex. Ch.; Arnold *v.* Cheque Bank, Arnold *v.* City Bank (1876), 1 C. P. D. 578; Atkinson *v.* Bradford Third Equitable Benefit Bldg. Soc. (1890), 25 Q. B. D. 377, C. A.; *Re* Tidd, Tidd *v.* Overell, [1893] 3 Ch. 154.

3646. Arrears of rent—Against value of improvements.]—An agreement for a lease of a mill provided that the machinery on the mill at the commencement & expiration of the tenancy should be valued, & the increase or diminution in value paid by the lessor or lessee, as the case might be. The lessee became bkpt., having improved the machinery. The assignees elected not to continue the tenancy, & the value of the improvements was ascertained:—*Held:* against such amount the landlord might set off the rent & also a demand for goods sold & delivered.—*Re* HANSON, *Ex p.* HOPE (1858), 3 De G. & J. 92; 27 L. J. Bcy. 40; 31 L. T. O. S. 323; 4 Jur. N. S. 1164; 6 W. R. 789; 44 E. R. 1203, L. JJ.

3647. Sums due to landlord—Against outgoing valuation.]—Brewers let a public-house on lease, one of the terms of which was that all debts due by the tenant to the landlord should be deducted out of the valuation to be paid by any incoming tenant, & the landlords were by the lease obliged to pay the amount of the valuation at the determination of the tenancy in default of finding another tenant able & willing to do so. At the date of the tenant's act of bkpcy. he was indebted to the landlords to an amount of about £500, & the amount of the valuation as subsequently ascertained was about the same sum:—*Held:* the landlords were entitled to set off the amount owing by the tenant against the sum due under the valuation.—*Re* RUSHFORTH, *Ex p.* HOLMES & SONS (1906), 95 L. T. 807; 23 T. L. R. 41; 51 Sol. Jo. 30; 14 Mans. 135, D. C.

3648. Sum due to shareholder from company—Against claim for calls.]—Where a shareholder in a limited co. has executed a deed of assignment which has been registered under 1861 Act, the trustees of that deed are entitled to set off a debt due to the shareholder from the co. against a demand for calls made by the official liquidator of the co.—*Re* DUCKWORTH (1867), 2 Ch. App. 578; 36 L. J. Bcy. 28; 16 L. T. 580; 15 W. R. 858, L. JJ.

Annotations:—**Apld.** *Re* Anglo-Greek Steam Navigation Co., Carralli & Haggard's Claim (1868), 19 L. T. 706. **Folld.** *Re* Universal Banking Corpn., *Ex p.* Strang (1870), 5 Ch. App. 492, L. J. **Distd.** Gill's Case (1879), 12 Ch. D. 755. **Dbtd.** *Re* Auriferous Properties, [1898] 1 Ch. 691. **Refd.** Waterhouse *v.* Jamieson (1870), L. R. 2 Sc. & Div. 29; *Re* National Funds Assce. (1878), 10 Ch. D. 118. **Mentd.** *Re* Appletreewick Lead Mining Co. (1874), L. R. 18 Eq. 95.

3649. —— ——.]—A contributory of a co. in course of winding-up executed an inspectorship deed, the effect of which was to import the mutual credit clause of 1849 Act. At the date of the deed the contributory was the holder of three bills accepted by the co., which were shortly afterwards indorsed to an agent for collection. After the execution of the deed a call was made on the contributory to an amount exceeding that of the bills, & a few days later the bills matured:—*Held:* the bills must be set off against the call.—*Re* ANGLO-GREEK STEAM NAVIGATION & TRADING CO., CARRALLI & HAGGARD'S CLAIM (1869), 4 Ch. App. 174; 19 L. T. 706; 17 W. R. 244, L. JJ.

3650. —— ——.]—A contributory of a co. in course of winding up, who was also a creditor to a larger amount than the amount due on his shares, assigned the debt due to him from the co., & afterwards executed a deed of arrangement with his creditors under 1861 Act:—*Held:* the debt could be set off against the calls, whether the claim was made in the bkpcy. or the winding up, & the assignment having been made before the bkpcy., the assignee stood in the same position as the contributory.—*Re* UNIVERSAL BANKING CORPN., *Ex p.* STRANG (1870), 5 Ch. App. 492; 39 L. J. Ch. 644; 22 L. T. 219; 18 W. R. 475, L. J.

Annotations:—**Distd.** Gill's Case (1879), 12 Ch. D. 755. **Refd.** *Re* Auriferous Properties, [1898] 1 Ch. 691.

See, also, COMPANIES.

3651. Unsecured debt—Against balance of partly secured debt.]—A. executed a mtge. to his bankers to secure any balance which might at any time be due upon his banking account. Afterwards the banking business, with all debts & securities due to or held by the firm, was assigned to pltfs. Pltf. subsequently employed A., & became indebted to him for work & materials. A. became bkpt., & the property comprised in the mtge. was not sufficient to pay the balance due from A., after paying off several prior incumbrances:—*Held:* pltfs. were entitled to set off the debt due from them to A., against the balance due from A. to the banking firm.—CLARK *v.* CORT (1840), Cr. & Ph. 154; 10 L. J. Ch. 113; 41 E. R. 449, L. C.

Annotations:—**Distd.** Hunt *v.* Jessel (1854), 18 Beav. 100; **Folld.** Cochrane *v.* Green (1860), 9 C. B. N. S. 448. **Consd.** *Re* Agra & Mastermans Bank, *Ex p.* Anderson (1866), 36 L. J. Ch. 73; Middleton *v.* Pollock, *Ex p.* Nugee (1875), L. R. 20 Eq. 29. **Apld.** Thornton *v.* Maynard (1875), L. R. 10 C. P. 695. **Folld.** Alcoy & Gandia Ry. & Harbour Co. *v.* Greenhill (1897), 76 L. T. 542. **Refd.** Dodd *v.* Lydall, Lydall *v.* Dodd (1842), 1 Hare, 333.

3652. —— **Secured debt.**]—At the time of the bkpcy. bkpt. owed B. & Co. £3,010, & B. & Co. owed bkpt. £88, but bkpt. held goods of B. & Co. upon which he had a lien for that amount. The trustee in the bkpcy. insisted that B. & Co. should pay the debt of £88 before the goods were delivered up to them, & that they should prove for the whole sum of £3,010 against bkpt's. estate:—*Held:* B. & Co. were entitled to have the sum of £88 set off against their claim, so as to free the goods from the lien, & to prove for the balance against bkpt.'s estate.—*Re* DEVEZE, *Ex p.* BARNETT (1874),

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3648 i. *Sum due to shareholder from company—Against claim for calls.*]—A shareholder, who is a creditor of the co. & has become insolvent, may, in the event of the co. being wound up, set off the debt due to him as against the calls, but if he has not yet become insolvent, but the co. is endeavouring to make him insolvent as for non-payment of the calls, he is not entitled to set off the debt due to him against petitioning creditors' debt.—*Re* SLOSS, *Ex p.* ROBISON BROTHERS, CAMPBELL & SLOSS, LTD. (1893), 19 V. L. R. 710. —AUS.

3648 ii. —— —— *Assigned to third party.*]—Where the liquidator of a joint-stock co. assigns an unpaid call due by a contributory, & the latter becomes bkpt., the assignee of the call cannot claim to be paid out of a set-off which bkpt. had against the co., but must prove on bkpt. estate, leaving bkpt.'s assignee to recover the amount due by the co.—*Re* MATHESON BROTHERS & CO., LTD., *Ex p.* MATHESON (1884), 3 N. Z. L. R. 323.—N.Z.

3652 i. *Unsecured debt—Secured debt.*]—A. passed a mtge. bond to B., who pledged it as a security to a bank. B. then became indebted to A., & subsequently surrendered his estate. The bank handed the bond to the trustee of B.'s estate, on his undertaking to pay the bank first out of the proceeds. The trustee sued A. for provisional sentence on the bond without referring in the summons to the pledge. The ct. refused to grant provisional sentence as deft. had a right to set-off against pltf.—VOS' TRUSTEE *v.* VOS (1885), 3 S. C. 320. —S. AF.

9 Ch. App. 293; 43 L. J. Bcy. 87; 29 L. T. 858; 22 W. R. 283, L. C. & L. JJ.

Annotations:—**Consd.** *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546. **Refd.** *Re* Vaughan, *Ex p.* Fletcher (1877), 6 Ch. D. 350.

3653. Valuation of policy with company ordered to be wound up.]—A holder of a policy on his own life borrowed from the assurance society on its security. The society was wound up, & the policy was valued in the winding up. The policy holder filed a petition, & his creditors agreed to accept a composition. Soon afterwards he died, & his estate was sufficient to pay 10*s.* in the pound. The amount which the estate would be able to pay on the sum advanced by the society was larger than that which the society would be able to pay in respect of the policy:—*Held:* the sum at which the policy had been valued in the winding up was not a debt due within 1869 Act, s. 39, & could not be set off against the loan made by the society on the security of the policy.—*Re* LANKESTER, *Ex p.* PRICE (1875), 10 Ch. App. 648; 33 L. T. 113; 23 W. R. 844, L. JJ.

Annotations:—**Consd.** Sovereign Life Assce. *v.* Dodd, [1892] 1 Q. B. 405. **Distd.** Sovereign Life Assce. *v.* Dodd, [1892] 2 Q. B. 573, C. A. **Consd.** *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.

3654. ——.]—Deft. effected with pltf. co. policies for a fixed period on his own life, which had not matured at the date when the winding up of pltf. co. was commenced. Before such date he had obtained loans from the co. on mtge. of the policies. By an arrangement under Joint Stock Cos. Arrangement Act, 1870 (c. 104), to which deft. did not consent, the policies of pltf. co. were transferred to C. Co., & the policies were reduced to an amount less than the loans. In an action by pltf. co. against deft. to recover the amount of the loans:—*Held:* deft. was entitled to set off the amount of the original policies.—SOVEREIGN LIFE ASSURANCE CO. *v.* DODD, [1892] 2 Q. B. 573; 62 L. J. Q. B. 19; 67 L. T. 396; 41 W. R. 4; 8 T. L. R. 684; 36 Sol. Jo. 644; 4 R. 17, C. A.

Annotations:—**Distd.** *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.

3655. Sum claimed in respect of voluntary settlement.]—A payment of £250 by bkpt. to his wife before bkpcy. was declared void against the trustee in bkpcy. as a voluntary settlement. At the date of the bkpcy. a debt of £250 was due from bkpt. to his wife. In an action by the trustee to recover the sum of £250 from the wife, she claimed to set off the debt of £250 due to her from bkpt.:—*Held:* the £250 claimed in respect of the voluntary settlement was not a debt due to bkpt. from his wife, & there was no right of set-off under 1883 Act, s. 38.—LISTER *v.* Hooson, [1908] 1 K. B. 174; 77 L. J. K. B. 161; 98 L. T. 75; 52 Sol. Jo. 93; 15 Mans. 17, C. A.

3656. Unliquidated damages arising out of contract—Guarantee.]—*Held:* a guarantee was merely a contract to indemnify upon a contingency, & being in the nature of a claim for unliquidated damages, it could not form the subject of a mutual credit, under 5 Geo. 2, c. 30, s. 28.—SAMPSON *v.* BURTON (1820), 2 Brod. & Bing. 89; 4 Moore, C. P. 515; 129 E. R. 891.

Annotations:—**Refd.** Gibson *v.* Bell (1835), 1 Bing. N. C. 743; Young *v.* Bank of Bengal (1836), 1 Deac. 622; Abbott *v.* Hicks (1839), 7 Scott, 715.

3657. —— **Failure to indemnify.**]—A., B., & C., traders in partnership, were indebted to H. in £51,891 12*s.* Upon a dissolution of the partnership, it was found that C., the retiring partner, was indebted to the firm in £6,817 9*s.* 8*d.*, supposing all the debts of the firm, including that of H., to be paid, whereupon it was agreed between them that C. should pay to A. & B. the £6,817 9*s.* 8*d.*, & should assign to them all the assets & effects of the firm, they undertaking to pay the partnership debts. A. & B. subsequently became bkpt., leaving unpaid of the debt due to H. a balance of £47,000. In an action by the assignees of A. & B. against C. for the recovery of the £6,817 9*s.* 8*d.* due from him to the firm:—*Held:* C.'s liability to H.

3655 i. *Sum claimed in respect of voluntary settlement.*]—Where property is settled by bkpt. upon his wife, who is his creditor, by bkpt. paying for land purchased in his wife's name with his own money, there can be no set-off of the debt against the value of the land under 1898 Act, s. 46.—*Re* HERMAN, *Ex p.* OFFICIAL ASSIGNEE (1916), 16 S. R. N. S. W. 264.—**AUS.**

3656 i. *Unliquidated damages arising out of contract.*]—A claim which, at the date of sequestration, is a mere unliquidated demand for damages cannot be set off against an ascertained liquidated debt due to the insolvent estate.—CLARK *v.* DENNY (1884), 4 F. D. C. 300.—**S. AF.**

3656 ii. —— *Action for deceit.*]—Pltf. sued for damages for deceit upon the sale by deft. to him of a business fraudulently represented to be of much greater value than it was. Deft. counterclaimed for the balance of the purchase-money. After the trial, but before judgment, pltf. made an assignment for the benefit of his creditors under Assignments Act, R. S. M., 1902, c. 8, & the assignee was added as a co-pltf. In giving judgment the trial judge ordered a set-off, & that judgment be entered for deft. for the balance:—*Held:* deft. entitled to maintain his counterclaim & to have pltf.'s damages paid by deducting them from it, as both claim & counterclaim arose out of the same transaction.—MCGREGOR *v* CAMPBELL (1909), 19 Man. L. R. 38; 11 W. L. R. 153.—**CAN.**

3656 iii. —— *Non-performance of building contract.*]—A builder contracted to perform work & began the work. On his bkpcy. & abandonment of the contract, the building materials & tools he had brought upon the premises were retained by his employers. In an action by the trustee of the sequestrated estate for the value of the work done, & for the value of the materials & tools, the employers averred that they had a claim for damage in respect of bkpt.'s failure to complete the contract, & in respect of that claim pleaded compensation:—*Held:* no objection being taken to the competency of the plea of compensation as founded on an illiquid claim, the employers were entitled to set off their claim for damages against the claims for the work done under the contract, for the value of the materials & for the use of the tools, but not against pursuer's right to damage for the illegal detention of tools after the work was completed.—KERR *v.* DUNDEE GAS CO. (1861), 23 Dunl. (Ct. of Sess.) 343.—**SCOT.**

h. *Instalments of purchase price of real property—Against judgments obtained against insolvent.*]—Where insolvent, prior to his insolvency, had sold certain immovable property, & his trustee sued the purchaser for certain instalments due under such sale:—*Held:* the purchaser was entitled to set off against such claim, the amount of certain judgments obtained by him against the vendor prior to his insolvency.—NORDEN (SMITH'S TRUSTEE) *v.* NORDEN (1843), 2 Men. 128, 136.—**S. AF.**

j. *Advances by auctioneer—Against proceeds of sale.*]—The tenant of a farm arranged with auctioneers to conduct a displenishing sale of the stock & cropping of the farm on Oct. 26, 1900. The tenant, who had been insolvent for some time prior to the date of the sale, was made notour bkpt. on Nov. 29, & was sequestrated on Jan. 11, 1901. At the date of the sale, the tenant owed the auctioneers £244, part of which was alleged to be an advance of £200 made on Sept. 26, 1900. On Oct. 19, a receipt, which was antedated Sept. 26, had been granted by the tenant to the auctioneers in these terms: "Received from M., F., & Co. the sum of £200 to account of my displenishing sale." In a question with the tenants' trustee, the auctioneers claimed to retain the £244, being part of the proceeds of the displenishing sale, in payment of the debt due to them by the tenant:—*Held:* the auctioneers having no right to retain for a general balance, were not entitled to retain the proceeds of the sale in order to repay in full unsecured advances made by them to the tenant.—CRAIG'S TRUSTEE *v.* MACDONALD, FRASER & CO. (1902), 39 Sc. L. R. 773.—**SCOT.**

k. *Costs of nonsuit—Against claim for larger amount.*]—Deft., entitled to costs of a nonsuit, became insolvent before payment, but was indebted to pltfs. in a larger amount:—*Held:* pltfs. before notice of the claim of deft.'s attorney, were entitled to prove upon deft.'s estate for the balance of their debt after deducting the amount due by them for the costs.—RUTHERFORD *v.* POWELL (1878), 4 V. L. R. 334.—**AUS.**

l. *Freight collected by broker for ship's husband—Against disbursements by ship's husband.*]—LINDSAY (M'GREGOR'S TRUSTEE) *v.* COX (1883), 10 R. (Ct. of Sess.) 1028; 20 Sc. L. R. 701.—**SCOT.**

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did not constitute a debt or mutual credit which could be set off under 6 Geo. 4, c. 16, s. 50.—ABBOTT *v.* HICKS (1839), 5 Bing. N. C. 578; 7 Scott, 715; 8 L. J. C. P. 314; 3 Jur. 871; 132 E. R. 1222.

Annotation:—**Mentd.** Hinton *v.* Acraman (1845), 2 C. B. 367.

3658. —— Failure to apply funds as directed.]—A plea of mutual credit by way of set-off, cannot be pleaded to a declaration by assignees, charging defts. with having received a sum of money from bkpt. for the purpose of meeting a certain acceptance, & neglecting so to apply it, whereby bkpt.'s estate sustained a damage, the claim being for unliquidated damages.—BELL *v.* CAREY (1849), 8 C. B. 887; 19 L. J. C. P. 103; 137 E. R. 757.

Annotations:—**Consd.** *Re* Albert Life Assce., Parlby's Case (1871), 23 L. T. 841. **Mentd.** Owen *v.* Rouch (1854), 18 Jur. 356.

3659. —— Sale of goods.]—In an action by assignees of bkpt. to recover the price of machinery supplied by bkpt., the ct. allowed deft. to plead an equitable plea of set-off for unliquidated damages arising out of the same contract.—MAKEHAM *v.* CROW (1864), 15 C. B. N. S. 847; 143 E. R. 1018.

Annotation:—**Consd.** Booth *v.* Hutchinson (1872), L. R. 15 Eq. 30.

3660. —— Failure to put house in repair.]—Debtor let a house to deft. & undertook to put it into repair, & subsequently executed a creditor's deed under which pltf. was trustee:—*Held:* damages for breach of contract to put the house in repair could be set off against the rent, although unliquidated at the date of the deed.—BOOTH *v.* HUTCHINSON (1872), L. R. 15 Eq. 30; 42 L. J. Ch. 492; 27 L. T. 600; 21 W. R. 116.

Annotations:—**Distd.** *Re* Winter, *Ex p.* Bolland (1878), 8 Ch. D. 225. **Apld.** Peat *v.* Jones (1881), 8 Q. B. D. 147, C. A. **Consd.** Palmer *v.* Day (1895), 2 Q. B. 618. **Apld.** *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546. **Refd.** *Re* Mid-Kent Fruit Factory (1896), 65 L. J. Ch. 250. **Mentd.** Bide *v.* Harrison (1873), L. R. 17 Eq. 76.

3661. —— Failure to deliver goods.]—Debtor, who had contracted to deliver iron to the defts. by monthly deliveries, sued for the price & went into liquidation. Pltf., who had been appointed trustee, continued the action. Defts. counterclaimed damages for non-delivery of part of the iron:—*Held:* the unliquidated damages could be pleaded as a set-off to pltf.'s claim without recourse to the Bkpcy. Ct.—PEAT *v.* JONES & CO. (1881), 8 Q. B. D. 147; 51 L. J. Q. B. 128; 30 W. R. 433, C. A.

Annotations:—**Apld.** Jack *v.* Kipping (1882), 9 Q. B. D. 113; Mersey Steel & Iron Co. *v.* Naylor (1882), 9 Q. B. D. 648, C. A. **Refd.** Palmer *v.* Day, [1895] 2 Q. B. 618; *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.

3662. —— Damages caused by fraud of bankrupt.]—The trustee of debtor brought an action for the balance of the price of shares sold & transferred to deft. by debtor. Deft. set up fraudulent misrepresentation on the part of debtor, whereby he was induced to purchase such shares, & counterclaimed to set off damages for the fraudulent misrepresentation:—*Held:* the fraudulent misrepresentation was not a personal tort, but a breach of the obligation arising out of the contract of sale, & such a claim arising out of the contract of sale was within 1869 Act, s. 39, & could form a set-off to the claim of the trustee.—JACK *v.* KIPPING (1882), 9 Q. B. D. 113; 51 L. J. Q. B 463; 46 L. T. 169; 30 W. R. 441, D. C.

Annotations:—**Consd.** *Re* Giles, *Ex p.* Stone (1889), 61 L. T. 82, D. C.; *Re* Mid-Kent Fruit Factory, [1896] 1 Ch. 567; Lister *v.* Hooson, [1908] 1 K. B. 174, C. A. **Apld.** Tilley *v.* Bowman, [1910] 1 K. B. 745. **Refd.** Palmer *v.* Day [1895] 2 Q. B. 618; *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.; *Re* Thorne (1914), 84 L. J. Ch. 161.

3663. —— ——.]—A sale of goods upon credit was induced by the fraud of the purchaser, who upon obtaining them pledged them with a pawnbroker. After the purchaser had paid part of the price a receiving order in bkpcy. was made against him. The vendor then discovered the fraud & disaffirmed the contract, retaking possession of the goods upon payment to the pawnbroker of the sum advanced upon them. The purchaser having been adjudicated bkpt., his trustee in bkpcy. brought an action against the vendor, claiming (1) to recover the goods or their value, after giving credit for the sum paid to the pawnbroker to redeem them, or (2) in the alternative to recover the amount paid to the vendor on account of the purchase price:—*Held:* the vendor was entitled under 1883 Act, s. 38, to set off the damages caused by the fraud of bkpt., *i.e.*, the sum paid to the pawnbroker to redeem the goods, against the amount paid on account of the purchase price.—TILLEY *v.* BOWMAN, LTD., [1910] 1 K. B. 745; 79 L. J. K. B. 547; 102 L. T. 318; 54 Sol. Jo. 342; 17 Mans. 97.

3664. —— 1869 Act, s. 81.]—W. having been adjudicated bkpt., the adjudication was annulled, & under the above sect. his property vested by assignment in pltf. as the person appointed by the ct. under that sect. Pltf., as such assignee, having sued deft. for money payable under the common counts, deft. pleaded a set-off for unliquidated damages provable in bkpcy:—*Held:* the plea was good as under the sect. deft. had the same rights of set-off as he would have had against the trustee in bkpcy.—WEST *v.* BAKER (1875), 1 Ex. D. 44; 45 L. J. Q. B. 113; 34 L. T. 102; 24 W. R. 277.

Costs.]—*See* Part XVI., Sect. 5, sub-sect. 4, *post.*

SUB-SECT. 4.—TO WHAT CREDITS—"MUTUAL CREDITS OR OTHER MUTUAL DEALINGS."

3665. General rule.]—In order to constitute a mutual credit within 5 Geo. 2, c. 30, s. 28, it must be confined to pecuniary demands on such credits only as in their nature will terminate in a debt.—ROSE *v.* HART (1818), 8 Taunt. 499; 2 Moore, C. P. 547; 129 E. R. 477.

Annotations:—**Distd.** Sampson *v.* Burton (1820), 2 Brod. & Bing. 89; Clark *v.* Fell (1833), 4 B. & Ad. 404. **Consd.** Gibson *v.* Bell (1835), 1 Bing. N. C. 743; Young *v.* Bank of Bengal (1836), 1 Deac. 622, P. C. **Folld.** Naoroji *v.* Chartered Bank of India (1868), L. R. 3 C. P. 444. **Consd.** Astley *v.* Gurney (1869), L. R. 4 C. P. 714, Ex. Ch. **Dbtd.** Booth *v.* Hutchinson (1878), L. R. 15 Eq. 30. **Consd.** *Re* Winter, *Ex p.* Bolland (1878), 8 Ch. D. 225. **Refd.** Elliott *v.* Turquand (1881), 7 App. Cas 79, P. C.; Palmer *v.* Day, [1895] 2 Q. B. 618, D. C.; *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.; Lister *v.* Hooson (1907), 77 L. J. K. B. 161, C. A.

3666. ——.]—The mutual credit sect. (6 Geo. 4, c. 16, s. 50) applies only to debts, or transactions which must end in debts.—ROSE *v.* SIMS (1830), 1 B. & Ad. 521; 9 L. J. O. S. K. B. 85; 109 E. R. 881.

Annotations:—**Distd.** Clarke *v.* Fell (1833), 4 B. & Ad. 404; Gibson *v.* Bell (1835), 1 Bing. N. C. 743. **Consd.** Groom *v.* West (1838), 8 Ad. & El. 758; Alsager *v.* Currie (1844), 12 M. & W. 751. **Refd.** Young *v.* Bank of Bengal (1836), 1 Deac. 622; Astley *v.* Gurney (1869), L. R. 4 C. P. 714. **Mentd.** Harrop *v.* Fisher (1861), 10 C. B. N. S. 192.

3667. ——.]—The "mutual dealings" sect. (1883 Act, s. 38) is only applicable where the claims on each side are such as result in pecuniary liabilities.—EBERLE'S HOTELS & RESTAURANT CO., LTD. *v.* JONAS (1887), 18 Q. B. D. 459; 56 L. J. Q. B. 278; 35 W. R. 467; 3 T. L. R. 421, C. A.

Annotations:—**Consd.** Palmer *v.* Day, [1895] 2 Q. B. 618. **Apld.** Lord *v.* G. E. Ry. Co., [1908] 2 K. B. 54, C. A. **Consd.** *Re* Taylor, *Ex p.* Norvell, [1910] 1 K. B. 562, C. A. **Apld.** *Re* Thorne, [1914] 2 Ch. 438. **Refd.** Elgood *v.*

Harris, [1896] 2 Q. B. 491; *Re* Mid-Kent Fruit Factory (1896), 3 Mans. 59; *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.; Lister *v.* Hooson (1907), 77 L. J. K. B. 161, C. A.

3668. Mutual credit distinguished from mutual debt.]—A creditor of bkpt. for £110, & a debtor to him upon bond for £340 at a future day, with lawful interest, may set off his demand of £110 against the principal & interest due on the bond as far as it will go, & is not obliged to prove his debt, & take a dividend upon it only, as though not in strictness a mutual debt, yet it is a mutual credit, for bkpt. gives a credit to the creditor in consideration of the bond, though payable at a future day, & he gives the credit for the debt bkpt. owes him upon simple contract.—*Re* PRESCOT, *Ex p.* PRESCOT (1753), 1 Atk. 230; 26 E. R. 147, L. C.

Annotations:—**Folld.** Atkinson *v.* Elliott (1797), 7 Term Rep. 378. **Consd.** Olive *v.* Smith (1813), 5 Taunt. 56. **Apld.** McGillivray *v.* Simson (1826), 9 Dow. & Ry. K. B. 35. **Refd.** Young *v.* Bank of Bengal (1836), 1 Moo. P. C. C. 150, P. C.; Astley *v.* Gurney (1869), L. R. 4 C. P. 714, Ex. Ch.; *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.

3669. May be by open account or mutually stated debts.]—It is not material whether the mutual credit be by open account or mutually stated debts.—LANESBOROUGH (LORD) *v.* JONES (1716), 1 P. Wms. 325; 24 E. R. 409, L. C.

Annotation:—**Refd.** Rose *v.* Hart (1818), 8 Taunt. 499.

3670. Goods deposited to have work done on them—Sum due by bankrupt on other account.]—A packer may retain goods till he is paid the price of packing, & if he has another debt due to him from the same person, the goods shall not be taken from him till he has paid the whole, notwithstanding his debtor has become bkpt.

The clause in 5 Geo. 2, c. 30, relating to mutual credit, has received a very liberal construction. Mutual credit is not confined to pecuniary demands, & if a man has goods in his hands, belonging to a debtor of his, which cannot be got from him without an action at law, or bill in equity, it is considered as mutual credit. Here, though if there had been no bkpcy., in an action for the goods, the debt could not have been set off, yet as the clause of mutual credit has been extended, it may come within that rule, especially as there is an account between them, on the one side £19 due for packing, etc., on the other side much about the same sum due to bkpt.'s estate for wine (LORD HARDWICKE, C.).—*Ex p.* DEEZE (1748), 1 Atk. 228; 26 E. R. 146, L. C.

Annotations:—**Consd.** *Re* Matthews, *Ex p.* Ockenden (1754), 1 Atk. 235, L. C.; Houghton *v.* Matthews (1803), 3 Bos. & P. 485; Olive *v.* Smith (1813), 5 Taunt. 56; Rose *v.* Hart (1818), 2 Moore, C. P. 547; Easum *v.* Cato (1822), 5 B. & Ald. 861. **Dbtd.** Young *v.* Bank of Bengal (1836), 1 Deac. 622. **Refd.** French *v.* Fenn (1783), 3 Doug. K. B. 257; Smith *v.* Hodson (1791), 4 Term Rep. 211; Glennie *v.* Edmunds (1813), 4 Taunt. 775; Sampson *v.* Burton (1820), Brod. & Bing. 89. **Mentd.** Green *v.* Farmer (1768), 4 Burr. 2214; Jones *v.* Smith (1794), 2 Ves. 372; Barnett *v.* Brandao (1843), 1 L. T. O. S. 387; *Re* Witt, *Ex p.* Shubrook (1876), 2 Ch. D. 489, C. A.

3671. —— ——.]—At the time of the bkpcy. bkpt. was indebted to A. in £286 7*s.* 10*d.* for grinding corn, & A. had in his custody a quantity of wheat belonging to bkpt., part ground & part grinding, besides a great number of sacks. £16 5*s.* was due to A. for grinding the corn which was in his hands at the time of the bkpcy. The wheat having been sold by the assignees, by agreement between them & A., without prejudice to his claim:—*Held:* if the money had been tendered for grinding the corn, & A. had refused to deliver it, & bkpt. had thereupon brought an action of trover, A. could not have set off his antecedent debt, but would have had only an allowance *pro tanto* as was due for grinding the corn.—*Re* MATTHEWS, *Ex p.* OCKENDEN (1754), 1 Atk. 235; 26 E. R. 151.

Annotations:—**Expld.** Green *v.* Farmer (1768), 4 Burr. 2214. **Consd.** Olive *v.* Smith (1813), 5 Taunt. 56; Rose *v.* Hart (1818), 8 Taunt. 499. **Refd.** Jones *v.* Smith (1794), 2 Ves. 372; Houghton *v.* Matthews (1803), 3 Bos. & P. 485; Glennie *v.* Edmunds (1813), 4 Taunt. 775; Young *v.* Bank of Bengal (1836), 1 Deac. 622; *Re* Witt, *Ex p.* Shubrook (1876), 34 L. T. 785, C. A. **Mentd.** Barnett *v.* Brandao (1843), 1 L. T. O. S. 387, Ex. Ch.

3672. —— ——.]—Cloths were left by bkpt. before his bkpcy., with deft., a fuller, to be dressed. A balance was then due from bkpt. for work done on other cloths. The assignees tendered the sum due for work done on the cloths. On deft.'s refusal to deliver them up:—*Held:* he had no right to detain them for his general balance, & the assignees were entitled to recover in an action of trover.—ROSE *v.* HART (1818), 8 Taunt. 499; 2 Moore, C. P. 547; 129 E. R. 477.

Annotations:—**Distd.** Sampson *v.* Burton (1820), 2 Brod. & Bing. 89; Clark *v.* Fell (1833), 4 B. & Ad. 404. **Consd.** Gibson *v.* Bell (1835), 1 Bing. N. C. 743; Young *v.* Bank of Bengal (1836), 1 Deac. 622, P. C. **Folld.** Naoroji *v.* Chartered Bank of India (1868), L. R. 3 C. P. 444. **Consd.** Astley *v.* Gurney (1869), L. R. 4 C. P. 714, Ex. Ch. **Dbtd.** Booth *v.* Hutchinson (1878), L. R. 15 Eq. 30. **Consd.** *Re* Winter, *Ex p.* Bolland (1878), 8 Ch. D. 225. **Refd.** Elliott *v.* Turquand (1881), 7 App. Cas. 79, P. C.; Palmer *v.* Day, [1895] 2 Q. B. 618, D. C.; *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.; Lister *v.* Hooson (1907), 77 L. J. K. B. 161, C. A.

3673. Loss on policy accruing before bankruptcy—General balance due by bankrupt.]—Bkpt. directed an insurance on three-fourths of a ship, which insurance was duly effected & notice of it given to bkpt. Bkpt. owed defts. a balance of £302, & after committing an act of bkpcy. wrote to defts. that he feared arrest. The ship having been captured, the underwriters paid the loss to defts. Subsequently, on a commission issuing against bkpt., the question arose whether the assignees could recover back from defts. the money paid them beyond what was due to them on account of the insurance:—*Held:* as general agents of bkpt. defts. could retain against the general balance due to them.—PARKER *v.* CARTER (1778), 1 Cooke's Bankrupt Laws, 7th ed., p. 518.

Annotations:—**Apld.** Olive *v.* Smith (1813), 5 Taunt. 56. **Expld.** Young *v.* Bank of Bengal (1836), 1 Deac. 622, P. C. **Refd.** Rose *v.* Hart (1818), 8 Taunt. 499.

3674. Loss on policy accruing after bankruptcy—Premiums due by bankrupt.]—A. employed B., a broker, to effect policies & sell goods, & trusted him with possession of the policies. A. being indebted to B. for premiums of insurance, obtained an advance of money upon a pledge of goods placed in B.'s hands for sale, but not on those goods to the exclusion of his general credit. A. became bkpt. Afterwards a loss happened, & B. received the amount of the loss from the underwriters:—*Held:* a mutual credit, within 30 Geo. 2, c. 5, & B. might retain the sum received for the loss, in liquidation of his advances as well as of the balance due for premiums.—OLIVE *v.* SMITH (1813), 5 Taunt. 56; 2 Rose, 122; 128 E. R. 607.

Annotations:—**Folld.** Arbouin *v.* Tritton (1816), Holt, N. P. 408, N. P. **Expld.** Graham *v.* Russell (1816), 2 Marsh, 561, Ex. Ch.; Hutton *v.* Bragg (1816), 2 Marsh, 339. **Distd.** Sampson *v.* Burton (1820), 2 Brod. & Bing. 89. **Folld.** Easum *v.* Cato (1822), 1 Dow. & Ry. K. B. 530. **Consd.** Young *v.* Bank of Bengal (1836), 1 Moo. P. C. C. 150, P. C. **Refd.** Key *v.* Flint (1817), 8 Taunt. 21; Rose *v.* Hart (1818), 8 Taunt. 499; Fearnley *v.* Wright (1840), 1 Scott, N. R. 657, Ex. Ch.; Bittleston *v.* Timmis (1845), 14 L. J. C. P. 117; Naoroji *v.* Chartered Bank of India (1868), L. R. 3 C. P. 444. **Mentd.** Alsager *v.* Currie (1844), 12 M. & W. 751.

See, 1914 Act, s. 31.

3675. —— ——.]—An underwriter cannot set off, as a mutual credit against a loss accruing after the bkpcy. of the assured, premiums of the same

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& other policies due before the bkptcy. from the assured, who was himself his own insurance broker in effecting those policies. Neither can he set off returns of premium upon a voyage not complete before the bkpcy., although the underwriter must, upon the conclusion of the adventure, necessarily become debtor to the assured, either for a loss or a return of premium.—GLENNIE *v.* EDMUNDS (1813), 4 Taunt. 775 ; 128 E. R. 536.

Annotation :—**Follid.** Sampson *v.* Burton (1820), 2 Brod. & Bing. 89.

3676. —— ——.]—An underwriter, in an action by the assignees of an assured, upon a loss which happened after the bkpcy., may set off a sum due to him for premiums on the balance of accounts between bkpt. & himself.—GRAHAM *v.* RUSSELL (1816), 5 M. & S. 498 ; 3 Price, 227 ; 2 Marsh. 561 ; 105 E. R. 1133, Ex. Ch.

Annotation :—**Refd.** *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.

See 1914 Act, s. 31.

3677. Sale of property on credit.]—Bkpt.'s property was sold after an act of bkpcy., but more than two months before the commission issued, & a creditor of bkpt. became a purchaser. In an action by the assignee for the value of the goods :—*Held :* the purchaser was entitled to set off against such claim the debt due to him from bkpt., this constituting a mutual credit between bkpt. & such creditor within 46 Geo. 3, c. 101, s. 3.—SOUTHWOOD *v.* TAYLOR (1818), 1 B. & Ald. 471 ; 106 E. R. 73.

Annotation :—**Consd.** Bittleston *v.* Timmis (1845), 2 Dow. & L. 817.

3678. —— **Business—Price depending on profits.**]—D., a solr., being indebted to M., another solr., in a sum of £86, on Dec. 24, 1892, committed an act of bkpcy. of which M. had no notice. On Dec. 31, 1892, D. sold his business to M. under an agreement which fixed as the price a portion of the profits expected to be earned for three years from the business sold. M. took possession of & carried on the business. On Jan. 17, 1893, a receiving order was made against D., but no profits had then been earned from the business. At the end of the three years a sum of £300 was found to be due from M. to D. under the agreement as the price of the business, & that sum M. paid to D.'s trustee in bkpcy. after deducting the £86. The trustee having objected that M. could not set off the £86 against the £300, but that he must pay the £300 in full & be satisfied with a dividend on the debt of £86 :—*Held :* (1) the dealings were "mutual dealings" within 1883 Act, s. 38, & M. was entitled to set off the £86 due to him from D. against the £300 due from him to D.—*Re* DAINTREY, *Ex p.* MANT, [1900] 1 Q. B. 546 ; 69 L. J. Q. B. 207 ; 82 L. T. 239 ; 7 Mans. 107, C. A.

Annotations :—**Apld.** Tilley *v.* Bowman, [1910] 1 K. B. 745. **Refd.** Lord *v.* G. E. Ry. Co., [1908] 2 K. B. 54, C. A. ; *Re* Taylor, *Ex p.* Norvell, [1910] 1 K. B. 562, C. A.

3679. —— **Possession wrongfully obtained from auctioneer without payment.**]—P. sent an auctioneer goods for sale for ready money, not to be removed until payment. The auctioneer sold them on those terms, stated in the conditions of sale, & received part of the price from some of the purchasers, but H., who had purchased part, took them away without payment, & without the consent of the auctioneer or of P. H. refused to pay, offering to set off a debt due to him from P., but that offer was declined. H. having obtained judgment against P., obtained an order to attach the price of the goods remaining in the auctioneer's hands under C. L. P. Act, 1854 (c. 125), s. 61, which was served on the garnishee. On the same day, but after the service, P. became bkpt. His assignees claimed the money from the garnishee, & also demanded payment from H. of the price of the goods taken away by him :—*Held :* (1) if the auctioneer should sue H. in his own name *ex contractu* for the goods sold, H. would have a defence by a plea in the nature of set-off, or at least by way of equitable defence, or, if the assignees sued on the contract, he would have a defence by way of mutual credit ; (2) the assignees might recover in trover, to which H. would have no defence.—HOLMES *v.* TUTTON (1855), 5 E. & B. 65 ; 24 L. J. Q. B. 346 ; 25 L. T. O. S. 177 ; 1 Jur. N. S. 975 ; 3 C. L. R. 1343 ; 119 E. R. 405.

Annotations :—**Apld.** Turner *v.* Jones (1857), 1 H. & N. 878 ; Tilbury *v.* Brown (1860), 30 L. J. Q. B. 46. **Distd.** Murray *v.* Arnold (1862), 3 B. & S. 287. **Apld.** Wood *v.* Dunn (1865), L. R. 1 Q. B. 77. **Consd.** Wood *v.* Dunn (1866), L. R. 2 Q. B. 73, Ex. Ch. ; Emanuel *v.* Bridger, (1874), L. R. 9 Q. B. 286. **Distd.** *Re* Keyworth, *Ex p.* Banner (1874), 9 Ch. App. 380, n. **Consd.** Lowe *v.* Blakemore (1875), L. R. 10 Q. B. 485 ; *Re* Watt, *Ex p.* Joselyne (1878), 8 Ch. D. 327, C. A. ; Manley *v.* Berkett, [1912] 2 K. B. 329. **Refd.** Newman *v.* Rook (1858), 4 C. B. N. S. 434 ; European Bank *v.* Fox (1866), 15 L. T. 288 ; *Re* Adams, *Ex p.* Greenway (1873), 29 L. T. 75 ; Stevens *v.* Phelips (1875), 10 Ch. App. 417, L. JJ. **Mentd.** Hopkins *v.* Clarke (1864), 4 B. & S. 836 ; *Re* Stanhope Silkstone Collieries Co. (1879), 40 L. T. 204, C. A.

3680. Agreement to set off debt of vendor against purchase-money—Purchaser without knowledge of act of bankruptcy—Specific performance.]—By two contracts dated June 18 & July 2, debtor agreed to sell for £880 four houses which were subject to a mtge. for £600. Debtor was indebted to the purchaser in the sum of £257 for work done by the purchaser to the houses agreed to be sold, & there was a collateral verbal agreement that the debt should be set off against the purchase-money. On July 11, the purchaser heard for the first time that debtor had committed an act of bkpcy. on the previous June 30. Afterwards debtor was adjudicated bkpt. The purchaser, having accepted the title & entered into possession, applied against the trustee in bkpcy. for specific performance of the two contracts & for a declaration that he was entitled to set off the £257 against the balance of the purchase-money after deducting the amount due on the mtge. :—*Held :* there had been mutual dealings between debtor & the purchaser within 1883 Act, s. 38, & the purchaser was entitled to specific performance upon the terms that the £257 due to him from debtor should be set off against the balance of the purchase-money.—*Re* TAYLOR, *Ex p.* NORVELL, [1910] 1 K. B. 562 ; 79 L. J. K. B. 610 ; 102 L. T. 84 ; 26 T. L. R. 270 ; 54 Sol. Jo. 271 ; 17 Mans. 145.

3681. Bill accepted for bankrupt's accommodation.]—Deft. lent his acceptance to bkpts. on a bill, which did not become due till after the act of bkpcy., & was then outstanding in the hands of third persons :—*Held :* deft. having paid the amount

PART X. SECT. 1, SUB-SECT. 4.

3677 i. *Sale of property on credit.*]—K. owed D. £74. D. called on K. & wished to buy goods worth £52. K. explained that he had called a meeting of his creditors at which he hoped to see D. & refused to sell except for cash. D. bought as for cash but got delivery without paying cash, & then claimed to set off the £74. K. assigned to trustees, who sued D. for the price of the goods sold :—*Held :* D. entitled to set up a plea of set-off.—DONALDSON *v.* COUCHE (1867), 4 W. W. & A'B. 41. —**AUS.**

3681 i. *Bill accepted for bankrupt's accommodation.*]—B. having indorsed over to a bank promissory notes drawn in his favour by P., P. shortly afterwards went into liquidation. The bank proved against P.'s estate on the promissory notes & obtained the amount of the composition on them. The balance amounting to £337 3*s.* 1*d.*, which remained due on the notes after payment of the composition, was paid to the bank by B. B. was at that time

after the commission issued, & before the action brought by the assignees, was entitled to set off same under the words "mutual credit," in 5 Geo. 2, c. 30, s. 28.—SMITH *v.* HODSON (1791), 4 Term Rep. 211; 100 E. R. 979.

Annotations :—**Distd.** Fair *v.* M'Iver (1812), 16 East, 130; Ouchterlony *v.* Easterby (1813), 4 Taunt. 888. **Expld.** Rose *v.* Hart (1818), 8 Taunt. 499; Thorpe *v.* Thorpe (1832), 1 L. J. K. B. 170. **Consd.** Young *v.* Bank of Bengal (1836), 1 Moo. Ind. App. 87, P. C.; Russell *v.* Bell (1841), 8 M. & W. 277. **Refd.** Olive *v.* Smith (1813), 5 Taunt. 56; Sims *v.* Simpson (1834), 1 Bing. N. C. 306; Hulme *v.* Muggleston (1837), 3 M. & W. 30; Bittleston *v.* Timmis (1845), 1 C. B. 389; Astley *v.* Gurney (1869), L. R. 4 C. P. 714; *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C. **Mentd.** Lightly *v.* Clouston (1808), 1 Taunt. 112; Foster *v.* Stewart (1814), 3 M. & S. 191; Cash *v.* Young (1824), 2 B. & C. 413; Brewer *v.* Sparrow (1827), 1 Man. & Ry. K. B. 2; Gye *v.* Hitchcock (1835), 4 Ad. & El. 84; Peru *v.* Peruvian Guano Co. (1887), 36 Ch. D. 489.

3682. ——.]—Bkpt. had received a loan on four notes from C., for which he had given an indemnity. Two were met before the bkpcy., & two were paid by C. after the bkpcy. The assignees set up an account for business done by bkpt. as C.'s solr. :—*Held :* C. was entitled to set the debt due to bkpt. against the payments after the bkpcy., & to prove the amount of the notes paid before the bkpcy.—*Re* SHEPHERD, *Ex p.* BOYLE (1803), 1 Cooke's Bankrupt Laws, 8th ed. p. 596.

Annotations :—**Refd.** Olive *v.* Smith (1813), 5 Taunt. 56; Hulme *v.* Muggleston (1837), 3 M. & W. 30; Bittleston *v.* Timmis (1845), 1 C. B. 389.

See 1914 Act, s. 31.

3683. ——.]—An acceptance, not due till after the bkpcy. of the drawer :—*Held :* capable of set-off within the mutual credit clause.—*Ex p.* WAGSTAFF (1806), 13 Ves. 65; 33 E. R. 219.

Annotations :—**Consd.** Hulme *v.* Muggleston (1837), 3 M. & W. 30. **Refd.** Young *v.* Bank of Bengal (1836), 1 Deac. 622, P. C.; Bittleston *v.* Timmis (1845), 1 C. B. 389.

3684. ——.]—A. at Hamburg, had dealings with B. & Co. in London, & previous to their bkpcy. drew a bill on them for £400, which they accepted. No debt was then due from them to A., but they were afterwards indebted to him in £236 11*s.* 3*d.*, when they drew on him for £163 8*s.* 9*d.*, being the balance due from A. in case the bill for £400 had been paid. That bill was drawn on Feb. 16, & on the same day sold by them to deft. for its full value, to be paid for on the 20th of the same month, on which day, B. & Co. committed an act of bkpcy., & requested deft. to keep the bill at the disposal of A., by whom the bill for £400 was drawn. On Feb. 23, A. accepted the bill, without knowledge of the bkpcy., & paid the amount of it when it became due to deft., on an agreement that he should resist the claims of the assignees. At that time the bill for £400 was overdue, & unpaid in the hands of A., & B. & Co. were indebted to him upon it, in more than the amount of the bill in question :—*Held :* pltfs., as assignees, could not recover against deft., as he stood in the place of A., who was a creditor of the estate of B. & Co., & there was a case of mutual credit between him & bkpts. before the bkpcy.—SHELDON *v.* ROTHSCHILD (1818), 8 Taunt. 156; 2 Moore, C. P. 43; 129 E. R. 343.

3685. ——.]—A. kept cash with M. & Co., bankers, & accepted a bill drawn by one of the partners in the house of M. & Co., & indorsed by that partner to M. & Co., who discounted it, & afterwards indorsed it for value to S. Before the bill became due, M. & Co. became bkpts., having funds in the hands of S. more than sufficient to pay the bill, & having in their hands money belonging to A. When the bill became due S. presented it for payment to A., who having refused payment, S. paid himself the amount out of the funds of M. & Co. remaining in his hands, & delivered the bill to their assignees :—*Held :* before the bkpcy. there was a mutual credit between bkpts. & A., & the latter was entitled to set off against the sum due to bkpts. on the bill the debt due to him from M. & Co. at the time of their bkpcy.—BOLLAND *v.* NASH (1828), 8 B. & C. 105; 2 Man. & Ry. K. B. 189; 6 L. J. O. S. K. B. 244; 108 E. R. 982.

Annotations :—**Consd.** Collins *v.* Jones (1830), 10 B. & C. 777. **Distd.** *Re* Royal British Bank, *Ex p.* Banes (1857), 28 L. T. O. S. 296. **Apld.** *Re* Anglo-Greek Steam Navigation & Trading Co., Carralli & Haggard's Claim (1869), 4 Ch. App. 174, L. JJ.

3686. ——.]—To *assumpsit* by the assignees of bkpt. for goods sold & delivered by bkpt., with counts for money paid, had & received, & on an account stated, deft. pleaded by way of set-off, that before notice of any act of bkpcy., & before the issuing of the fiat, & before action brought, deft. gave credit to bkpt., by accepting bills of exchange for his accommodation, & at his request, without any consideration or value, which bills were, before notice of the bkpcy., negotiated by bkpt. for his own use & benefit, that the credits so given were likely to end in debts from bkpt. to deft., & that afterwards, & before the commencement of the action, deft. paid the bills :—*Held :* a good set-off under 6 Geo. 4, c. 16, s. 15, on the ground that a mutual credit was shown.—RUSSELL *v.* BELL (1841), 8 M. & W. 277; 1 Dowl. N. S. 107; 10 L. J. Ex. 300; 151 E. R. 1042.

Annotation :—**Mentd.** Bittleston *v.* Timmis (1845), 1 C. B. 389.

3687. ——.]—To *assumpsit* by the assignees of A., for money had & received by deft. to the use of pltfs. as assignees, deft. pleaded that before the commencement of the suit & before deft. had notice of any act of bkpcy. committed by A., & before any fiat against him, deft. gave credit to A. in the sum of £148 10*s.*, by accepting, for his accommodation, & at his request & without any consideration, a bill of exchange for that sum, which bill A. afterwards & before notice to deft. of A.'s bkpcy., indorsed & negotiated for value for his own use & benefit, that the credit so given by deft. to A. was a credit of a nature extremely likely to end in a debt from A. to deft., that afterwards & before the commencement of the suit deft. was obliged to pay the bill to the holders, & thereupon & thereby A. became & was indebted to deft. in the sum of £148 10*s.*, that before deft. had notice of any act of bkpcy. committed by A. & before any fiat against him, A. delivered to deft. bills of exchange for £100 & £20 for the purpose & in order that deft. might receive the amounts thereof for the use of A., that deft. afterwards received such amounts, & was ready & willing to set off the one debt against the other :—*Held :* the acceptance of the bill for the accommodation of A., was a credit given to A., & the delivery of the two bills by A. to deft. for the purpose in the plea mentioned, was a credit given by A. to deft., & such mutual

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indebted to P. in the sum of £126 5*s.* for accommodation acceptances made by P. in B.'s favour, leaving a balance of £210 18*s.* 1*d.* in favour of B. Subsequently proceedings in liquidation were instituted in B.'s estate, & P. sought to prove against the estate for a debt of £181. 14*s.* 6*d.*, which was admitted to be due unless the trustee was entitled to set off the £210 18*s.* 1*d.* :—*Held :* the trustee was so entitled.—*Re* BELL (1878), Q. L. R. (Beor) 46.—**AUS.**

3681 ii. ——.]—A. accepted bills for accommodation of B., who discounted them at the bank. A. & B. having become bkpt., the bank ranked on both estates for the full amount of the bills. A.'s trustee claimed to retain a debt due by him to B.'s estate as a security on the bills paid by him on B.'s account to the bank :—*Held :* A.'s trustee was not entitled to retain the sums due to B.'s estate either in security or in satisfaction.—ANDERSON *v.* MACKINNON (1876), 3 R. (Ct. of Sess.) 608.—**SCOT.**

Sect. 1.—*Application of the doctrine: Sub-sect.* 4.]

credits resulted in debts, which might be set off against each other under 6 Geo. 4, c. 16, s. 50.—BITTLESTON *v.* TIMMIS (1845), 1 C. B. 389; 2 Dow. & L. 817; 14 L. J. C. P. 117; 4 L. T. O. S. 413; 135 E. R. 591.

Annotation:—**Expld.** *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.

3688. —— Bill paid by way of composition—Set-off of full amount.]—Deft., in an action by assignees, before the bkpcy., had accepted bills drawn upon him by bkpt. Those bills had been paid away to bkpt.'s creditors. At the time of his accepting the bills deft., as bkpt.'s agent, had in his hands money of bkpt. to the full amount of the sum for which the bills were drawn, & those funds had not been withdrawn at the time of the bkpcy. After the bills became due respectively, & before the act of bkpcy., the holders of the bills, in order to relieve deft. from his responsibility to them, took from deft. a composition upon the acceptances, & delivered up the bills to deft., but bkpt. was not a party to such arrangement. In taking the accounts between the parties, the arbitrator, to whom the matter had been referred, did not allow the amount of the sums for which the bills were drawn to be set off by deft., but only the amount of the composition:—*Held:* deft. was entitled to have the full amount of the bills allowed him in account.—STONEHOUSE *v.* READ (1825), 3 B. & C. 669; 5 Dow. & Ry. K. B. 603; 107 E. R. 881.

3689. Obligation to accept bill.]—The assignees of a bkpt. brought an action against deft., without alleging special damage, for not accepting a bill of exchange, in pursuance of an agreement made on balancing accounts with bkpt. Deft. pleaded a set-off for money lent & money received to his use:—*Held:* the transaction was "a mutual credit," & the plea of set-off could be maintained.—GIBSON *v.* BELL (1835), 1 Bing. N. C. 743; 1 Hodg. 136; 1 Scott, 712; 131 E. R. 1303.

Annotations:—**Folld.** Groom *v.* West (1838), 8 Ad. & El. 758. **Consd.** Alsager *v.* Currie (1844), 12 M. & W. 751. **Apprvd.** Peat *v.* Jones (1881), 8 Q. B. D. 147, C. A. **Refd.** Boath *v.* Hutchinson (1872), L. R. 15 Eq. 30; *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.

3690. ——.]—A declaration, by assignees of R., stated that deft., in consideration that R. would sell & deliver to him sugar at the rate & price of, etc., agreed to pay him for same, prompt two months, or an acceptance at seventy days if required, that the goods were delivered to & received by deft., before the bkpcy., on those terms, but he did not, though required before the bkpcy., pay, then or since, by an acceptance, nor did he otherwise pay, whereby R. before his bkpcy. lost the use & benefit of such acceptance, & the benefit which would have accrued to him from having it discounted & raising money on it for his use in the way of his trade, & was put to loss & inconvenience by not having such acceptances to negotiate, & his estate applicable to the payment of his just debts was, by reason of the non-payment for the goods in manner aforesaid, diminished in value, to the damage of the assignees & creditors. Plea, set-off for a debt due from R. before bkpcy:—*Held:* the case appearing on the declaration was one of mutual credit, within 6 Geo. 4, c. 16, s. 50, & a set-off might be pleaded.—GROOM *v.* WEST (1838), 8 Ad. & El. 758; 1 Per. & Dav. 19; 1 Will. Woll. & H. 638; 8 L. J. Q. B. 25; 2 Jur. 940; 112 E. R. 1025.

3691. Obligation to indorse bill.]—A. having given deft. his acceptance for £20, deft., in consideration thereof, undertook that he would indorse to A. a bill drawn by him, deft., on E., payable to deft.'s order. He gave the bill, but would not indorse it. On *assumpsit* for breach of contract, brought by the assignees of A., who had become bkpt., & whose acceptance was dishonoured:—*Held:* the contract to indorse was not a subject of "mutual credit" within 6 Geo. 4, c. 16, s. 50, & could not have been set off by the assignees against the £20 due from A. to deft.—ROSE *v.* SIMS (1830), 1 B. & Ad. 521; 9 L. J. O. S. K. B. 85; 109 E. R. 881.

Annotations:—**Consd.** Clarke *v.* Fell (1833), 4 B. & Ad. 404. **Distd.** Gibson *v.* Bell (1835), 1 Bing. N. C. 743. **Consd.** Young *v.* Bank of Bengal (1836), 1 Deac. 622; Groom *v.* West (1838), 8 Ad. & El. 758. **Distd.** Alsager *v.* Currie (1844), 12 M. & W. 751; Harrop *v.* Fisher (1861), 10 C. B. N. S. 196. **Consd.** Astley *v.* Gurney (1869), L. R. 4 C. P. 714.

3692. Bill indorsed for bankrupt's accommodation.]—The giving of credit to bkpt., by indorsing a bill of exchange for his accommodation, is such a giving of credit to bkpt. within 6 Geo. 4, c. 16, s. 50, as might be the subject of set-off in an action brought by his assignees.—HULME *v.* MUGGLESTON (1837), 3 M. & W. 30; 6 Dowl. 112; Murp. & H. 344; 7 L. J. Ex. 20; 150 E. R. 1043.

Annotations:—**Consd.** Bittleston *v.* Timmis (1845), 1 C. B. 389. The marginal note in 3 M. & W. 30 is evidently wrong in stating that the credit was given to the bkpt. before the bkpcy (CRESSWELL, J.). **Expld.** *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.

3693. ——.]—The indorser of a bill of exchange, who has been compelled by the bkpcy. of the acceptor to take it up at maturity, may set off the amount of such bill against a debt to the estate of the acceptor, without being compelled to have recourse to a prior indorser, or being affected by any collateral security which such prior indorser may have.—MCKINNON *v.* ARMSTRONG BROTHERS & CO. (1877), 2 App. Cas. 531; 36 L. T. 482, H. L.

Annotation:—**Consd.** *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.

3694. Bill discounted for bankrupt.]—A. before his bkpcy., discounted bills of exchange with B. & Co., his bankers. They gave him immediate credit for the value of the bills in his account, *minus* the discount. A balance was likewise struck, before the bkpcy., &, whilst the bills were yet running, in favour of A., when the bankers admitted that they had in their hands £934 8*s.* 8*d.* due to A., giving him credit for the bills then running. A. became bkpt., & the bills were dishonoured. In an action against the bankers for the balance admitted to be due to A. before his bkpcy.:—

3694 i. *Bill discounted for bankrupt.*]—Z. consigned goods to England, drawing bills of lading in respect thereof & four bills of exchange against the goods upon the consignees for the value thereof. Those bills Z. indorsed over to deft. bank together with the shipping documents relating to the goods against which the bills were drawn, & the amount of the bills was placed to the credit of Z.'s floating current account. Thereafter, on Oct. 14, Z. became bkpt. on which day his effects vested in the official assignee & a large sum stood to his credit in the bank books. The four bills were dishonoured & protested after the vesting order. Under an hypothecation given by Z. to the bank, the bank subsequently to the vesting order caused the goods against which the bills had been drawn to be sold. The amount realised from the sale was less than the amount due on the bills, leaving thereby a balance due to the bank. Thereupon they retained, after giving credit to Z. for the net proceeds of the sales, out of the sum standing to the credit of the firm at the date of the vesting order a sum equivalent to the amount due on the bills & paid over the remaining balance of the current account to the official assignee. The official receiver claimed to be entitled to the whole of the balance of the current account as it existed at the date of the vesting order:—*Held:* until dishonour of the bills there was no debt & there could be no "mutual credit" entitling the bank to a set-off.—MILLER *v.* NATIONAL BANK OF INDIA (1891), I. L. R. 19 Calc. 146.—IND.

Held: they had a right to set off against such claim, the amount of the dishonoured bills, it being a case of mutual credit, under 5 Geo. 2, c. 30, s. 28.—ARBOUIN *v.* TRITTON (1816), Holt, N. P. 408.

Annotation:—**Distd.** Abbott *v.* Hicks (1839), 5 Bing. N. C. 578.

3695. ——.]—Defts., bankers in London, were the bankers of E. & Co. up to Oct. 24, 1842, when E. & Co. became bkpt. Previously to that day defts. had discounted for them bills to a large amount, & on that day defts. had in their hands a balance of £179 19*s.* 11*d.*, belonging to bkpts. The bills were indorsed by bkpts. in blank, & two of them were paid by the acceptors before the bkpcy.; the others, far exceeding in amount the sum of £179 19*s.* 11*d.*, did not become due until Nov. 16 & other later periods. An action for money lent, etc., was commenced on Nov. 2, 1842, by bkpts.' assignee, & on Nov. 8 defts. proved against bkpts.' estate the whole of the bills, except the two which had been paid, deducting the balance of £179 19*s.* 11*d.*:—*Held:* defts., as indorsees of the bills, were entitled to set them off in the action.—ALSAGER *v.* CURRIE (1844), 12 M. & W. 751; 13 L. J. Ex. 203; 3 L. T. O. S. 59; 152 E. R. 1402.

Annotations:—**Consd.** Naoroji *v.* Chartered Bank of India (1868), L. R. 3 C. P. 444. **Refd.** Astley v. Gurney (1869), L. R. 4 C. P. 714.

3696. Bills deposited for collection.]—The employment of a bank by the drawer to collect the payment of bills of exchange is sufficient to create a credit by the drawer to the bank within the mutual credit clause of 1849 Act.

Pltfs., a firm of merchants in London, employed defts. to collect the payment of their drafts upon their customers at Bombay. Before the bills were paid to defts., pltfs. executed a deed of inspectorship under 1861 Act, to which defts. were parties in respect of a large sum due from pltfs. to defts.:—*Held:* notwithstanding the power of pltfs. to have revoked their authority to defts. before payment took place, the circumstances created a mutual credit between the parties, & defts. had a right to set off the amount of the sums paid to them on pltfs.' drafts against the debt of pltfs. to them.—NAOROJI *v.* CHARTERED BANK OF INDIA (1868), L. R. 3 C. P. 444; 37 L. J. C. P. 221; 18 L. T. 358; 6 W. R. 791.

Annotations:—**Apprvd.** Astley *v.* Gurney (1869), L. R. 4 C. P. 714, Ex. Ch. **Consd.** Elliott *v.* Turquand (1881), 7 App. Cas. 79, P. C. **Refd.** Palmer *v.* Day, [1895] 2 Q. B. 618; *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.

3697. Bankrupt's acceptance taken as payment for note.]—*Assumpsit* by the assignees of R., on a promissory note drawn by deft., payable to G. or order, & by him indorsed to R. before the bkpcy. In Oct. 1825, G. applied to R. to discount the note, & took as part of the proceeds a bill of exchange, accepted by R., payable to G.'s order. G. indorsed the bill for value to deft., & he got it discounted by H., who was the holder when it became due. A commission of bkpcy. issued against R. on Dec. 23, & the bill became due on the 24th, when it was presented & dishonoured. On the 26th H. received the amount from deft., & returned the bill to him:—*Held:* he had a right to set off the bill against the demand of the assignees on the promissory note.—COLLINS *v.* JONES (1830), 10 B. & C. 777; 109 E. R. 638.

Annotations:—**Consd.** *Re* Moseley Green Coal & Coke Co., Barrett's Case (1865), 4 De G. J. & Sm. 756. **Apprvd.** McKinnon *v.* Armstrong (1877), 2 App. Cas. 531, H. L. **Refd.** *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.

3698. Bankrupt's acceptance discounted for him.]—H. & Co. claimed to prove for £5,000 upon several acceptances of bkpt. which had come into their hands, & which were discounted by the U. Bank at their request. The bills, when due, were dishonoured by bkpt. & paid by H. & Co. A set-off by bkpt. in respect of £1,854 in respect of two acceptances in the hands of third parties, which had been proved against the estate, allowed.—*Re* ALEXANDER & Co., *Ex p.* HASTIE & HUTCHINSON (1850), 1 Fonbl. 59; 14 L. T. O. S. 402.

3699. Bill given for larger sum than due—On obligation to return surplus when paid.]—A. purchased one & afterwards another parcel of goods of B., each at six months' credit. When the first sum became due A. lodged in B.'s hands a bill of exchange for a larger amount than the value of the goods, B. engaging to return to A. the overplus when the bill should be paid. B. received the amount of the bill, & then A. became bkpt., not having paid for the second parcel of goods:—*Held:* B. might retain the surplus to satisfy his demand on A. for the second parcel of goods.—ATKINSON *v.* ELLIOTT (1797), 7 Term Rep. 378; 101 E. R. 1030.

Annotations:—**Consd.** Buchanan *v.* Findlay (1829), 9 B. & C. 738. **Distd.** Young *v.* Bank of Bengal (1836), 1 Deac. 622. **Consd.** Astley *v.* Gurney (1869), L. R. 4 C. P. 714, Ex. Ch. **Refd.** Key *v.* Flint (1817), 8 Taunt. 21.

3700. Surplus proceeds of collateral security—Authority to sell given before bankruptcy.]—On Mar. 30, J. & Co. indorsed & deposited with defts. bills of lading for cotton & coffee valued at £7,048, as collateral security for defts.' acceptance at three months for £5,000, which became due on June 23, J. & Co. undertaking "to provide funds one day before maturity of the bill." On Apr. 5, J. & Co. indorsed & deposited with defts. bills of lading for other cotton valued at £4,280, & four bills of exchange amounting to £2,400, as collateral security for a further acceptance of defts. for £5,000 due June 30, J. & Co. undertaking "to provide funds before maturity to keep defts. out of cash advance." J. & Co. were at that time already indebted to defts. upon bills which defts. had discounted for them, & which were subsequently dishonoured, & on May 19, J. & Co. became bkpt. Before their bkpcy., J. & Co. gave their assent that defts. should sell the cotton & coffee & receive the proceeds. The cotton was sold & the proceeds received by defts. before the bkpcy. of J. & Co. The coffee did not arrive until after the bkpcy. It was then sold by defts. The four bills deposited with defts. were duly paid. The securities deposited on Mar. 30 & Apr. 5 respectively, realised £11,816 12*s.* 3*d.*, thus leaving, after payment of defts.' acceptances for £10,000, a balance of £1816 12*s.* 3*d.*, against which defts. claimed to set off the debt due to them from J. & Co.:—*Held:* there was a mutual credit as to the proceeds of the sale & the debt could be set off.—ASTLEY *v.* GURNEY (1869), L. R. 4 C. P. 714; 38 L. J. C. P. 357; 18 W. R. 44, Ex. Ch.

Annotations:—**Refd.** Palmer *v.* Day, [1895] 2 Q. B. 618; *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.

3701. —— Agreement to collect & pay over surplus.]—A creditor of a partnership, having made further advances on the security of a bill of exchange deposited with him for that purpose by the partners, & having undertaken to receive the amount when due & return the surplus, the bill having been dishonoured & remaining in his

3700 i. *Proceeds of collateral security—Paid to unsecured creditor by mistake.*]—Where money, the proceeds of a fire policy, ceded as collateral security for a debt also secured by a covering bond, was wrongly paid to the cessionary by the insurance co. after the insolvency of the cedent:—*Held:* the cessionary could not set off against the money so paid to him the amount of unsecured debts owing to him by the cedent.—NATIONAL BANK OF SOUTH AFRICA, LTD. *v.* COHEN'S TRUSTEE (1911), App. D. 235.—S. AF.

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hands unpaid, is not entitled, on the bkpcy. of the partners, to set off his prior advances against a demand by the assignees for the bill.—*Re* ROBINSON, *Ex p.* FLINT (1818), 1 Swan. 30; 36 E. R. 285, L. C.

Annotations:—**Follid.** Buchanan *v.* Findlay (1829), 9 B. & C. 738. **Refd.** Young *v.* Bank of Bengal (1836), 1 Deac. 622, P. C.

3702. —— Deposited for specific purpose.]—P. & Co. having borrowed a large sum of the B. Bank, deposited the co.'s paper with the bank to a greater amount, as a collateral security, accompanied with a written agreement, authorising the bank in default of repayment of the loan by a given day, "to sell the co.'s paper for the reimbursement of the bank, rendering to P. & Co. any surplus." Before default was made in repayment of the loan, P. & Co. were declared insolvent. At the time of the adjudication of insolvency, the bank were also holders of two promissory notes of P. & Co., which they had discounted for them before the transaction of the loan, & the agreement as to the deposit of the co.'s paper. The time for repayment of the loan having expired, the bank sold the co.'s paper, the proceeds of which, after satisfying the principal & interest due on the loan, produced a considerable surplus. In an action by the assignees of P. & Co., against the bank, to recover the amount of such surplus:—*Held:* the bank could not set off the amount of the two promissory notes, & the case did not come within the clause of mutual credit in Indian Insolvent Act, 1828 (c. 73).—YOUNG *v.* BANK OF BENGAL (1836), 1 Moo. Ind. App. 87; 1 Deac. 622; 1 Moo. P. C. C. 150; 18 E. R. 34, P. C.

Annotations:—**Consd.** Fearnley *v.* Wright (1840), 1 Scott, N. R. 657, Ex. Ch. **Distd.** Alsager *v.* Currie (1844), 12 M. & W. 751; Naoroji *v.* Chartered Bank of India (1868), L. R. 3 C. P. 444. **Consd.** Astley *v.* Gurney (1869), L. R. 4 C. P. 714, Ex. Ch.; *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C. **Refd.** Bittleston *v.* Timmis (1845), 1 C. B. 389.

3703. Surplus proceeds of mortgage—Debts & mortgage purchased after death of insolvent.]—Testator devised all his real & personal estate to his widow & appointed her his sole extrix. He died insolvent. The widow did not prove the will. A judgment was given for the administration of his real & personal estate. Between the date of testator's death & the date of the judgment H. purchased & had assigned to him certain bond & simple contract debts due from testator & also took transfers of mtges. upon testator's real estate. In exercise of the powers of sale contained in the mtges. H. sold the mortgaged properties, & after paying himself principal & interest out of the proceeds there remained in his hands a balance which he claimed to set off in satisfaction *pro tanto* of the bond & simple contract debts:—*Held:* the purchase after testator's death of the debts, & the transfers of the mtges. followed by a sale under the powers of sale, were not "mutual dealings" between H. & testator's estate within 1883 Act, s. 38, & H. was not entitled to the right of set-off. —*Re* GEDNEY, SMITH *v.* GRUMMITT, [1908] 1 Ch. 804; 77 L. J. Ch. 428; 98 L. T. 797; 15 Mans. 97.

Annotation:—**Consd.** *Re* Thorne, [1914] 2 Ch. 438.

3704. Bill remitted for particular purpose.]—A. & Co. remitted a bill to B. & Co., with directions to get it discounted, & apply the proceeds in a particular way. B. & Co. did not get the bill discounted, but received the money when it became due. Before that time A. & Co. had stopped payment, & desired to have the bill returned to them. They became bkpt. before the money was received on the bill by B. & Co.:—*Held:* the assignees of A. & Co. could recover the amount of the bill as money received to their use, & B. & Co. could not set off a debt due to them from A. & Co. as the bill had been remitted to them for a particular purpose.—BUCHANAN *v.* FINDLAY (1829), 9 B. & C. 738; 4 Man. & Ry. K. B. 593; 7 L. J. O. S. K. B. 314; 109 E. R. 274.

Annotations:—**Distd.** Thorpe *v.* Thorpe (1832), 3 B. & Ad. 580. **Consd.** *Re* Douglas, *Ex p.* Thompson, Hankey, Cheape & Pennell (1838), 2 Jur. 734; Groom *v.* West (1838), 8 Ad. & El. 758; Muttyloll Seal *v.* Dent (1853), 5 Moo. Ind. App. 328, P. C. **Refd.** Clarke *v.* Fell (1833), 4 B. & Ad. 404. **Mentd.** Russell *v.* Bell (1841), 8 M. & W. 277.

3705. ——.]—A., previous to his bkpcy., deposited a bill of exchange with B., for the specific purpose of raising money thereon, & B. advanced money on the bill:—*Held:* the assignees of A. were entitled to recover from B. the amount of the bill in an action of trover, they having tendered to B. the money advanced by him, though a general balance remained due from bkpt. to B., & this did not form a case of mutual credit within 5 Geo. 2, c. 30.—KEY *v.* FLINT (1817), 8 Taunt. 21; 1 Moore, C. P. 451; 129 E. R. 289.

Annotations:—**Refd.** Buchanan *v.* Findlay (1829), 9 B. & C. 738; Young *v.* Bank of Bengal (1836), 1 Moo. P. C. C. 150, P. C.

3706. Money deposited for specific purpose.]—The deposit of money for a specific purpose constitutes the depositary a trustee, & if that purpose fails & the depositor becomes bkpt., the amount cannot be set off against debts due from the depositor. —WRIGHT *v.* WATSON (1883), Cab. & El. 171.

3707. ——.]—Money was handed by a co. to its solrs. to discharge claims, with instructions to settle them if possible for less sums than their full amounts. This the solrs. in some cases succeeded in doing, but without the knowledge of the co. The co. subsequently went into liquidation, & the solrs. sought to set off the balance retained by them against a larger sum due to them by the co. in respect of costs:—*Held:* the money having been received by the solrs. for a specific purpose, the *onus* was upon them to show that the co. had consented to any change in the purpose, & having failed to do so, there could be no set-off.—*Re* MID-KENT FRUIT FACTORY, LTD., [1896] 1 Ch. 567; 65 L. J. Ch. 250; 74 L. T. 22; 44 W. R. 284; 40 Sol. Jol. 211; 3 Mans. 59.

3703 i. *Surplus proceeds of mortgage.*]—A trader carrying on business in two establishments mortgaged both stocks-in-trade to B. as security for instalments on a composition with his creditors & for advances in cash & goods to a fixed amount. The composition notes were made & indorsed by B., who made advances to an amount considerably over that stated in the mtge. Afterwards the mtgor. was in default for the advances & a portion of overdue notes, & there were some notes not matured, & B. consented to the sale of one of the mortgaged stocks, taking the purchaser's notes in payment, applying the amount generally in payment of his overdue debt, part of which was unsecured. A few days afterwards B. seized the other stock of goods covered by his mtgee., & about the same time the sheriff seized that stock under execution, & shortly afterwards the mtgor. assigned for benefit of creditors. An interpleader issue between B. & the execution creditor resulted in favour of B., who received, out of the proceeds of the sale of the goods under an order of the ct., the balance remaining due on his mtge. The assignee of the mtgor. having brought an action against B. to recover the amount representing the unsecured part of his debt, which was paid by the purchase of the first stock, which payment was alleged to be a preference to B. over the other creditors:—*Held:* B.'s position was the same as if his whole debt, secured & unsecured, had been overdue, & there had been one sale of both stocks of goods realising an amount equal to such debt, in which case he could have appropriated a portion of the proceeds to payment of his secured debt, & would have had the benefit of the law of set-off as to the unsecured debt.—STEPHENS *v.* BOISSEAU (1896), 26 S. C. R. 437.—**CAN.**

Annotations :—**Consd.** Monkwearmouth Flour Mill Co. *v.* Lightfoot (1897), 13 T. L. R. 327 ; *Re* Thorne, [1914] 2 Ch. 438. **Refd.** *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C. ; Tilley *v.* Bowman, [1910] 1 K. B. 745.

3708. Goods deposited for specific purpose—Claim in detinue for return of specific goods.]—Pltf. co. had deposited cigars with defts. to secure a debt. The co. was wound up, & the secured debt paid off. The liquidator brought an action of detinue for the cigars. Their value having been assessed in the action, defts. claimed to set off another debt due from the co. to them against such value by virtue of the conjoint effect of 1883 Act, s. 38, & Jud. Act, 1875 (c. 77), s. 10 :—*Held :* they were not entitled to do so, as the co.'s claim was in detinue for the return of specific goods. —EBERLE'S HOTELS & RESTAURANT CO., LTD. *v.* JONAS (1887), 18 Q. B. D. 459 ; 56 L. J. Q. B. 278 ; 35 W. R. 467 ; 3 T. L. R. 421, C. A.

Annotations :—**Consd.** Lord *v.* G. E. Ry. Co., [1908] 2 K. B. 54, C. A. **Apld.** *Re* Thorne [1914] 2 Ch. 438. **Refd.** Palmer *v.* Day [1895], 2 Q. B. 618, D. C. ; Elgood *v.* Harris, [1896] 2 Q. B. 491 ; *Re* Mid-Kent Fruit Factory (1896), 3 Mans. 59 ; *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C. ; Lister *v.* Hooson (1907), 77 L. J. K. B. 161, C. A. ; *Re* Taylor, *Ex p.* Norvell, [1910] 1 K. B. 562, C. A.

3709. —— Right to return of goods.] — A railway co. by a "ledger agreement" opened a credit account with a coal merchant for the carriage of his coal, the co. to have a continual lien upon the coal conveyed on their lines or being at any time on ground rented of the co. for all charges due to them, & to be at liberty to sell & dispose of any of the coal to satisfy the lien, with the right to close the account by giving one day's notice. By separate agreements the co. let to the merchant allotments within the railway yard for the purpose only of stacking & dealing with the coal. The co. had the keys of the yard gates & kept them locked at certain times. The payments being in arrear, the co. closed the account, locked the gates, & detained the coal. The coal merchant was shortly afterwards adjudicated bkpt., & his trustee brought an action against the co. for trespass :—*Held :* at the date of the receiving order the right of bkpt. was a right to a return of the coal, & the right of the co. was a right to money, & the two claims could not be set off under 1883 Act, s. 38.—LORD'S TRUSTEE *v.* GREAT EASTERN RY. CO., [1908] 2 K. B. 54 ; 77 L. J. K. B. 611 ; 98 L. T. 910 ; 24 T. L. R. 470 ; 52 Sol. Jo. 394 ; 15 Mans. 107, C. A., *revsd.* on another point, *sub nom.* GREAT EASTERN RY. CO. *v.* LORD'S TRUSTEE [1909] A. C. 109, H. L.

Annotation :—**Consd.** Tilley *v.* Bowman, [1910] 1 K. B. 745.

3710. Property entrusted with authority to receive proceeds.]—Deft. & C. purchased a string of pearls with money advanced by deft., & agreed that the profit & loss thereon should be equally divided, C. paying his share of interest till the pearls were sold. C. became bkpt., being indebted at that time to deft. The pearls were afterwards sold, & the money was received by deft. In an action by C.'s assignees for his share of the money received :—*Held :* deft. was entitled to set off the debt from C. to himself.—FRENCH *v.* FENN (1783), 3 Doug. K. B. 257 ; 99 E. R. 642.

Annotations :—**Consd.** Smith *v.* Hodson (1791), 4 Term Rep. 211 ; Olive *v.* Smith (1813), 5 Taunt. 56 ; Graham *v.* Russell (1816), 3 Price, 227 ; Rose *v.* Hart (1818), 2 Moore, C. P. 547 ; Sampson *v.* Burton (1820), 2 Brod. & Bing. 89. **Distd.** Young *v.* Bank of Bengal (1836), 1 Moo. Ind. App. 87, P.C. **Consd.** Astley *v.* Gurney (1869), L. R. 4 C. P. 714, Ex. Ch. **Refd.** Elliott *v.* Turquand (1881), 7 App. Cas. 79, P. C.

3711. ——.]—S. being desirous of making a shipment for his own risk & advantage, but not in his own name, represented to the merchants, through whom the shipment was to be made, that the goods were the property of A., & shipped on his account, & A., by the desire of S., wrote to the merchants, stating the party to be so, & directing them to insure, & to advance money to S. on the goods, which was done :—*Held :* this was a credit given to A. by S. by the delivery of goods in its nature likely to terminate in a debt, & S. having subsequently become bkpt., A. was entitled to recover the proceeds of the shipment from the merchants, & to set off against them a debt due from bkpt. to him.—EASUM *v.* CATO (1822), 5 B. & Ald. 861 ; 1 Dow. & Ry. K. B. 530 ; 106 E. R. 1406.

Annotations :—**Consd.** Young *v.* Bank of Bengal (1836), 1 Deac. 622. **Refd.** Astley *v.* Gurney (1869), L. R. 4 C. P. 714, Ex. Ch.

3712. ——.]—Applt., the agent of a West Indian estate, between whom & the owners were mutual debts & credits, was employed by the owners to sell their estate, to receive the purchase-money, & to place it to their credit. The estate was sold, & the purchase-money was received by applt. & placed by him to the credit of the owners, who were indebted to applt. at the time in a larger amount. Before the money was so received by applt., the owners, without the knowledge of applt., had committed an act of bkpcy. :—*Held :* applt. was entitled to set off the purchase-money in account with bkpt.'s trustee.—ELLIOTT *v.* TURQUAND (1881), 7 App. Cas. 79 ; 51 L. J. P. C. 1 ; 45 L. T. 771 ; 30 W. R. 477, P. C.

Annotations :—**Consd.** *Re* Gillespie, *Ex p.* Reid (1885), 14 Q. B. D. 963. **Refd.** *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.

3713. ——.]—A customer authorising a shopkeeper, with whom he has deposited chattels for safe custody, to sell them against his account, gives the shopkeeper on the customer's bkpcy. a security on the deposited chattels. A bare

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3710 i. *Property entrusted with authority to receive proceeds—To creditor on promissory note.*]—Debtor instructed applt., an auctioneer, to whom he was indebted upon a promissory note, not then due, to conduct sales of his live-stock & furniture for him, & to receive & hold the proceeds. Applt. paid certain debts due by debtor to other creditors out of the proceeds upon written orders of debtor. Debtor became bkpt., & applt. claimed the right to set off the amount due to him under the promissory note, against the balance of proceeds of sales in his hands :—*Held :* such claim could not be resisted, on the ground that what had taken place amounted to a fraudulent preference.—HUNTER *v.* BISPHAM'S OFFICIAL ASSIGNEE (1898), 17 N. Z. L. R. 175.—**N.Z.**

3710 ii. —— *To creditor on bill of exchange.*]—In an action by the trustee of the estate of bkpt. in Scotland, under a sequestration, the declaration contained counts by which pltf. claimed for money received by deft. for the use of pltf. as trustee after the bkpcy., & for interest upon money due from deft. to pltf. as trustee after the bkpcy., to which deft. pleaded that, before he had notice of the bkpcy. & before the sequestration, he gave credit to bkpt. by becoming the indorsee & holder *bonâ fide* within the Scottish law of a bill of exchange drawn by A. upon bkpt., & accepted by him, & which bill became due & payable after the bkpcy., & which credit was of a nature likely to end in a debt from bkpt. to deft., & the amount of the acceptance was due, & with interest equalled pltf.'s claim, that before notice of the bkpcy. & before sequestration bkpt. gave credit to deft. by consigning goods to him for sale upon the terms that the proceeds should be remitted & paid to bkpt. in Scotland, & that the money sought to be recovered was the proceeds of the sale of the goods under the consignment, & which consignment was of a nature likely to end in a debt from deft. to bkpt., & deft. offered to set off the amount due to him as indorsee & holder of the bill against the claim of pltf., as he was entitled to do by the law of Scotland :—*Held :* a good plea.—MACFARLANE *v.* NORRIS (1862), 2 B. & S. 783 ; 31 L. J. Q. B. 245 ; 6 L. T. 492 ; 9 Jur. N. S. 74 ; 121 E. R. 1263.—**SCOT.**

3710 iii. —— *To agent creditor.*]—Where the creditor & agent of a debtor sold real estate on his behalf & received the purchase-money :—*Held :* that did not constitute a credit giving the agent a right of set-off under 1883 Act, s. 112. —CASTENDYCK *v.* MCLELLAN'S OFFICIAL ASSIGNEE (1887), 6 N. Z. L. R. 67.—**N.Z.**

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authority to sell, in such circumstances, if executed, gives the shopkeeper a right to set off.—*Re* ROSE, *Ex p.* HASLUCK & GARRARD (1894), 1 Mans. 218; 10 R. 262, D. C.

3714. ——.]—Debtor instructed auctioneers to sell his house & furnture, & a sum of money became due from him to them in respect of their charges for the sale of the furniture & the attempted sale of the house. Subsequently he instructed the auctioneers to remove to their own premises certain pictures which had remained unsold, & to sell them subject to his approval of the price. Debtor became bkpt. while the pictures were still unsold, & the pictures were with other property of bkpt. subsequently sold by the auctioneers, acting upon the instructions of debtor's trustee in bkpcy. The auctioneers claimed to deduct from the proceeds the money due to them for their charges in respect of the sale of the furniture & the abortive sale of the house:—*Held:* (1) the deposit by debtor of the pictures, with such authority to sell & receive the proceeds, constituted a giving of credit by him to defts.; (2) there were mutual dealings between him & defts. at the date of the bkpcy., in respect of which the auctioneers had a right of set-off in bkpcy. under 1883 Act, s. 38.—PALMER *v.* DAY & SONS, [1895] 2 Q. B. 618; 64 L. J. Q. B. 807; 44 W. R. 14; 11 T. L. R. 565; 39 Sol. Jo. 708; 2 Mans. 386; 15 R. 523.

Annotations:—**Expld.** *Re* Mid-Kent Fruit Factory, [1896] 1 Ch. 567. **Consd.** *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C. **Refd.** *Re* Taylor, *Ex p.* Norvell, [1910] 1 K. B. 562, D. C. **Mentd.** Tilley *v.* Bowman, [1910] 1 K. B. 745.

3715. Deposit of chattels with right to use same.]—In June, 1876, A. bought of bkpt., a horsedealer, & paid for two horses, which A. returned in Aug. as not being according to warranty. Bkpt. then supplied A. with two other horses which A. declined to keep but it was agreed that they should be retained & used by A. until she was supplied with a pair answering the warranty. The horses had been placed with bkpt. to sell or job on commission, but of that A. was ignorant, she having considered throughout that the horses belonged to bkpt:—*Held:* as against the trustee in bkpcy., A. could not claim to retain the two horses in her possession either by way of set-off, or as having a lien upon them for the purchase-money.—*Re* SILLENCE, *Ex p.* ROY (1877), 7 Ch. D. 70; 47 L. J. Bcy. 36; 37 L. T. 508; 26 W. R. 82.

3716. ——.]—By the terms of a contract the plant brought by the contractor on to the works was "deemed the property of" the employers "for the time being," & was not to be "removed during the progress of the work without the written order of the engineer," & in case of suspension of the works by the engineer for any act or default of the contractor, same was "subject to be used" for the completion of the works. The works were suspended by the engineer, the contractor went into liquidation, & the works having been completed by the employers, the plant was by consent sold:—*Held:* the plant did not become the property of the employers, & the user of the materials by the employers after the suspension of the works was not a "dealing" within 1869 Act, s. 39, & the employers were not entitled to set off the value of the plant against the sum due to them for breach of the contract.—*Re* WINTER, *Ex p.* BOLLAND (1878), 8 Ch. D. 225; 47 L. J. Bcy. 52; 38 L. T. 362; 26 W. R. 512.

3717. Property belonging to bankrupt's estate coming into creditor's hands—Salvage.]—The trustee in bkpcy. of an underwriter sued insurance brokers, who had effected policies with the underwriter, for money which had come into their hands since the bkpcy. as salvage in respect of losses which had been paid by the underwriter before his bkpcy. The brokers claimed to set off losses on other policies effected by them with the underwriter, which, in consequence of his bkpcy., they had had to make good to their principals, to whom they had guaranteed the solvency of the underwriter:—*Held:* the brokers were not entitled to set off those losses, since the sums received by way of salvage were part of bkpt.'s estate, which they only held as trustees for him.—ELGOOD *v.* HARRIS, [1896] 2 Q. B. 491; 66 L. J. Q. B. 53; 75 L. T. 419; 45 W. R. 158; 12 T. L. R. 504; 40 Sol. Jo. 743; 8 Asp. M. L. C. 206; 1 Com. Cas. 400; 3 Mans. 332.

Annotation:—**Consd.** *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.

3718. Right reserved over stock for sums due by stockholder to company.]—A stockholder in deft. co., was their banker or cashier, & on that account was indebted to the co. He became bkpt. & his assignees sued for a transfer of the stock belonging to him. The co. relied upon a bye-law providing that the stock & dividend of each adventurer should be obliged for such debts & engagements as such adventurer should be engaged in to the co., & also on the mutual credit sect. of 5 Geo. 2, c. 30:—*Held:* there were mutual credits, & the co. might retain the debt due to them & should not be obliged to come in as a creditor under the Act.—GIBSON *v.* HUDSON'S BAY CO. (1727), 7 Vin. Abr. 125.

3717 i. *Property belonging to bankrupt's estate coming into creditor's hands—Solicitor's bill of costs incurred before notice of act of bankruptcy.*]—H., a hotelkeeper, owed his solr., C., about £50, & on Sept. 10, 1900, in terms of an arrangement previously made, allowed C. to obtain the purchase-money for the hotel furniture & stock-in-trade, amounting to £271 8*s.* 9*d.* That sum represented practically the whole of H.'s estate. Immediately before receipt of the above amount C. had advised, & charged H. for advising him, that he must not give any creditor a preference. Both C. & H. knew the latter's position to be hopelessly insolvent. The net amount left in C.'s hands, after deducting therefrom all payments made by him direct to H. amounted to the sum of £101 18*s.* 4*d.* C. had prior to Sept. 10, rendered H. some professional services, in connection with the sale of his furniture, etc., & had a few further charges against him, which were incurred between that date & Oct. 10. On that latter date H. committed an act of bkpcy., & a petition in bkpcy. was on the following day filed & served. C. fruitlessly opposed the petition, & H. was on Oct. 21 adjudicated bkpt. C.'s charges amounted to £43 for his services in connection with those proceedings, & he claimed a lien upon, or right of set-off against, the money in his hands belonging to bkpt. in respect of same:—*Held:* out of the £101 18*s.* 4*d.* left in C.'s hands by H., C. could retain (*a*) his taxed costs in connection with the sale of the furniture, & (*b*) the costs incurred between Sept. 10, the date of his receiving the money, & Oct. 10, the date he received notice of the act of bkpcy.—*Re* HARDY (1901), 19 N. Z. L. R. 845. —N.Z.

n. *Money collected by traveller—Against salary.*]—A traveller for a commercial firm, in the knowledge of the impending insolvency of his principals, uplifted certain debts due to them, & retained them to account of his own personal claims against the firm, whose debt to him consisted chiefly of arrears of salary. The firm was sequestrated, & soon thereafter the traveller having also been declared bkpt., his official assignee claimed on the sequestrated estate of the firm for the balance due to the traveller, crediting, however, the estate of the principals with the debts so uplifted:—*Held:* the traveller was not entitled, in the knowledge of his master's insolvency, to collect & retain the funds for payment of his own debt, & the claim of his official assignee must be rejected.—DICKSON *v.* NICHOLSON (1855), 17 Dunl. (Ct. of Sess.) 1011: 27 Sc. Jur. 515.—**SCOT.**

SUB-SECT. 5.—AT WHAT TIME DEBTS AND MUTUAL CREDITS MUST EXIST.

3719. Present rule.]—Under the earlier Bkpcy. Acts the date which was the time for ascertaining what mutual debts, credits, & dealings were existing between debtor & other persons, was the date of the commission, under 1869 Act it was the date of adjudication, & under 1883 it is the date of the receiving order.—*Re* DAINTREY, *Ex p.* MANT, [1900] 1 Q. B. 546; 69 L. J. Q. B. 207; 82 L. T. 239; 7 Mans. 107, D. C.; *affd.*, [1900] 1 Q. B. 571, C. A.

Annotations :—**Refd.** Lord *v.* G. E. Ry. Co., [1908] 2 K. B. 54, C A.; Tilley *v.* Bowman, [1910] 1 K. B. 745. **Mentd.** *Re* Taylor, *Ex p.* Norvell, [1910] 1 K. B. 562, C. A.

3720. At time of act of bankruptcy—Money deposited afterwards but before commission to meet acceptance.]—Bankers having accepted bills for the accommodation of a trader, he, after committing an act of bkpcy., but before a commission was sued out, lodged money with them to take up the bills, which did not become due till after a commission was sued out, & were then regularly paid by the acceptors :—*Held :* they were bound to refund such money to the assignees, & they had no right of set-off under 5 Geo. 2, c. 30.—TAMPLIN *v.* DIGGINS (1809), 2 Camp. 312, N. P.

Annotation :—**Apld.** Kinder *v.* Butterworth (1826), 6 B. & C. 42.

See 1914 Act, s. 31.

3721. —— Bill transferred afterwards—To provide set-off for transferee.]—Bkpts. had drawn an accommodation bill upon C., who accepted. After they had stopped payment, C. sold the bill to B. B. was indebted to bkpts. for goods, & C. represented to B. that he could set off the bill against his debt. B. proved in the bkpcy. for the difference between the amount of the bill & his debt :—*Held :* B. was not a *bonâ fide* holder of the bill & the proof was expunged.—*Re* WETTON & PAYNE, *Ex p.* STONE (1822), 1 Gl. & J. 191.

See, also, Nos. 3681 *et seq. ante.*

3722. —— No notice of act of bankruptcy.]—To a count for money had & received to the use of assignees of a bkpt., deft. pleaded that although the money mentioned remained & was in the possession of deft. after the bkpcy., yet it was in fact received before the issuing of the fiat, & from thence remained in deft.'s possession, that before & at the time of the issuing of the fiat, bkpt. was indebted to deft. in a larger sum, & that, at the time he so gave credit to bkpt., he had no notice of any act of bkpcy. :—*Held :* this was not a good ground for a set-off, which the plea concluded with, and the plea was bad.—WOOD *v.* SMITH (1838), 4 M. & W. 522; 7 Dowl. 214; 1 Horn. & H. 401; 8 L. J. Ex. 57; 150 E. R. 1536.

Annotations :—**Distd.** Bittleston *v.* Timmis (1845), 1 C. B. 389. **Refd.** *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.

3723. —— ——.]—A trader committed a secret act of bkpcy., by leaving his house, but, before he left, desired deft., his foreman, who had been accustomed to manage his business for him, to carry it on in his absence. Deft. did so, & received several sums of money for debts due to bkpt., & for goods sold after the act of bkpcy. He also made several *bonâ fide* payments, some to creditors of bkpt., for the expenses of housekeeping, & retained some for wages due to himself. The money was received & the payments made without notice of the act of bkpcy. An action having been brought by the assignees to recover the money so received as money had & received to their use, deft. pleaded never indebted, & a set-off :—*Held :* deft. was liable to the assignees for all the money received by him after the act of bkpcy., & he was not entitled to set off any of the payments made by him. *Semble :* deft. might have protected himself by a special plea, as to the payments & disbursements made by him without notice of the act of bkpcy., under 6 Geo. 4, c. 16, s. 82, & 2 & 3 Vict. c. 29, s. 1.—KYNASTON *v.* CROUCH (1845), 14 M. & W. 266; 14 L. J. Ex. 324; 5 L. T. O. S. 430; 9 Jur. 584; 153 E. R. 476.

Annotations :—**Mentd.** Mayhew *v.* Herrick (1849), 7 C. B. 229; Cannan *v.* S. E. Ry. Co. (1852), 7 Exch. 843.

3724. Two months before issue of commission—Debts incurred by bankrupt to factor.] — *Held :* assignees might recover from bkpt., factor, all money received by him from bkpt. within two months before the issuing of the commission, & the factor could not set off debts incurred by bkpt. to him within the same time, although the factor had acted *bonâ fide*, & in ignorance of the act of bkpcy.—KINDER *v.* BUTTERWORTH (1826), 6 B. & C. 42; 9 Dow. & Ry. K. B. 47; 5 L. J. O. S. K. B. 23; 108 E. R. 369.

Annotation :—**Refd.** Bittleston *v.* Timmis (1845), 1 C. B. 389.

PART X. SECT. 1, SUB-SECT. 5.

3721 i. *At time of act of bankruptcy—Bill transferred afterwards—To provide set-off for transferee.*]—C. having proved on the insolvent estate of A., A. tendered to him his own overdue promissory notes & claimed to set off those notes, together with the interest accrued thereon, against his debt to C. The notes had been acquired when overdue & after C.'s proof had been allowed, by a relative of A. & then given by him to A. for the purpose of making the tender :—*Held :* C.'s claim being against A.'s estate, there could be no set-off save between C. & A.'s trustee.—ANDERSON *v.* KENNEDY (1885), 3 H. C. 251. —S. AF.

3721 ii. —— *Purchase of debt—To provide set-off for transferee—Aware of vendor's insolvency.*]—Before an assignment for the benefit of creditors, a person indebted to the assignor, & who was aware of his insolvency, purchased from a creditor of the insolvent a debt due to the former by the latter, which the purchaser claimed to set off against his debt to the insolvent : —*Held :* under R. S. O., 1887, c. 124, s. 23, in connection with the general law of set-off, he was entitled to do so. —THIBAUDEAU *v.* GARLAND (1896), 27 O. R. 391.—CAN.

3721 iii. —— —— —— —— *Evidence.*]—Where a claim against insolvent is purchased by a debtor for the purpose of set-off, it is his knowledge of insolvent's being unable to meet his engagements, & his intention in purchasing, not that of the seller, which prevents the set-off from being available.

In an action brought by the assignee of the insolvent, where defts. sought to set off a note purchased by them prior to the assignment, a demand of assignment made on the insolvent by the holder of the note prior to the transfer :—*Held :* properly admitted to show the insolvency of debtor at the time.—MCLEOD *v.* DOMVILLE (1874), 2 Pug. 422.—CAN.

3721 iv. —— —— *What debts included.*]—*Held :* 1869 Act, s. 91, applied to the transfer of any debt sought to be set off, whether actually payable or not at the time of the assignment.—MCLEOD *v.* DOMVILLE (1874), 2 Pug. 422.—CAN.

3721 v. —— *Debt transferred afterwards—To give fraudulent preference.*]—The transferee of a debt due from a person, who makes an assignment for the general benefit of his creditors is not entitled to set off the debt, where such transfer is a colourable contrivance to enable the transferee to obtain a preference. The allowance of a set-off of a debt due from a person who has made an assignment for the benefit of creditors, & after such an assignment, would be contrary to the spirit & intention of Assignments Act.—MACKINNON *v.* HORN, [1917] 1 W. W. R. 830; 10 Alta. L. R. 389; 32 D. L. R. 374.—CAN.

3722 i. —— *No notice of act of bankruptcy.*]—B. accepted a bill to accommodate brewers, who undertook to deliver him ale to an amount sufficient to put him in funds to meet the bill. Before it became due they presented their petition, & an order vested their estate in official assignees, who were permitted to carry on the trade, & supply B. with ale as usual. The case was then adjourned into bkpcy., & the trading continued until the appointment of a creditor's assignee. Though B. paid the bill, he was not allowed to set off the amount against any portion of the debt contracted after the vesting order under the arrangement, although he had no notice of it until the bkpcy.—*Re* REIDS, *Ex p.* LEVY (1861), 13 Ir. Jur. 186.—IR.

Sect. 1.—*Application of the doctrine: Sub-sect.* 5.]

3725. At time of bankruptcy.]—A plea of mutual credits cannot succeed, unless it appears that the balance was due at the time of the bkpcy. —HEWISON *v.* GUTHRIE (1836), 2 Bing. N. C. 755; 2 Hodg. 51; 3 Scott, 298; 5 L. J. C. P. 283; 132 E. R. 290.

Annotations :—**Mentd.** Angus *v.* McLachlan (1883), 23 Ch. D. 330; *Re* Morris, [1908] 1 K. B. 473, C. A.

See 1914 Act, s. 31.

3726. ——.]—Pltfs. & defts. being, by agreement between them, jointly entitled to the benefits of a charterparty, pltfs. assigned their interest in it, by indorsement, to D., their creditor, at the same time giving defts. notice of such assignment, & afterwards became bkpts. The assignees of the charterparty having sued upon it in the names of pltfs., defts. pleaded the bkpcy. of pltfs., by which the right to their choses in action vested in their assignees. Replication, setting forth the assignment by pltfs. of their interest in the charterparty to D., & notice to defts. of that assignment given by them before the bkpcy. of pltfs., & that pltfs. sued on account of D. Rejoinder setting up the previous agreement between pltfs. & defts., that they should share the benefits of the charterparty, by way of a mutual credit between the parties, on which an account should be stated, & one demand set against the other, under 6 Geo. 4, c. 16, s. 50 :—*Held :* bad, for at the time of the bkpcy. no mutual credit existed between pltfs. & defts.

The contingency on which mutual accounts were to be taken between the parties does not happen. The equity is not that the debt shall not be transferred, but that on that contingency happening mutual account shall be taken. Here the defts. do not show themselves entitled to mutual credit. As the assignment was before the bkpcy., there is an end of mutual credit. That equity can only exist in the event of the occurrence of bkpcy. of one of two parties during the existence of a mutual credit between them. The defts. cannot say there was any agreement, express or implied, that the defts. should pay themselves out of the freight. The guarantee was not complied with, so no equity arises. Had the bkpcy. occurred at the time both debts were due, there would have been a set-off; but here there was no bkpcy. before the assignment (PARKE, B.). —BOYD *v.* MANGLES (1847), 16 M. & W. 337; 8 L. T. O. S. 392; 153 E. R. 1218.

3727. —— Subsequent transfer under arrangement made previously.]—Though in general after a bkpcy. an assignment cannot be taken of a debt of bkpt., in order to set it off against a debt due to bkpt., yet if such assignment is taken in consequence of any arrangement, for that purpose made before the bkptcy. or by reason of any equity to have such assignment arising from matters which have occurred before the bkpcy., then a set-off will be allowed in respect of the debt so assigned. So a surety, before bkpcy., paying off the debt of the principal, after a bkpcy., & taking assignment of securities, among which is a security of bkpt., is entitled to set it off against a debt due from him to bkpt.—*Re* MOSELEY GREEN COAL & COKE CO., BARRETT'S CASE (1865), 5 New Rep. 496; 34 L. J. Bcy. 41; 12 L. T. 193; 13 W. R. 559, L. C.

3728. —— Indorser becoming party to bill before bankruptcy—Becoming holder afterwards.]—If the indorser of a bill became a party to the bill before the bkpcy., he may set it off on becoming holder afterwards (LORD BLACKBURN.)—MCKINNON *v.* ARMSTRONG BROTHERS & CO. (1877), 2 App. Cas. 531; 36 L. T. 482, H. L.

Annotation :—**Refd.** *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.

3729. —— Debt contracted after bankruptcy.] —When bkpt. had not obtained an order of discharge, a creditor who has proved in the bkpcy., & who is being sued by bkpt., or by his exor., after his death, for a debt due to bkpt. on a contract entered into after the commencement of the bkpcy., cannot, during the period of three years from the close of the bkpcy., set off the unpaid balance of his proved debt against the sum claimed in the action.—*Re* SMITH, GREEN *v.* SMITH (1883), 22 Ch. D. 586; 52 L. J. Ch. 411; 48 L. T. 254; 31 W. R. 413.

Annotation :—**Consd.** *Re* Rees, Rees *v.* Rees (1889), 60 L. T. 260.

3730. —— Attempted evasion after bankruptcy.] —A. & Co. & B. & Co. respectively carried on the business of bankers. B. & Co. became bkpts., & at the time of their act of bkpcy. the two banks held notes & other securities of each other to nearly the same amount. The assignee of B. & Co., knowing that fact, presented & obtained payment of the notes of A. & Co., partly at their bank, & partly at the house of their agents in London, who were ignorant of the situation in which the parties stood :—*Held :* A. & Co., might recover the amount so received, in an action for money had & received against the assignee.—EDMEADS *v.* NEWMAN (1823), 1 B. & C. 418; 2 Dow. & Ry. K. B. 568; 107 E. R. 155.

3725 i. *At time of bankruptcy.*]—The right to set-off in respect of mutual dealings under 1890 Act, s. 121, is to be determined & fixed in respect of transactions existing at the insolvency, & while no right of set-off can arise from a transaction entered into after insolvency, yet the right of set-off may arise subsequently to insolvency out of a transaction which was initiated prior to insolvency.—SAVAGE *v.* THOMPSON (1903), 29 V. L. R. 436.—**AUS.**

3725 ii. ——.]—A firm in Glasgow consigned goods to a London firm for realisation, & on Apr. 13 sent bills to London for acceptance as against the proceeds. Apr. 14 was a business holiday in London, but on the 15th the London firm returned the bills accepted. The Glasgow house stopped payment on Apr. 14, & were afterwards sequestrated :—*Held :* the acceptors were entitled to an interdict to prevent the trustee in the sequestration from indorsing the bills for value, so as by raising questions with third parties to deprive the acceptors of a plea of compensation which they could plead against the trustee himself, the state of indebtedness falling to be ascertained as at the date of the bkpcy.—HARVEY, BRAND & CO. *v.* ANDERSON (1866), 4 Macph. (Ct. of Sess.) 1128.—**SCOT.**

3725 iii. ——.]—Where a right of set-off exists before sequestration, such right continues after insolvency, except in the cases in which it is specially restricted by the Insolvent Ordinance. —BRITISH SOUTH AFRICA CO. *v.* LYLE BROTHERS & WRIGHT'S TRUSTEES (1900), 17 S. C. 328.—**S. AF.**

3725 iv. ——.]—C. passed a bond for £450 to defts. in order to obtain banking facilities & bound in security as a first mtge. certain land. He also ceded as collateral security a fire policy on the buildings upon the land. A fire occurred, & before payment of the loss, C. became insolvent. Three days later the amount of the policy, £800, was paid by the co. to defts. :—*Held :* defts. could not set off against the amount received by them after insolvency the amount of debts owing to them by insolvent at the time of insolvency.—NATIONAL BANK OF SOUTH AFRICA, LTD. *v.* COHEN'S TRUSTEE (1911), App. D. 236.—**S. AF.**

3725 v. —— *Disputed debt.*]—Where there is a debt due from an insolvent prior to his insolvency to another, from whom there was a debt which was in dispute due to the insolvent, in a suit brought by the official assignee to recover the latter debt, deft. is entitled to set off the debt due from insolvent against sums which may be claimed from him.—MILLER *v.* BEER (1880), 6 C. L. R. 294.—**IND.**

3725 vi. —— *Subsequent costs awarded against creditor who had proved.*]—Where an application by a creditor for execution against an unrehabilitated insolvent had been refused with costs : —*Held :* appct. was not entitled to set-off against the costs so incurred his debt which had originated before the sequestration & which had been proved on the estate.—SEYDELL *v.* BOLTMAN (1900), 17 S. C. 337.—**S. AF.**

3731. At commencement of bankruptcy—Bill accepted with notice of bankruptcy.]—The line as to set-off must, as a general rule, apart from special circumstances, be drawn at the date of the commencement of the bkptcy.

A creditor, after debtor's bkpcy., & with knowledge thereof, accepted a bill of exchange, of which debtor was the holder:—*Held:* he could not set off the debt due to him before the bkpcy. against the claim of the trustee upon the bill.—*Re* GILLESPIE, *Ex p.* REID (1885), 14 Q. B. D. 963; 54 L. J. Q. B. 342; 52 L. T. 692; 33 W. R. 707; 2 Morr. 100.

Annotations:—**Distd.** Sovereign Life Assce. *v.* Dodd, [1892] 1 Q. B. 405. **Consd.** *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.

3732. —— Bankrupt's indebtedness at that date.]—To an action by assignees for a debt due to bkpt.'s estate deft. cannot set off cash notes, issued by bkpt., payable to bearer, bearing date before his bkpcy., unless he shows further that such notes came to his hands before the bkpcy.—DICKSON *v.* EVANS (1794), 6 Term Rep. 57; 101 E. R. 433.

Annotations:—**Refd.** Roberts *v.* Bethell (1852), 12 C. B. 778; *Re* Milan Tram. Co., *Ex p.* Theys (1884), 25 Ch. D. 587, C. A.; *Re* Gillespie, *Ex p.* Reid (1885), 14 Q. B. D. 963; *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.

3733. —— —— How proved.]—To an action by assignees, for a debt due to bkpt.'s estate, deft. set off notes in his possession issued by bkpt. before the bkpcy.:—*Held:* proof that notes to the amount of the set-off came into his hands three or four weeks before the bkpcy., was sufficient evidence, from which the jury might infer that he was in possession of them at the time of the bkpcy., without identifying them with the notes produced.—MOORE *v.* WRIGHT (1816), 6 Taunt. 517; 2 Rose, 470; 2 Marsh. 209; 128 E. R. 1135.

3734. —— Obligation to pay own debt or mutual credit at that date.]—To enable the holder of bkpt.'s acceptances to avail himself of them in an action by the assignees against himself on his own acceptance, by way either of set-off, or of mutual credit, he must most distinctly prove, either that the obligation on himself to pay the bill so set off subsisted before the bkpcy., or that there was a mutual credit created in the origin of the bills.—OUCHTERLONY *v.* EASTERBY (1813), 4 Taunt. 888; 128 E. R. 582.

3735. At time of notice of act of bankruptcy.]—If bankers receive & pay money on account of bkpt. after notice of an act of bkpcy., all the sums received are so to the use of the estate, & they cannot set off the payments made, or be allowed to come in as creditors, & to claim dividend on debts paid which were owing before the act of bkpcy.—HANKEY *v.* VERNON (1791), 3 Bro. C. C. 313; 29 E. R. 555.

Annotation:—**Mentd.** Harrison *v.* Nettleship & Fuller (1833), 2 My. & K. 423.

3736. —— Set-off of bankers' notes acquired after notice of stoppage of payment—Before notice of act of bankruptcy.]—In an action by the assignees of bankers:—*Held:* a party had a right to set off notes of such bankers taken by him after he knew that they had stopped payment, but before he knew that they had committed an act of bkpcy.—HAWKINS *v.* WHITTEN (1829), 10 B. & C. 217; 5 Man. & Ry. K. B. 219; 8 L. J. O. S. K. B. 135; 109 E. R. 431.

Annotations:—**Consd.** Dickson *v.* Cass (1830), 1 B. & Ad. 343. **Distd.** Arthur *v.* Whitworth (1842), 6 Jur. 323.

3737. —— —— —— After knowledge that some partners had committed acts of bankruptcy.]—In an action brought by the assignees of bankers:—*Held:* (1) a party had a right to set off notes of such bankers taken by him after he knew that they had stopped payment, but before he knew that any of the partners constituting the banking house had committed an act of bkpcy.; (2) he had no right to set off notes of such bankers, taken by him after he knew that three of the four partners constituting the banking house had committed acts of bkpcy.—DICKSON *v.* CASS (1830), 1 B. & Ad. 343; 8 L. J. O. S. K. B. 396; 109 E. R. 814.

Annotations:—**Mentd.** Doe d. Scruton *v.* Snaith (1832), 8 Bing. 146; Paddon *v.* Bartlett (1834), 2 Ad. & El. 9; Wills *v.* Noott (1834), 4 Tyr. 726; *Re* Bush, *Ex p.* Fussell (1837), 2 Deac. 158; Doe d. Merceron *v.* Bragg (1838), 8 Ad. & El. 620; Parker *v.* Smart (1841), H. & W. 85; Wroughton *v.* Turtle (1843), 1 Dow. & L. 473; Frith *v.* Rotherham (1846), 15 M. & W. 39; Suffield *v.* I. R. Comrs., [1908] 1 K. B. 865.

3738. —— Transactions protected till that date.]—Where there are mutual accounts a secret act of bkpcy. does not stop the currency of those accounts; the existence of mutual dealings protects the credits & debts on each side from the operation of the act of bkpcy. until notice of it.—ELLIOTT *v.* TURQUAND (1881), 7 App. Cas. 79; 51 L. J. P. C. 1; 45 L. T. 771; 30 W. R. 477, P. C.

Annotations:—**Distd.** *Re* Gillespie, *Ex p.* Reid (1885), 14 Q. B. D. 963. **Consd.** *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.

3739. At date of receiving order—Not at date of act of bankruptcy.]—The date of the receiving order, & not that of the act of bkpcy., is the proper date at which to ascertain what the dealings were so as to be capable of being made the subject of a set-off.—*Re* DAINTREY, *Ex p.* MANT, [1900] 1 Q. B. 546; 69 L. J. Q. B. 207; 82 L. T. 239; 7 Mans. 107, C. A.

Annotations:—**Apld.** *Re* Taylor, *Ex p.* Norvell, [1910] 1 K. B. 562, C. A. **Refd.** Lord *v.* G. E. Ry. Co., [1908] 2 K. B. 54, C. A.; Tilley *v.* Bowman, [1910] 1 K. B. 745.

3740. —— Claim arising only when receiving order made.]—On an application by a judgment debtor to set aside a bkpcy. notice on the ground that he has a set-off against the judgment debt

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3738 i. *At time of notice of act of bankruptcy—Transactions protected till that date.*]—Two solrs. acted for each other professionally as mutual agents. One of them became bkpt., & the other received a sum of money as bkpt.'s agent before the adjudication, but after the commission of the act of bkpcy. upon which the adjudication was founded, & after the filing of a creditor's petition for adjudication. He had at the time no knowledge of the act of bkpcy., or of the filing of the petition, & bkpt. was then indebted to him in a sum larger than the amount he had received:—*Held:* the agent was entitled to retain the amount received by him & prove for the rest of his debt.—*Re* JACKSON, *Ex p.* OFFICIAL ASSIGNEE (1888), 6 N. Z. L. R. 417.—**N.Z.**

3739 i. *At date of receiving order.*]—H. was a shareholder in a co., which went into voluntary liquidation on Apr. 10, 1901. H. became bkpt. on Sept. 10. On Sept. 30 & Dec. 7, 1900, two promissory notes, made by H. in favour of the co. fell due & were dishonoured, & at the date of the liquidation were still unpaid. On Oct. 21, 1901, a dividend was declared by the liquidator of the co. who deducted therefrom the amount of H.'s indebtedness to the co. & the trustee in bkpcy. claiming payment of the dividends payable to H. on the ground that the liquidator was not entitled to set off against the dividends the indebtedness of H. to the co.:—*Held:* (1) the time to set off was the date of the receiving order but the amount owing to H. by the co. at such date need not be ascertained if the winding-up proceedings must necessarily terminate in the co. being indebted to the shareholder; (2) in the circumstances the liquidator of the co. was entitled to set off against the debt of H., the money which he became entitled to receive in respect of his shares in the winding up of the co.—*Re* WEST AUSTRALIAN LIGHTERAGE, ETC. CO., LTD., *Ex p.* BANK OF NEW SOUTH WALES (1903), 5 W. A. L. R. 132.—**AUS.**

o. *At date of judicial abandonment for creditors.*]—Creditors are without right of compensation for claims maturing after an abandonment for the benefit of creditors.—RIDDELLS-QUAL. *v.* GOOLD (1889), M. L. R. 5 S. C. 170. —**CAN.**

Sect. 1.—*Application of the doctrine: Sub-sects.* 5 & 6. *Sects.* 2 & 3.]

within 1883 Act, s. 4 (1) (*g*), he must satisfy the ct. that he has, not merely an inchoate right of set-off which may, in the event of bkpcy., ripen into an effective set-off under s. 38, but an effective set-off existing at the time the application is heard, *i.e.*, a set-off of a debt then capable of being enforced by action.

Where the liquidator of a limited co. in liquidation under a supervision order has obtained judgment in an action against a shareholder for unpaid calls, the judgment debtor cannot, upon an application by him to set aside a bkpcy. notice for payment of the judgment debt, claim to set off a debt alleged to have become due to him from the co. prior to the liquidation, for, until after a receiving order has been made against him, he cannot set off against his unpaid calls the debt due to him from the co.—*Re* G. E. B., [1903] 2 K. B. 340; 72 L. J. K. B. 712; 89 L. T. 245; 10 Mans. 243; *sub nom. Re* A DEBTOR, 51 W. R. 675; 47 Sol. Jo. 618, C. A.

Annotations:—**Refd.** Lister *v.* Hooson (1907), 77 L. J. K. B. 161, C. A.; *Re* A Debtor, *Ex p.* Peak Hill Goldfield, [1909] 1 K. B. 430, C. A.

3741. Different rule in winding up.]—Though a set-off of mutual debts within three months of the bkpcy. of an individual is not a fraudulent preference, such a set-off within three months of the presentation of a petition to wind up a co. is a fraudulent preference, inasmuch as the right of set-off continues in bkpcy., but not in winding up.

U., a director of a co., held shares not fully paid up, & his director's fees were unpaid. The co. was admittedly in embarrassed circumstances. On July 21, 1891, on which day the co.'s balance at its bankers was £2 0*s* 11*d.*, U. gave to the co. a cheque for £70, the amount remaining unpaid on his shares, & received at the same time from the co. a cheque for a like amount on account of his fees, signed by himself & M., another director. Within three months a winding-up petition was presented, on which a winding-up order was made:—*Held:* if the co. had been an ordinary bkpt. trader, to whom the mutual credit clause (1883 Act, s. 38) had been applicable, the preferential payments to M. & U. could not have been avoided by the trustee in bkpcy., because they would have injured no one, & the two debts could have been set one against the other after the bkpcy. just as effectually as before, & whether the debts had been both paid or had been set off against each other before the bkpcy. or after would have been perfectly immaterial.—*Re* WASHINGTON DIAMOND MINING CO., [1893] 3 Ch. 95; 62 L. J. Ch. 895; 69 L. T. 27; 41 W. R. 681; 9 T. L. R. 509; 37 Sol. Jo. 559; 2 R. 523, C. A.

Annotations:—**Refd.** *Re* Auriferous Properties, [1898] 1 Ch. 691; Lister *v.* Hooson, [1908] 1 K. B. 174, C. A. **Mentd.** *Re* North Wales Gunpowder Co., [1892] 2 Q. B. 220, C. A.

See, further, COMPANIES.

3742. At registration of deed—Not at execution of deed.]—In an action by trustees of a deed, made by debtor under 1861 Act, deft. may set off a debt for rent payable to him by debtor under a demise, & which became due after the execution of the deed, but before its registration.—STANGER *v.* MILLER (1865), L. R. 1 Exch. 58; 4 H. & C. 1; 35 L. J. Ex. 49; 11 Jur. N. S. 1005.

3743. At date of deed—Not at registration thereof.] — Debtor assigned his property to trustees by deed registered under 1861 Act, by which it was provided that the property should be applied as if debtor had been "at the date hereof," adjudged bkpt. At the date of the deed & of its registration, R. held a bill of exchange accepted by debtor, which had not matured. After the execution of the deed, but before its registration, R. accepted a bill of exchange drawn upon him by debtor:—*Held:* R. had no right to set off the two bills against each other, for the date of the deed, & not the time of registration, was to be looked to, & at the former time there was no mutual credit.—*Re* DOUGLAS, *Ex p.* RYDER (1871), 6 Ch. App. 413; 40 L. J. Bcy. 63; 24 L. T. 80; 19 W. R. 554, L. JJ.

Annotation:—**Consd.** *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.

3744. Before decree made for administration of deceased insolvent's estate.]—N. & C. were exors. of a will & trustees of the real & personal estate of testator, who died in 1859. N. & F. were tenants of the residuary estate in equal shares. In Jan., 1873, C. was residing abroad & N., being about also to go abroad gave to P., the solr. of the exors. & trustees, an authority on behalf of both trustees to receive the rents of the real estate & pay the outgoings. Under that authority P. received the rents, & at his death a considerable sum was due from him in respect thereof. P.'s estate proved insolvent, & the usual creditor's decree was made for administration. Subsequently to the decree F. assigned to N. all F.'s interest in the sum due from P. N. was indebted to A. & B., as trustees for P., in a sum the repayment of which was secured by a mtge. of real estate belonging to N., & that sum was paid into ct. in the suit to a separate account, under an order made without prejudice to any question as to set-off. N. afterwards presented a petition claiming to be entitled to set off the debt due from P. against the mtge. debt, & seeking to have the amount of the debt due from P. paid out of the fund standing to the separate account:—*Held:* with regard to F.'s interest there could be no set-off, inasmuch as it was not assigned to N. until after the decree:—MIDDLETON *v.* POLLOCK, *Ex p.* NUGEE (1875), L. R. 20 Eq. 29; 44 L. J. Ch. 584; 33 L. T. 240; 23 W. R. 766.

Annotation:—**Refd.** *Re* Jones, Christmas *v.* Jones, [1897] 2 Ch. 190.

See, further, EXECUTORS & ADMINISTRATORS; SET-OFF & COUNTERCLAIM.

SUB-SECT. 6.—EFFECT OF AGREEMENT.

3745. Agreement to exclude set-off.] — The operation of the mutual credit sect. (1869 Act, s. 39) cannot be excluded by any agreement to the

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p. *At delivery of deed—Not at execution thereof.*]—After recovery of judgment by defts. against pltf. for a debt & costs, pltf. recovered judgment against defts. in a separate action for damages for malicious prosecution & costs. Before the verdict for damages was actually given, pltf. executed an assignment to a trustee for the benefit of his creditors of the amount of any verdict which he might recover, but the assignment was not delivered until after the verdict had been rendered & an order for the entry or judgment upon it made by the trial judge:—*Held:* at the time the assignment was delivered the claim to damages had become a judgment debt, &, as such, a debt which should be set off.—MOODY *v.* CANADIAN BANK OF COMMERCE (1891), 14 P. R. 258.—CAN.

PART X. SECT. 1, SUB-SECT. 6.

3745 i. *Agreement to exclude set-off.*]—S. being embarrassed, sold to D., then a creditor, property for £600. £200 was paid to S. at once. It was agreed that D. should pay the £400 when required & should not retain or set off S.'s previous debt to him. Before S. became insolvent D. actually paid the £400 to S. The old debt to D. remained unpaid:—*Held:* D. could not have set off his old debt under 5 Vict. No. 17, s. 37, if S. had sequestrated his estate before the £400 had been paid.—STEPHEN *v.* DOYLE (1882), 3 N. S. W. Eq. 1.—AUS.

3745 ii. ——.]—A. & Sons, a firm of flax spinners in Belfast, stopped payment in Jan., 1884. At the time of the

contrary that may be existing between bkpt. & his creditors at the commencement of the bkpcy. —*Re* VAUGHAN, *Ex p.* FLETCHER (1877), 6 Ch. D. 356 ; 37 L. T. 282, C. A.

3746. Agreement by bankrupt to do work for creditor for ready money.]—A tradesman undertook to repair an article for a person to whom he was indebted, & it was agreed that the work should be paid for in ready money. He afterwards became bkpt. :—*Held :* 6 Geo. 4, c. 16, s. 50, did not render the assignees liable in trover for refusing to deliver such article to the creditor on his offering to set off the price of the work against his own demand, as the contract was for ready money.—CLARKE *v.* FELL (1833), 4 B. & Ad. 404 ; 1 Nev. & M. K. B. 244 ; 2 L. J. K. B. 84 ; 110 E. R. 507.

Annotations :—**Consd.** *Re* Deveze, *Ex p.* Barnett (1874), 9 Ch. App. 293, L. C. & L. JJ. **Refd.** Groom *v.* West (1838), 1 Per. & Dav. 19.

3747. Agreement to exclude personal liability.]—I., consignee of a West India estate, was appointed trustee thereof by B., the tenant for life, for the purpose of keeping down incumbrances. I. was also private agent & banker for B., with the understanding that B. was not, nor were his funds, to be liable for advances made by I. for the estate. I. was afterwards declared bkpt :—*Held :* a sum found due from I. to B. on their private dealings, might be set off against a sum found due to I. in respect of his advances & payments for the estate.—BAILLIE *v.* EDWARDS (1848), 2 H. L. Cas. 74 ; 9 E. R. 1020, H. L. ; *revsg.* S. C. *sub nom.* BAILLIE *v.* INNES (1845), 13 L. J. Ch. 341, L. C.

3748. Agreement providing for set-off—Between joint & several debts.]—In answer to an action by a trustee in bkpcy. for the price of goods supplied by bkpt., deft. set up as a cross claim a debt incurred by bkpt.'s firm, the business of which had subsequently been taken over by bkpt. personally :—*Held :* while *primâ facie* such a set-off could not be maintained, as an agreement had been come to whereby the claim against bkpt.'s partner as a joint debtor had been given up & all transactions were to be treated as having been with bkpt. alone, in the circumstances, deft. was entitled to set up such set-off.—BURGESS *v.* MORTON (1894), 10 T. L. R. 339, C. A. ; *revsd.* on another point, [1896] A. C. 136, H. L.

Annotation :—**Mentd.** Druce *v.* Young, [1899] P. 84.

See, also, No. 3680, *ante.*

3749. —— —— How proved.]—An allegation of an agreement to set off a specific joint debt against specific separate debts, previously accrued, is in substance proved by evidence of an agreement prior to the debts accruing, to set off all joint debts that should thereafter arise against all separate debts that should thereafter arise.—KINNERLEY *v.* HOSSACK (1809), 2 Taunt. 170 ; 127 E. R. 1042.

Agreement between landlord & tenant.]—*See* No. 3647, *ante.*

SECT. 2.—PLEADING AND PROOF.

3750. What plea must show—Mutuality.]—To a count in debt by assignees for money had & received by deft., not stating whether received before or since the bkpcy., deft. pleaded a set-off for money due to him on an account stated with bkpt. before his bkpcy. :—*Held :* the plea was bad, as it did not show that the debts were mutual, *i.e.* in the same right.—GROOM *v.* MEALEY (1835), 2 Bing. N. C. 138 ; 1 Hodg. 212 ; 2 Scott, 171 ; 4 L. J. C. P. 274 ; 132 E. R. 54.

Annotation :—**Refd.** *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.

3751. Sufficiency of evidence—Proof allowed by commissioners.]—In an action by assignees, it is not sufficient proof of a set-off that the comrs. permitted deft. to prove the debt proposed to be set off under the commission.—PIRIE *v.* MENNETT (1812) 3 Camp. 279 ; 1 Rose, 359.

Annotation :—**Consd.** *Re* Oliver, *Ex p.* Hilton (1820), 1 Jac. & W. 467.

—— As to existence of credit at proper time.]—*See* Nos. 3733, 3734, *ante.*

—— As to agreements allowing set-off.]—*See* No. 3749, *ante.*

SECT. 3.—EFFECT OF SET-OFF.

3752. Payment over or proof for balance by creditor.] — A creditor may set off his debt against his bkpt. debtor, & pay over or prove the balance, as it shall happen to be.—ANON. (1676), 1 Mod. Rep. 215 ; 86 E. R. 837.

Annotations :—**Refd.** Gibson *v.* Bell (1835), 1 Bing. N. C. 743 ; Young *v.* Bank of Bengal (1836), 1 Moo. Ind. App. 87, P. C. ; Freeman *v.* Lomas (1851), 9 Hare, 109 ; MacFarlane *v.* Norris (1862), 2 B. & S. 783 ; Bailey *v.* Finch (1871), 20 W. R. 294.

3753. ——.]—Where there are mutual dealings between bkpt. & a creditor, only the balance is to be paid to bkpt.'s estate.—CHAPMAN *v.* DERBY (1689), 2 Vern. 117 ; 23 E. R. 684.

Annotations :—**Consd.** Bailey *v.* Finch (1871), L. R. 7 Q. B. 34. **Refd.** MacFarlane *v.* Norris (1862), 2 B. & S. 783. **Mentd.** Gibson *v.* Bell (1835), 1 Bing. N. C. 743 ; Freeman v. Lomas (1851), 9 Hare, 109 ; Middleton *v.* Pollock, *Ex p.* Nugee (1875), L. R. 20 Eq. 29.

3754. ——.]—There was a mutual credit between A., a goldsmith, & B. A. became bkpt :—*Held :* only the balance should be liable to the bkpcy.—LANESBOROUGH (LORD) *v.* JONES (1716), 1 P. Wms. 325 ; 24 E. R. 409, L. C.

Annotation :—**Refd.** Rose *v.* Hart (1818), 8 Taunt. 499.

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suspension deft. was a creditor for over £2,000. Immediately after the suspension, A. & Sons opened what was known in Belfast as a No. 2 account with their bankers & customers, & deft. subsequently sold goods to A. & Sons, for which he was paid in cash, & by cheques drawn on the No. 2 account, from which it appeared that deft. was acquainted with the fact of the No. 2 account having been opened, & that he was dealing on that account. In June, 1884, deft. purchased £1,189 8*s.* 4*d.* worth of goods from A. & Sons, to be paid for in cash upon delivery. He did not pay for the goods, & A. & Sons were adjudicated bkpts. on Dec. 23, 1885. In the proceedings in bkpcy. deft. claimed to set off, under 1857 Act, s. 251, against the debt of £1,189 8*s.* 4*d.* due by him, so much of the debt due to him before the stoppage as would be sufficient to meet it. Evidence was given in an action by the assignees, that the effect of opening a No. 2 account in Belfast was perfectly well understood by all the merchants & traders there, & that the effect was to exclude all right of set-off between transactions before & after the opening of the No. 2 account, whether bkpcy. ensued or not :—*Held :* it was competent for deft., by such agreement, to waive the statutory right of set-off conferred by the above sect.—DEERING *v.* HYNDMAN (1886), 18 L. R. Ir. 467.—**IR.**

3745 iii. —— *How proved.*]—Vague statements by a creditor, an auctioneer, & debtor to other creditors, with regard to the creditor's holding the proceeds of sales :—*Held :* not to amount, in the circumstances, to anything which would make it inequitable that he should exercise his right of set-off & not to estop him from setting up his right to do so.—HUNTER *v.* BISPHAM'S OFFICIAL ASSIGNEE (1898), 17 N. Z. L. R. 175.—**N.Z.**

PART X. SECT. 2.

3750 i. *What plea must show—Mutuality.*]—To an action for money received to pltf.'s use as assignee deft. pleaded a set-off, under Insolvency Act, s. 79 :—*Held :* a bad plea to the claim by the assignee for a debt due to him as assignee.—COURTNEY *v.* KING (1870), 1 V. L. R. R. 70.—**AUS.**

q. *Stating of account.*]—Where a claim is made on behalf of a bkpt. estate & a set-off is pleaded, the stating of an account is not a condition precedent to the jurisdiction of a magistrate to entertain the claim of set-off. —TAPPER *v.* MATHESON (1884) 3 N. Z. L. R. 312.—**N Z**

Sect. 3.—Effect of set-off. Sects. 4 & 5: Sub-sect. 1.]

3755. ——.]—The same rule is applicable to Scottish cases as to English ones, *i.e.*, that where there is mutual credit between bkpt. & the person who sues him, which has ended in a debt, the trustee, in effect, is only entitled to recover the balance.—MACFARLANE *v.* NORRIS (1862), 2 B. & S. 783; 31 L. J. Q. B. 245; 6 L. T. 492; 9 Jur. N. S. 74; 121 E. R. 1263.

Annotation:—**Refd.** Maspons y Hermano *v.* Mildred (1882), 9 Q. B. D. 530, C. A.

3756. —— Injunction against further proceedings against creditor—For debt due to estate.]—An action was brought by assignees for premiums due on policies effected by deft. & underwritten by bkpt. Deft. applied that pltfs. might be restrained by injunction from further proceeding in it, upon the ground that the comrs. in the bkpcy. had found a balance of account due from bkpt. to deft.:—*Held:* the set-off ought to be allowed, & the injunction should issue.—*Re* HAMILTON, *Ex p.* MENNETT (1812), 1 Rose, 395.

SECT. 4.—LOSS OF RIGHT.

3757. Payment of debt in ignorance of right—Withdrawal of proof.]—A. borrowed money of B. & Co., country bankers, on his promissory note, which they deposited indorsed, along with other bills & notes, with W. & Co., their London agents, to secure the payment of advances. B. & Co. became bkpt., when A. held notes issued by their bank more than sufficient to discharge the amount of his promissory note, & W. & Co. also held bills & notes of B. & Co. to a greater amount than the balance due to them from B. & Co. W. & Co. compelled A. to pay to them the amount of his promissory note, & refused to allow him to set off the notes he held of B. & Co., & A., not knowing that W. & Co. held sufficient securities to discharge the balance due to them from B. & Co., proved under the fiat for the amount of the notes which he held of B. & Co. The assignees of B. & Co. then paid W. & Co. the amount of the balance due to them, after receiving credit for the sum paid by A. in discharge of his promissory note, & took out of W. & Co.'s hands all the remaining securities:—*Held:* as A. would have had a right of set-off against bkpts., if they had continued in possession of his promissory note, he was not to be deprived of that right by his ignorance of the state of the account between W. & Co. & bkpts., & the assignees were bound, on the withdrawal of his proof, to repay him the amount of his promissory note, on his giving up bkpt.'s notes to the same amount.—*Re* WISE, *Ex p.* STADDON (1843), 3 Mont. D. & De G. 256; 12 L. J. Bcy. 39: 7 Jur. 358, Ct. of R.

3758. Failure to claim under examination.]—A person examined adversely on a summons in bkpcy. by creditors & assignees is under no obligation except that of fully and sufficiently answering questions put to him, & where a person on such an examination did not mention a right of set-off, which he had against a sum claimed to be due from him to the estate, & subsequently the unrealised credits were sold:—*Held:* he was not precluded by the omission from insisting on the right of set-off as against the purchaser.—ROLT *v.* WHITE (1862), 3 De G. J. & Sm. 360; 1 New Rep. 171; 7 L. T. 586; 9 Jur. N. S. 343; 46 E. R. 674, L. C.

SECT. 5.—RIGHTS BETWEEN TRUSTEE OR EXECUTOR AND BANKRUPT BENEFICIARY.

SUB-SECT. 1.—RIGHT OF TRUSTEE OR EXECUTOR TO RETAIN.

See, further, Part XIV., Sect. 2, *post*, & EXECUTORS & ADMINISTRATORS.

3759. Under what settlements—Voluntary settlement—When so far completed as to be enforceable.]—*Semble:* the right of trustees to retain trust property as against a beneficiary, who owes money to them as trustees under the instrument creating the trust, exists in favour of trustees of a voluntary settlement which has been so completed as to be enforceable by the ct.—*Re* WESTON, DAVIES *v.* TAGART, [1900] 2 Ch. 164; 69 L. J. Ch. 555; 82 L. T. 591; 48 W. R. 467.

Annotation:—**Mentd.** *Re* Jewell's Settlmt., Watts *v.* Public Trustee, [1919] 2 Ch. 161.

3760. Against whom benefits may be retained—Trustee in bankruptcy of legatee.]—Pltf.'s testator, having a nephew, W., received him when an infant into his family, provided him with clothes, sent him to school, & took him apprentice in the trade of a wine cooper. Testator kept an account in his books of all expenses of clothes, learning, & board, but after W. became an apprentice, the board was omitted in the account. Testator by his will gave £500 to W. & made pltf. his exor. & residuary legatee. Subsequently W. sued pltf. for the legacy, & pltf. brought his bill first against W. &, he becoming a bkpt., against the assignees under the commission, to have an allowance made to him, out of the legacy, for the money which W. owed to testator, & likewise to pltf., & the assignees brought their cross bill against pltf. for the legacy:—*Held:* as the assignees stood in the place of W., they could be in no better case, &, as pltf., had W. brought his bill for the legacy, might have retained what was due from W., pltf. had the same right against the assignees, & was liable to pay only the surplus, after having deducted what was due from W., as well to himself as to testator.—JEFFS *v.* WOOD (1723), 2 P. Wms. 128; 24 E. R. 668.

Annotations:—**Consd.** *Re* Henley Thurgood. *Re* Messrs. Fairhead (1863), 11 W. R. 1021. **Refd.** Ranking *v.* Barnard (1820), 5 Madd. 32; *Re* Briant, Poulter *v.* Shackel (1888), 39 Ch. D. 471. **Mentd.** Robins *v.* Harding (1737), cited 6 Notes of Cases, at p. 217; Barker *v.* Braham (1773), 2 Wm. Bl. 869; Campbell *v.* Graham (1831), 1 Russ. & M. 453; Courtenay *v.* Williams (1844), 3 Hare, 539; Jones *v.* Mossop (1844), 3 Hare, 568; Fell *v.* Law (1848), 1 Rob. Eccl. 726; Gingell *v.* Purkins (1850), 4 Exch. 720; Freeman *v.* Lomas (1851), 9 Hare, 109; Dingle *v.* Coppen, Coppen *v.* Dingle, [1899] 1 Ch. 726.

PART X. SECT. 4.

r. *Neglect to prove.*]—The non-proof by a creditor of his claim on the estate of an insolvent debtor does not deprive such creditor of the right to set off his claim against a debt due by him to insolvent.—GAMMER'S TRUSTEE *v.* JOSEPH (1876), Buch. 229. —**S. AF.**

s. *Proof of claim.*]—By a lease, made by deft. to insolvents, the lessees were "to get pay for improvements at a fair valuation, & to have the right of purchase during the term by paying the lessor, first, all claims by way of notes, or otherwise, he holds, or may hold, against the lessees, & the sum of $235.15, as purchase-money," etc. In Jan., 1875, an attachment under 1869 Act was issued, & in Mar. deft. filed his claim, which included a note for $500, most of which sum had been expended in improvements, & had been obtained for that purpose. There had been a valuation of the improvements at the end of the term in 1877, at $275, in which deft. did not take part, & the assignee sued deft. for that sum on his covenant:—*Held:* (1) the note formed an equitable, if not a legal, set-off against the claim; (2) deft. was not precluded by having proved his claim. —MASON *v.* MACDONALD (1880), 45 U. C. R. 113.—**CAN.**

t. *Delay in enforcing claim.*]—R. S. O., 1887, c. 124, s. 20 (5), does not affect the right to set off a claim barred by the above sub-sect. in an action against claimant by the assignee of the estate, or any one claiming through him.—JOHNSTON *v.* BURNS (1893), 23 O. R. 582.—**CAN.**

3761. —— ——.]—A legatee having become bkpt. since the death of testator, & a larger sum of money being due from him to the estate :—*Held :* his assignees were not entitled to take any part of the personal estate bequeathed to the legatee.—RICHARDS *v.* RICHARDS (1821), 9 Price, 219 ; 147 E. R. 72.

3762. —— —— **Or any person claiming through him—Purchaser.**]—A trust estate suffered loss by reason of the tenant for life allowing his landlord to distrain on certain heirlooms :—*Held :* the trustees' right to retain the income until the loss was made good was superior to the right of the trustee in bkpcy. of the tenant for life or of any persons claiming through him, *e.g.*, a purchaser of bkpt.'s life interest from the trustee in bkpcy. —*Re* HOPE, DE CETTO *v.* HOPE, [1900] W. N. 76.

3763. What benefits may be retained & against what debts—Legacy to wife—Against debt by husband to testator.]—Legacy of £1,000 to the wife of A. who was largely indebted to testatrix. A. became bkpt., & his wife afterwards died, without having asserted any claim in respect of the legacy. A.'s assignees having claimed the legacy :—*Held :* the exors. of testatrix were entitled to retain the legacy in part discharge of the debt due to testatrix.—RANKING *v.* BARNARD (1820), 5 Madd. 32 ; 56 E. R. 806.

Annotations :—**Consd.** Lee *v.* Egremont, Egremont *v.* Lee (1852), 5 De G. & Sm. 348. **Distd.** *Re* Henley Thurgood, *Re* Messrs. Fairhead (1863), 11 W. R. 1021. **Refd.** *Re* Briant, Poulter *v.* Shackel (1888), 39 Ch. D. 471. **Mentd.** Harvey *v.* Palmer (1851), 4 De G. & Sm. 425.

3764. —— —— ——.]—Testator during his life made an advance of £5,800 to his son-in-law, R. In Feb., 1908, R. was adjudicated bkpt., with assets *nil*, & he had not obtained his discharge. No interest was ever paid by R. By his will, made in Mar., 1908, testator settled a sum of £20,000 & one-fourth of his residue upon each of the wives of R. & M., another son-in-law, & their children, & he directed that the debt of R. should not be called in for five years if interest was paid, but if not, or in the event of the bkpcy. of R., the whole principal & interest should immediately become payable, & he declared that any loss sustained in respect of any indebtedness of R. should be credited as a loss to the trust legacy of £20,000 to the wife of debtor, & not as a loss to his residuary estate :—*Held :* the whole of the indebtedness of R. must be treated by the exors. as a loss, & deducted from the settled legacy to his wife.—*Re* PINK, PINK *v.* PINK, [1912] 1 Ch. 498 ; 81 L. J. Ch. 353 ; 106 L. T. 338 ; 56 Sol. Jo. 274 ; *varied* without affecting this point, [1912] 2 Ch. 528, C. A.

Annotation :—**Refd.** *Re* Stoneham, Stoneham *v.* Stoneham, [1919] 1 Ch. 149

3765. —— —— —— **Moiety only retained.**]—Exors. were allowed to set off a moiety of a legacy given by their testator to bkpt.'s wife against a debt due from bkpt. to testator. The other moiety was ordered to be settled on the wife for life, with remainder to the issue of the marriage. —*Re* GORDON, *Ex p.* O'FERRALL (1822), 1 Gl. & J. 347.

Annotation :—**Refd.** Egremont *v.* Lee (1852), 19 L. T. O. S. 345.

3766. —— **Bankrupt's life interest in trust fund—Against balance of bond debt outstanding.**]—Testator gave £4,000 in trust for his married daughter for life, then to her husband for life, & then for the children. The husband owed testator £6,000 on bond, & testator directed that, if not paid off in his lifetime, it would be taken in satisfaction of the £4,000. £950 was paid on the bond, & invested in stock ; the husband became bkpt., & the exor. proved the remaining bond debt, & invested the dividends in stock. The wife having died :—*Held :* the interest of the stocks was to accumulate till the £4,000 was made good, & then the assignees should be entitled to the interest during the husband's life.—*Re* PRIOR, *Ex p.* YOUNG (1835), 2 Mont. & A. 228 ; 4 Deac. & Ch. 645 ; 4 L. J. Bcy. 60, Ct. of R.

Annotation :—**Refd.** *Re* Severn, *Ex p.* King (1835), 1 Deac. 143.

3767. —— —— **Against debt due by bankrupt to testator.**]—R. by will devised to bkpt. her whole estate for the trust purposes specified. At the time of R.'s death, both the trustee & certain of the beneficiaries were indebted to testatrix. In a petition to ascertain whether there was any lien on behalf of the estate upon interests given by the will to one of the bkpt. beneficiaries in respect of her separate indebtedness to the estate :—*Held :* the assignees were entitled during the life of the bkpt. beneficiary to receive the rents & profits of the real estate devised to or in trust for her for her life, there being no postponement of her rights until her indebtedness was discharged.—*Re* COUSEN, *Ex p.* BARFF (1848), De G. 613 ; 17 L. J. Bcy. 22 ; 11 L. T. O. S. 474 ; 12 Jur. 668.

Annotations :—**Distd.** Doering *v.* Doering (1889), 42 Ch. D. 203. **Refd.** Fox *v.* Buckley (1876), 3 Ch. D. 508, C. A. ; *Re* Moore, Moore *v.* Moore (1881), 45 L. T. 466 ; *Re* Milnes, Milnes *v.* Sherwin (1885), 53 L. T. 534.

3768. —— —— **Against loss from his failing to protect heirlooms from distress.**]—Chattels were settled as heirlooms, & the tenant for life had their use. The tenant for life got into pecuniary difficulties, & some of the heirlooms were distrained upon by his landlord for arrears of rent & sold :—*Held :* the trustees were entitled to be paid out of income the loss the trust estate had suffered by reason of the tenant for life who had been adjudicated bkpt. & had obtained his discharge, allowing his landlord to distrain on the heirlooms, & as the tenant for life had had the benefit of the money produced by the sale of the chattels in the payment of his debt, the trustees had a right to retain the income until the loss was made good to the estate.—*Re* HOPE, DE CETTO *v.* HOPE, [1900] W. N. 76.

PART X. SECT. 5, SUB-SECT. 1.

3763 i. *What benefits may be retained & against what debts—Legacy to wife—Against debt by husband to testator.*]—A bequest to a wife married in community of property as "her free & own property, without any deductions," is not a settlement upon the wife to her separate use so as, upon the insolvency of her husband, to deprive the trustee of the property for the benefit of his creditors. The creditors of testator are entitled, notwithstanding the words "without any deductions," to set off against the trustee's claim to the property, a debt due by insolvent to testator's estate.—TESSELAAR'S TRUSTEE *v.* BLANCKENBERG'S EXECUTORS (1877), Buch. 54.—**S. AF.**

w. —— *Legacies to sons—Against debt due by partnership in which sons were members.*]—Testator gave a legacy each to his sons, who were members of a firm. The members of the firm after the death of testator were adjudged bkpt., & at the time of the bkpcy. the firm was indebted to testator's estate ; —*Held :* the assignees were not entitled to the legacies so bequeathed as long as the partnership debt remained due to testator's estate.—MCLEA'S TRUSTEES *v.* MCLEA'S EXECUTORS (1875), 6 Nfld. L. R. 37.—**NFLD.**

y. —— *Share of proceeds of sale—Against debt due to testator repayable by instalments after death.*]—Under their father's will, two sons were to receive a share of the proceeds of land to be sold on the death of his widow, who was still alive. They also owed testator a debt, which, by the will, was to be payable in five yearly instalments from the time of his death. About two years subsequent thereto the sons made an assignment for the benefit of their creditors under R. S. O. 1887, c. 124 :—*Held :* the exors., being also the trustees of the land of which the sons were to receive shares when sold under the will, had the right to impound the sons' shares under the will as against their debt to the estate.—TILLIE *v.* SPRINGER (1892), 21 O. R. 585.—**CAN.**

Sect. 5.—Rights between trustee or executor and bankrupt beneficiary: Sub-sect. 1.]

3769. —— Legacy to executors in trust to pay income to bankrupt with power of appointment of remainder—Against debt due by bankrupt to testator.]—A. became bkpt., being indebted to B. After the bkpcy. B. made her will & bequeathed a legacy to her exors. in trust to pay the income to A. for life without power of assigning or anticipating it, with remainder as he should appoint. B. died, A. being an uncertified bkpt., & B.'s debt remaining unpaid:—*Held:* as the liability to pay the whole debt, & the right to receive the legacy, had never rested in the same person, B.'s exors. were not entitled as against A.'s assignees to set off A.'s debt against the legacy.—CHERRY *v.* BOULTBEE (1839), 2 Keen, 319; 4 My. & Cr. 442; 9 L. J. Ch. 118; 3 Jur. 1116; 41 E. R. 171, L. C.

Annotations:—**Apld.** Bell *v.* Bell (1849), 17 Sim. 127. **Distd.** Lee *v.* Egremont, Egremont *v.* Lee (1852), 5 De G. & Sm. 348. **Consd.** Smith *v.* Smith (1861), 3 Giff. 263. **Foll.** *Re* Hodgson, Hodgson *v.* Fox (1878), 9 Ch. D. 673. **Apld.** *Re* Orpen, Beswick *v.* Orpen (1880), 16 Ch. D. 202. **Consd.** *Re* Rees, Rees *v.* Rees (1889), 60 L. T. 260. **Apld.** *Re* Akerman, Akerman *v.* Akerman, [1891] 3 Ch. 212. **Distd.** *Re* Watson, Turner *v.* Watson, [1896] 1 Ch. 925. **Consd.** Turner *v.* Turner, [1911] 1 Ch. 716. **Expld.** *Re* Pink, Pink *v.* Pink, [1912] 1 Ch. 498. **Apld.** *Re* Dacre, Whitaker *v.* Dacre, [1915] 2 Ch. 480; *Re* Peruvian Railway Construction Co., [1915] 2 Ch. 442, C. A. **Distd.** *Re* Smelting Corpn., Seaver *v.* Smelting Corpn., [1915] 1 Ch. 472. **Consd.** *Re* Melton, Milk *v.* Towers, [1918] 1 Ch. 37; *Re* Savage, Cull *v.* Howard, [1918] 2 Ch. 146. **Refd.** Freeman *v.* Lomas (1851), 9 Hare, 109; Beyer *v.* Adams, *Re* Law, Hopetoun's Claim (1857), 30 L. T. O. S. 9; *Re* Rhodesia Goldfields, Partridge *v.* Rhodesia Goldfields, [1910] 1 Ch. 239; *Re* Dacre, Whitaker *v.* Dacre, [1916] 1 Ch. 344, C. A.; *Re* National Live Stock Insce., *Re* National General Insce., [1917] 1 Ch. 628. **Mentd.** *Re* Taylor, Taylor *v.* Wade (1894), 8 R. 186.

3770. —— Share of residuary legatee—Against trust money lent him by executors.]—Exors. sold out a sum of stock, part of the residue of testator's estate, & advanced the proceeds to one of several residuary legatees with the concurrence of the others, taking as a security for its replacement a warrant of attorney & a deposit of title-deeds. The purpose of the deposit was stated in the defeasance to the warrant of attorney, which, however, did not expressly give a lien on the legatee's share of the residue. On the legatee's having become bkpt.:—*Held:* the exor. might retain his share in the residue in part payment of the debt.—*Re* MAKINS, *Ex p.* MAKINS (1842), 2 Mont. D. & De G. 508; 6 Jur. 468, Ct. of R.

3771. —— —— Against debt due to estate in which testator residuary legatee.]—Testator left his residuary estate to his daughter. The daughter left one-sixth of her residuary estate to a son, who was indebted to testator's estate, & who subsequently became bkpt. Testator's estate yielded a clear residue exclusive of this debt:—*Held:* the exors. of the daughter were entitled to set off the debt out of bkpt.'s share.—BOUSFIELD *v.* LAWFORD (1863), 1 De G. J. & Sm. 459; 2 New Rep. 293; 33 L. J. Ch. 26; 8 L. T. 619; 11 W. R. 842; 46 E. R. 182, L. JJ.

Annotations:—**Consd.** Stammers *v.* Elliott (1867), L. R. 4 Eq. 675. **Consd. & Apld.** *Re* Watson, Turner *v.* Watson, [1896] 1 Ch. 925.

3772. —— —— Against debt never proved by testator or executors.]—A week before the death of testatrix, a debtor to her, who was one of the residuary legatees under her will, dated several years previously, became bkpt. The debt was never proved by testatrix in her lifetime, or by her exors. after her death, nor had any dividend been declared in the bkpcy.:—*Held:* the exors. of testatrix were not entitled to set off or retain the amount of the debt due to testatrix against the share of bkpt., nor, in the circumstances, any amount in respect of dividend on such debt.—*Re* HODGSON, HODGSON *v.* FOX (1878), 9 Ch. D. 673; 48 L. J. Ch. 52; 27 W. R. 38.

Annotations:—**Distd.** *Re* Watson, Turner *v* Watson, [1896] 1 Ch. 925. **Refd.** *Re* Peruvian Railway Construction Co., [1915] 2 Ch. 144.

3773. —— —— Against sum due under bond—Against damages from disclaimer of contract by trustee in bankruptcy of legatee.]—Where a residuary legatee is indebted to the estate in a bond, & has contracted to purchase part of the estate, & on his bkpcy. the contract is disclaimed by his trustee & no claim is proved by the exors., the latter are entitled to set off against his interest under the will the sum due under the bond, but have no claim which they can set off in respect of the contract.—*Re* PALMER, PALMER *v.* CLARKE (1894), 13 R. 220.

3774. —— —— Against liability of estate on guarantee given by testator.]—A father deposited with a bank £2,400 (money of his own) as a continuing security for any amount which might from time to time be owing to the bank by a firm, in which two of his sons were the only partners. Interest on the deposit was from time to time paid by the bank to the father. By his will the father gave legacies, & shares of residue to the two sons. At the date of his death the sons owed £8,858 to the bank, & were afterwards adjudicated bkpts. The bank proved in the bkpcy. for the whole £8,858. No dividend had been paid in the bkpcy., & it was admitted to be improbable that the estate would realise enough to pay the bank in full, & that the bank would ultimately appropriate the deposit of £2,400 towards the payment of the firm's debt:—*Held:* the trustees of the father's will were not entitled as against the trustee in bkpcy. to retain the legacies & shares thereby bequeathed to the sons against the liability of the father's estate as surety to the bank.—*Re* BINNS, LEE *v.* BINNS, [1896] 2 Ch. 584; 65 L. J. Ch. 830; 75 L. T. 99; 40 Sol. Jo. 654.

Annotations:—**Consd. & Distd.** *Re* Melton, Milk *v.* Towers (1917), 86 L. J. Ch. 708. **Mentd.** *Re* Mitchell, Freelove *v.* Mitchell, [1913] 1 Ch. 201.

3775. —— —— Against sums paid in respect of guarantee by testator.]—A surety for mtgor. bequeathed to him a share of the residue of his estate, subject to the life interest of testator's widow. After the death of testator mtgor. became bkpt. He never obtained a discharge, & the bkpcy. was never closed. Neither mtgees. nor testator's exors. proved in the bkpcy. After the bkpcy. the exors. made some payments to mtgees. in pursuance of testator's liability under his contract of suretyship:—*Held:* on the death of the tenant for life, the exors. were entitled, notwithstanding the bkpcy., to retain out of mtgor.'s share of the residue the amount of the payments which they had made to mtgees., with interest thereon at 4 per cent.—*Re* WATSON, TURNER *v.* WATSON, [1896] 1 Ch. 925; 65 L. J. Ch. 553; 74 L. T. 453; 44 W. R. 571.

Annotations:—**Consd.** *Re* Melton, Milk *v.* Towers, [1918] 1 Ch. 37, C. A. **Refd.** *Re* Powell, Powell *v.* Powell (1904), 20 T. L. R. 374; *Re* Sewell, White *v.* Sewell, [1909] 1 Ch. 806. **Mentd.** *Re* Goy, Farmer *v.* Goy, [1900] 2 Ch. 149; *Re* Brown & Gregory, Shepheard *v.* Brown & Gregory, Andrews *v.* Brown & Gregory, [1904] 1 Ch. 627; *Re* Rhodesia Goldfields, Partridge *v.* Rhodesia Goldfields, [1910] 1 Ch. 239.

3776. —— —— ——.]—After testator's death, a legatee of a one-fourth reversionary share in a residuary fund, on whose behalf testator had given a continuing guarantee fully securing his banking account, but limiting testator's liability to a specified amount, mortgaged his reversionary share

to the bank to secure his account & subsequently became bkpt. The bank as principal creditors valued their security & proved for the whole balance of their overdraft, on which they received under 10*s.* in the pound, & had no chance of obtaining full payment. The exors. as sureties were then compelled to pay the sum of £313, the full amount for which they were liable under the guarantee. The bank, with the concurrence of the legatee's trustee in bkpcy., subsequently sold the reversionary share to an assignee. On the reversion falling in & the estate becoming divisible :—*Held :* the £313 must be brought into hotchpot by the assignee, on the ground that it did not form part of the assignor's estate at the time of his bkpcy.—*Re* MELTON, MILK *v.* TOWERS, [1918] 1 Ch. 37 ; 87 L. J. Ch. 18 ; 117 L. T. 679 ; 34 T. L. R. 20 ; [1917] H. B. R. 246, C. A.

3777. —— Legacy to bankrupt—Against debt to testator statute-barred at the testator's death.]—An exor. may retain a legacy as a set-off against or in satisfaction of a debt due from the legatee to testator, although the debt, at the time of the death of testator, was barred by Stat. Limitations.—COURTNAY *v.* WILLIAMS (1846), 15 L. J. Ch. 204 ; 6 L. T. O. S. 517.

Annotations :—**Apld.** Coates *v.* Coates (1864), 33 L. J. Ch. 448. **Consd.** *Re* Akerman, Akerman *v.* Akerman, [1891] 3 Ch. 212 ; *Re* Langham, Otway *v.* Langham (1896), 74 L. T. 611 ; Dingle *v.* Coppen, Coppen *v.* Dingle, [1899] 1 Ch. 726. **Apld.** *Re* Bruce, Lawford *v.* Bruce, [1908] 1 Ch. 850. **Refd.** Harvey *v.* Palmer (1851), 4 De G. & Sm. 425 ; *Re* Morley, Morley *v.* Saunders (1869), L. R. 8 Eq. 594 ; *Re* Milnes, Milnes *v.* Sherwin (1885), 53 L. T. 534 ; *Re* Watson, Turner *v.* Watson, [1896] 1 Ch. 925 ; *Re* Lloyd, Lloyd *v.* Lloyd, [1903] 1 Ch. 385, C. A. ; *Re* Sewell, White *v.* Sewell, [1909] 1 Ch. 806 ; *Re* Rhodesia Goldfields, Partridge *v.* Rhodesia Goldfields, [1910] 1 Ch. 239. **Mentd.** Poole *v.* Poole (1871), 7 Ch. App. 17, L. JJ. ; *Re* Stead's Settlmt. Trusts (1876), 24 W. R. 698 ; *Re* Taylor, Taylor *v.* Wade (1894), 8 R. 186 ; *Re* National Live Stock Insce., *Re* National General Insce., [1917] 1 Ch. 628 ; *Re* Savage, Cull *v.* Howard, [1918] 2 Ch. 146.

3778. —— —— Against debt unenforceable until three years after close of legatee's liquidation—Testator dying less than three years after close of liquidation.]—A. filed his liquidation petition. B. proved for a debt, but did not receive any dividend. In Dec., 1886, the liquidation was closed, but no discharge was granted to A. In Jan., 1888, B. died, leaving A. a legacy :—*Held :* as there was no debt, which could be enforced until the expiration of three years from the close of the liquidation, the exors. of B. could not retain or set off the debt as against the legacy.—*Re* REES, REES *v.* REES (1889), 60 L. T. 260.

Annotations :—**Distd.** *Re* Watson, Turner *v.* Watson, [1896] 1 Ch. 925. **Consd.** *Re* Powell, Powell *v.* Powell (1904), 20 T. L. R. 374. **Folld.** *Re* Abrahams, Abrahams *v.* Abrahams, [1908] 2 Ch. 69.

3779. —— Bequest of leaseholds—Against debt due by bankrupt to testator.]—Under a bequest of leaseholds for the legatee's personal support & maintenance, & to be entirely free from any claim, charge or demand, or lien of his creditors :—*Held :* the leaseholds could not be withheld from the assignees in bkpcy. of the legatee until he had paid a debt due from him to testator, even assuming (as to which, *qu.*) that a specific legacy might be so withheld in the absence of such a testamentary exemption.—HARVEY *v.* PALMER (1851), 4 De G. & Sm. 425 ; 18 L. T. O. S. 5 ; 15 Jur. 982 ; 64 E. R. 897.

3780. —— Share of next of kin—Against statute-barred debt to deceased.]—An administrator is entitled to set off against the share of one of the next of kin in intestate's estate, the whole of a debt, of which part had become barred by Stat. Limitations.—*Re* CORDWELL'S ESTATE, WHITE *v.* CORDWELL (1875), L. R. 20 Eq. 644 ; 23 W. R. 826.

Annotations :—**Consd.** *Re* Milnes, Milnes *v.* Sherwin (1885), 53 L. T. 534. **Refd.** *Re* Akerman, Akerman *v.* Akerman, [1891] 3 Ch. 212 ; *Re* Langham, Otway *v.* Langham (1896), 74 L. T. 611.

3781. —— Bankrupt's right to property conveyed by him to trustees to secure annuity—Against arrears of annuity payable by bankrupt.]—By a separation deed, after reciting that the husband & wife had agreed to live apart, the husband assigned leaseholds to trustees, in trust to pay the rents to the wife for life, & then to sell & hold the proceeds, in the events which happened, in trust for himself, & he covenanted to make up the wife's income to £300 a year. The deed contained a proviso for determination in the event of the wife seeking to resume cohabitation, but it contained no covenant by the wife to live apart. The husband paid nothing under the covenant, & was adjudicated bkpt. The trustees proved for arrears due down to the date of the bkpcy., but there were further arrears due to them since that date. On the death of the wife the husband's assignee in bkpcy. claimed the leaseholds :—*Held :* a covenant by the wife to live apart ought to be implied from the recital, & there was valuable consideration for the husband's covenant, & the trustees were entitled to retain the leaseholds until the arrears were satisfied.—*Re* WESTON, DAVIES *v.* TAGART, [1900] 2 Ch. 164 ; 69 L. J. Ch. 555 ; 82 L. T. 591 ; 48 W. R. 467.

Annotation :—**Mentd.** *Re* Jewell's Settlmt., Watts *v.* Public Trustee, [1919] 2 Ch. 161.

3782. What amount may be retained—Amount of composition by bankrupt beneficiary with interest—Not whole amount of debt.]—A. son, being indebted to his father upon two promissory notes & a bill of sale, executed a deed of composition with his creditors, to which his father was not a party, nor was he scheduled as a creditor. The son was afterwards adjudicated bkpt., & the statutory majority of creditors resolved to accept a composition of 2*s.* 6*d.* in the pound, & the bkpcy. was annulled. The father, never having proved in the bkpcy., nor having been paid the composition, died, leaving by his will a share in his estate to the son :—*Held :* the amount of the second composition had become substituted for all debts provable in the bkpcy., & the father's exors. were entitled to retain out of the son's share in the estate only the amount of the composition upon the whole debt, & upon the amount of six years' interest due at the time of the bkpcy. under the promissory note, & the whole interest due at that time under the bill of sale.—*Re* ORPEN, BESWICK *v.* ORPEN (1880), 16 Ch. D. 202 ; 50 L. J. Ch. 25 ; 43 L. T. 728 ; 29 W. R. 467.

Annotations :—**Expld.** *Re* Watson, Turner *v.* Watson, [1896] 1 Ch. 925. **Apld.** *Re* Sewell, White *v.* Sewell, [1909] 1 Ch. 806. **Refd.** *Re* Peruvian Railway Construction Co., [1915] 2 Ch. 144.

3783. —— Testator's estate insufficient to pay legacies in full—Legacy not specific.]—Testator bequeathed to his son £10,000, & directed that any money due to him at his decease from that legatee should, but not exceeding £10,000, be set off & retained in or towards satisfaction of the legacy. The legatee was indebted to testator's estate, & the exors. obtained judgment against him for £26,398 12*s.* 6*d.*, after giving credit for the amount of the legacy. The legatee became bkpt. & testator's estate proved insufficient to pay the legacies in full. The exors. proved in the bkpcy. for £5,356 1*s.* 2*d.*, the difference between the amount of the legacy of £10,000 with which bkpt. had been credited, & £4,643 18*s.* 10*d.* the

Sect. 5.—Rights between trustee or executor and bankrupt beneficiary: Sub-sects. 1 & 2. Part XI. Sects. 1 & 2; sub-sects. 1, 2 & 3.]

proportion due on abatement:—*Held:* the legacy was not specific, & was subject to abatement, & the proof must be admitted.—*Re* RICHARDSON, *Ex p.* THOMPSON *v.* HUTTON (1902), 86 L. T. 25.

3784. How right to retain lost—Proof against bankrupt.]—Bkpt. was indebted to the estate of testator, & was also entitled as one of the residuary legatees of same testator, & also to distributive shares as next of kin of three other residuary legatees. The exor. of testator proved the debts under the bkpcy. & received a dividend on the proof:—*Held:* the exor. had thereby abandoned the right to retain the debt out of the direct or derivative shares of bkpt. in testator's residuary estate. *Semble:* if the exor. had not proved in the bkpcy., the personal representative of testator would have been entitled in equity to retain the amount of the debt against bkpt.'s direct & derivative shares in the residue.—STAMMERS *v.* ELLIOTT (1868), 3 Ch. App. 195; 37 L. J. Ch. 353; 18 L. T. 1; 16 W. R. 489, L. C.

Annotations:—**Apld.** Armstrong *v.* Armstrong (1871), L. R. 12 Eq. 614. **Distd.** *Re* Palmer, Palmer *v.* Clarke (1894), 13 R. 220; *Re* Rhoades, *Ex p.* Rhoades, [1899] 1 Q. B. 905. **Expld. & Distd.** *Re* West Coast Gold Fields, Rowe's Trustee's Claim, [1906] 1 Ch. 1, C. A. **Apld.** *Re* Sewell, White *v.* Sewell, [1909] 1 Ch. 806. **Consd.** *Re* Melton, Milk *v.* Towers, [1918] 1 Ch. 37, C. A. **Refd.** *Re* Binns, Lee *v.* Binns (1896), 65 L. J. Ch. 330; *Re* Watson, Turner *v.* Watson, [1896] 1 Ch. 925. **Mentd.** *Re* Whitehouse, Whitehouse *v.* Edwards (1887), 37 Ch. D. 683.

3785. ——. ——.]—A receiver in the cause, without obtaining leave from the ct., proved against the estate of a bkpt. legatee, who was a debtor to the estate:—*Held:* the receiver must be treated for the purpose as having authority, & the effect of the proof was to discharge the debt & entitle bkpt., whose bkpcy. had been annulled, to his legacy.—ARMSTRONG *v.* ARMSTRONG (1871), L. R. 12 Eq. 614; 25 L. T. 199; 19 W. R. 971.

Annotations:—**Refd.** *Re* Watson, Turner *v.* Watson, [1896] 1 Ch. 925; *Re* Sewell. White *v.* Sewell, [1909] 1 Ch. 806.

SUB-SECT. 2.—RIGHT OF BANKRUPT BENEFICIARY TO SET OFF.

3786. What benefits may be set off & against what debts—Legacy—Against debt due by bankrupt to testator.]—A. proved a debt of £424 against the separate estate of B., & died before B. had obtained his certificate, having bequeathed to B. a legacy of £200. On the petition of the assignee:—*Held:* the sum of £200 should be deducted from the proof of £424 made by A.—*Re* HARVEY, *Ex p.* MAN (1829), 1 Mont. & M. 210.

Annotations:—**Consd.** Cherry *v.* Boultbee (1839), 4 My. & Cr. 442, L. C. **Refd.** Cherry *v.* Boultbee (1838), 2 Keen. 319.

3787. —— **Bankrupt executor's beneficial share—Against debt found due to estate in administration action.**]—In an action to administer testator's estate, £11,000 was found due from the two trustees of the will. One of the trustees having been adjudicated a bkpt., his co-trustee sought to prove for £6,400, part of the £11,000; & the receiver in the administration action sought to prove for £4,600, the balance of the £11,000. Bkpt.'s beneficial share in testator's estate was £1,600:—*Held:* the receiver was only entitled to prove for the £4,600, less the £1,600, bkpt.'s beneficial share.—*Re* CHAPMAN, *Ex p.* PARKER (1887), 35 W. R. 595; 4 Morr. 109, D. C.

Part XI.—Joint and Separate Estates—Bankruptcy of Firm or Partner.

SECT. 1.—IN GENERAL.

See, now, 1914 Act, s. 33 (6).

3788. Rules for distributing property.]—Joint-effects are to be applied, first to pay the partnership debts, & then the separate debts, & as to the separate effects, first the separate creditors, & afterwards the partnership creditors, are to be paid out of the same.—*Ex p.* CROWDER (1715), 2 Vern. 706; 23 E. R. 1064.

Annotations:—**Apprvd.** *Ex p.* Cook (1728), 2 P. Wms. 500. **Apld.** Wickes *v.* Strahan (1741), 2 Stra. 1157. **Distd.** Crispe *v.* Perrit (1744), Willes, 467.

3789. ——.]—The joint creditors shall be first paid out of the partnership or joint estate, & the separate creditors out of the separate estate of each partner.—*Ex p.* COOK (1728), 2 P. Wms. 500; 2 Eq. Cas. Abr. 110; 24 E. R. 834; *sub nom. Ex p.* COKE & TUCKER, *Ex p.* PRIESTLAND, Mos. 80, L. C.

Annotations:—**Apld.** Wickes *v.* Strahan (1741), 2 Stra. 1157. **Distd.** Crispe *v.* Perrit (1744), Willes, 467.

3790. ——.]—If two partners commit an act of bkpcy., they are bkpts. in all respects, & cannot be said to be bkpts. as to their joint estate, & not as to their separate estate, & if the separate creditors come in under the joint commission, the joint estate shall be applied to pay off the joint debts, & the separate effects to pay off the separate debts.—HOWARD *v.* POOLE (1734), Cunn. 111; 2 Stra. 995; 94 E. R. 1095.

Annotation:—**Refd.** Wickes *v.* Strahan (1741), 2 Stra. 1157.

3791. *S. P. Ex p.* ABELL (1799), 4 Ves. 837; 31 E. R. 434, L. C.

PART XI. SECT. 1.

3788 i. *Rules for distributing property.*]—If the dividend is derived wholly out of joint estate, the joint creditors alone can share until fully paid; if wholly out of separate estate, it belongs entirely to separate creditors till they are paid, & if partly out of each class of assets, it should be divided *pro ratâ* between each class of debts.—*Re* WALKER (1880), 6 A. R. 169.—**CAN.**

3788 ii. ——.]—Where the assets of a partnership are in ct. for distribution, the creditors of the copartnership will be entitled to be paid before the creditors of the individual partners.—IRVINE *v.* HERVEY (1908), 5 E. L. R. 578.—**CAN.**

3788 iii. ——.]—The rule of equity is clear that in distributing the joint & separate estates of partners in trade who become bkpt., the joint estate shall be applied first in payment of joint creditors, & the separate estate in discharge of separate debts; & if any surplus remains of either estate after payment of the demands upon it, such surplus shall go in augmentation of the other, that is, the surplus of the joint in augmentation of the separate estate, & the surplus of the separate estate in augmentation of the joint estate.—HAYDEN *v.* CARROLL (1796), 3 Ridg. Parl. Rep. 545, 605.—**IR.**

3788 iv. ——.]—Pltf. sold lumber to S. Co., a partnership composed of M. & J., & notes signed by the co., M. & J., were given to pltf. Both M. & the co. assigned for the benefit of their creditors:—*Held:* the notes were the joint & several notes of the partners & the individual members, & the claim in respect of the partnership liability must rank first upon the partnership estate, & that in respect of the individual estate upon the individual estate. Neither could rank upon the other estate until after the creditors of that other had been paid in full.—GORDON *v.* MATTHEWS (1909), 18 O. L. R. 340; 13 O. W. R. 649; 19 O. L. R. 564; 14 O. W. R. 873.—**CAN.**

3792. ——.]—Separate estate is to be distributed amongst separate creditors, & joint estate amongst joint creditors.—*Re* SPARKE & BRIDGES, *Ex p.* DAY (1863), 9 L. T. 350.

3793. Allowance to bankrupt—How calculated.] —Under a joint & separate fiat, the allowance to bkpt. is to be calculated on the amount of his separate estate, & on his share of the joint estate, but not on the gross amount of the joint estate.—*Re* LOMAS, *Ex p.* LOMAS (1834), 3 L. J. Bcy. 99, Ct. of R.

See, further, Part VII., Sect. 7, *ante*.

Right of joint creditor to present petition.]—*See* Part III., Sect. 1, sub-sect. 2, H, *ante*.

SECT. 2.—RIGHTS OF SEPARATE CREDITORS.

SUB-SECT. 1.—AGAINST JOINT ESTATE OR JOINT CREDITORS.

3794. To joint estate—Joint commission & separate commission against one.]—Where there is a joint commission against partners, & a separate commission against one, the assignees having taken possession of the whole fund, must divide it among the joint creditors, & the separate bond creditors of the other partner cannot claim against them.—HANKEY *v.* GARRAT (1790), 3 Bro.C.C. 457 ; 1 Ves. 236 ; 29 E. R. 641.

Annotations :—**Distd.** *Ex p.* Ruffin (1801), 6 Ves. 119 ; Everett *v.* Backhouse (1804), 10 Ves. 94. **Refd.** Brett *v.* Beckwith (1856), 3 Jur. N. S. 31. **Mentd.** Thompson *v.* Derham (1842), 1 Hare, 358 ; Martin *v.* Powning (1868), 4 Ch. App. 356, n.

3795. To reimbursement of expenses—Of collecting joint estate.]—Under a separate commission, the separate estate is entitled to be reimbursed out of the joint estate expenses incurred in recovering property for the benefit of the joint creditors.—*Re* ASHLEY, *Ex p.* RUTHERFORD (1811), 1 Rose, 201.

3796. To joint effects taken in execution after act of bankruptcy of partner.]—Joint creditors, who have taken joint effects in execution subsequently to an act of bkpcy. by one of the partners, cannot retain them against the assignees under a separate commission, afterwards issued by another joint creditor against that partner.—*Re* WAIT (1820), 1 Jac. & W. 605 ; 37 E. R. 499.

Annotations :—**Expld.** Woodbridge *v.* Swann (1833), 4 B. & Ad. 633. **Refd.** *Ex p.* Robinson (1833), Coop. *temp.* Brough. 162 ; Morgan *v.* Marquis (1853), 9 Exch. 145 ; *Re* Bainbridge, *Ex p.* Fletcher (1878), 8 Ch. D. 218 ; Dibb *v.* Brooke, [1894] 2 Q. B. 338.

3797. To appropriation of funds—Effect of joint fiat & petition to supersede separate fiat.]—An application for appropriation of funds under a separate fiat need not stand over because a subsequent joint fiat has issued, under which a petition to supersede the separate fiat is pending.—*Re* HADDON (1839), Mont. & Ch. 42.

3798. To have inspector appointed to protect interests—Joint creditors appointed assignees under separate commission.]—Under 1861 Act a separate adjudication was made against a partner, no joint adjudication being made. The separate debts were about £8,000, the joint debts about £90,000. The separate estate realised about £4,000. There was no partnership estate. Two joint creditors were appointed assignees. On the application of the principal separate creditor :—*Held :* an inspector might be appointed to protect the interests of the separate creditors, but he must take no step in the matter without the approval of the registrar.—*Re* MELBOURN, *Ex p.* MELBOURN (1871), 6 Ch. App. 835 ; 40 L. J. Bcy. 56 ; 25 L. T. 368 ; 19 W. R. 1073, L. JJ.

See, generally, PARTNERSHIP.

SUB-SECT. 2.—WHAT PROPERTY BELONGS TO SEPARATE ESTATE.

See cases in Sect. 3, sub-sects. 2 & 3, *post*.

SUB-SECT. 3.—TO SURPLUS OF JOINT ESTATE.

See, now, 1914 Act, s. 33 (6).

3799. Separate creditors entitled to surplus.]—Upon a commission of bkpcy. being issued against partners :—*Held :* the partnership assets must first be applied in paying the partnership debts, & the separate debts of each of the partners were payable out of the surplus coming to them respectively.—CRAVEN (EARL) *v.* KNIGHT (1683), 2 Rep. Ch. 226 ; 21 E. R. 664.

Annotation :—**Refd.** Ryall *v.* Rolle (1749), 1 Atk. 165.

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a. *Effect of sequestration on joint estate.*]—On compulsory sequestration as on voluntary sequestration the joint sequestration of the joint estate of partners is a sequestration of the separate estate of each partner. But when the joint estate & separate estates are administered they must be kept distinct as to claims upon them respectively.—*Re* TURNBULL (1862), 1 W. & W. 105.—**AUS.**

b. ——.]—An order for the sequestration of the estate of a firm, vests in the assignee the joint estate & the separate estates of the partners &, upon the election of trustee of the estate, the joint & separate estates become vested in him.—*Re* CURTAIN & HEALEY (1879), 5 V. L. R. 109.—**AUS.**

c. *Effect of vesting order on separate estate—Indian Insolvency Act*, 1847 (c 21).]—A vesting order made upon the petition of a trading firm under the above Act, vests in the official assignee the separate property of each partner as well as the joint estate of the firm.—BROWN *v.* CARBERRY (1864), 16 C. B. N. S. 2 ; 143 E. R. 1023.—**IND.**

d. *Distinct commissions issued by separate & joint creditors—Separate commission superseded.*]—A commission of bkpcy. issued against A. at the suit of B., & another at the suit of a joint creditor of a late firm, of which A. was the surviving partner, describing him as "the surviving partner of C. deceased" :—*Held :* the former should be superseded at the cost of the joint estate.—*Ex p.* HAIG (1832), Glascock, 237.—**IR.**

e. *Investigation of conflicting claims between firms composed of same parties.*]—The whole case will be sent before the Chief Registrar for investigation when the claims & rights of different firms composed of the same parties conflict.—*Re* TATE & CO. (1868), 2 I. L. T. Jo. 284.—**IR.**

f. *Sole partner trading as two separate firms—Effect of sequestration.*]—Where separate sequestrations were awarded of two firms carrying on business at different places, but in both of which the same individual was sole partner :—*Held :* but one & the same estate was to be disposed of in their sequestration.—CULLEN *v.* M'FARLANE (1842), 14 Sc. Jur. 587.—**SCOT.**

g. *Jurisdiction of court — Undue preference of separate creditor over joint creditors.*]—The ct. has jurisdiction, & will exercise it, to prevent a creditor of one partner obtaining an undue preference over the creditors of a firm by means of proceedings in ct.—FELAN *v.* MCGILL (1870), 3 Ch. Ch. 68.—**CAN.**

h. —— *Citation of partnership—Power to sequestrate separate estates.*]—Where a co. has been duly cited in terms of 1913 Act, s. 26, the estates of the individual partners as well as those of the co. may be sequestrated, although the individual partners have not been cited in terms of s. 25 of the Act.—CENTRAL MOTOR ENGINEERING CO. *v.* GALBRAITH, [1918] S. C. 755.—**SCOT.**

j. —— *Application by assignee for declaration as to composition of firm—Vesting order.*]—BOTHAM *v.* KEEFER (1878), 2 A. R. 595.—**CAN.**

k. *Advertising for claims.*]—Where the assets of a partnership are in ct. for distribution, in the advertisement calling for creditors' claims to be filed the creditors of the individual partners should be notified as well as those of the copartnership.—IRVINE *v.* HERVEY (1908), 5 E. L. R. 578.—**CAN.**

l. *Joint property of partners & partnership assets distinguished.*]—*Re* LITTLE, *Ex p.* FIFE BANKING CO. (1843), 6 I. Eq. R. 197.—**IR.**

PART XI. SECT. 2, SUB-SECT. 3.

3799 i. *Separate creditors entitled to surplus.*]—The separate creditors shall rank upon the separate estate & shall not be permitted to rank upon the partnership estate until the partnership creditors are satisfied.—*Re* MARTIN, WINTER *v.* BANK OF MONTREAL (1907), 9 Nfld. L. R. 357.—**NFLD.**

Sect. 2.—*Rights of separate creditors: Sub-sects.* 3 & 4, *A.*]

3800. ——.]—If there be a surplus of the joint estate, besides what will pay the joint creditors, same shall be applied to pay the separate creditors. —*Ex p.* COOK (1728), 2 P. Wms. 500; 2 Eq. Cas. Abr. 110; 24 E. R. 834; *sub nom. Ex p.* COKE & TUCKER, *Ex p.* PRIESTLAND, Mos. 80, L. C.

Annotations:—**Refd.** Wickes *v.* Strahan (1741), 2 Stra. 1157. **Mentd.** Crispe *v.* Perrit (1744), Willes, 467.

3801. ——.]—On a joint commission, the joint creditors are first to come in on the partnership effects, & if there remain a surplus, then the separate creditors are to be admitted.—HORSEY'S CASE (1729), 3 P. Wms. 23; 24 E. R. 954.

3802. ——.]—If there be any surplus of the joint estate, after the joint debts paid, it shall be applied by moieties, to the discharge of the separate debts of each.—HOWARD *v.* POOLE (1734), Cunn. 111; 2 Stra. 995; 94 E. R. 1095.

Annotation:—**Mentd.** Wickes *v.* Strahan (1741), 2 Stra. 1157.

3803. ——.]—In bkpcy. the joint estate is to be applied to the joint debts, & after they are paid the surplus, if any, to the separate debts.—*Ex p.* ABELL (1799), 4 Ves. 837; 31 E. R. 434, L. C.

3804. ——.]—It is necessary, in order to carry into effect the principle adopted in bkpcy., that the joint property ought first to be applied to the joint debts. The assignees under the separate commission have some right in the property; the right to all of it, that remains the separate property of the partner, against whom the commission has issued, subject however to the joint debts, & the claims of his partner (GRANT, M.R.). —EVERETT *v.* BACKHOUSE (1804), 10 Ves. 94; 32 E. R. 779.

Annotation:—**Mentd.** Kerakoose *v.* Brooks (1860), 8 Moo. Ind. App. 339, P. C.

3805. ——.]—Where there is a surplus after payment of joint debts, separate creditors are permitted to prove against such surplus for the amount of their separate debts.—*Re* SPARKE & BRIDGES, *Ex p.* DAY (1863), 9 L. T. 350.

3806. ——.]—Debtor, a trader, married a widow, who was entitled to three-fourths of the profits of a distinct business. He afterwards purchased the remaining fourth of that business, & executed a settlement of his wife's share for her separate use. Afterwards he went into liquidation, his own business being hopelessly insolvent: —*Held:* the assets of the two businesses constituted distinct estates, the separate estate of debtor, & the joint estate of debtor & the trustee of the settlement, & the assets of the latter were first to be applied in payment of its creditors, & the surplus to the separate creditors of debtor.—*Re* CHILDS, *Ex p.* NEW (1874), 9 Ch. App. 508; 43 L. J. Bcy. 89; 30 L. T. 447, L. JJ.

Annotation:—**Consd.** *Re* Beale, *Ex p.* Corbridge (1876), 4 Ch. D. 246.

See 1915 Rules, r. 295.

3807. —— **In ratio of partners' shares in firm—Fund embezzled by one partner to be retained.**]—One partner embezzled part of the partnership estate & became bkpt.:—*Held:* accounts must be taken of the joint estate, & of the amount embezzled, the joint creditors to be paid first, & the residue to be divided in the ratio of the partners' shares, & the amount embezzled by bkpt. made good out of his share, & then any residue to be for the benefit for bkpt.'s separate creditors.—GROSS *v.* DUSFRESNAY (1735), 2 Eq. Cas. Abr. 110, pl. 5; 22 E. R. 94.

3808. —— —— **Less proportionate cost of commissions.**]—A joint commission issued against two persons, & the separate creditors applied to prove their debts:—*Held:* separate accounts were to be kept of the joint & separate estates, distinguishing the joint & separate estates of each bkpt. from the other, & what belonged to the joint estate applied towards satisfaction of the joint creditors, a moiety of any surplus of the joint estate, after paying the joint creditors in full, to be placed to the credit of each separate estate, & applied to satisfy the separate creditors, & a proportionable part of the costs of the commission to be borne by each separate estate.—*Ex p.* POWEL & POWEL (1742), 2 Eq. Cas. Abr. 112, pl. 7; 22 E. R. 95, L. C.

See 1914 Act, s. 63, & 1915 Rules, rr. 120, 121.

3809. —— **Only after joint creditors have received interest—Creditor & debtor firms with common partners.**]—When there is a surplus upon the estate of three, which is indebted to a firm, consisting of two of the three, the creditors of the three are entitled to interest before the surplus is carried to the estate of the two.—*Re* HURST, *Ex p.* OGLE (1831), Mont. 350.

3810. Whether separate creditors have lien—Separate estate diminished by joint creditors resorting thereto.]—A joint commission issued against A. & B. A. being a dormant partner, the joint creditors resorted to the separate estate of B., thereby diminishing that separate estate, & exonerating the joint estate of A. & B., so as to produce a surplus of it:—*Held:* the separate creditors of B. had a lien upon such surplus, to the extent to which their funds had been diminished by the resort of the joint creditors.—*Re* BLAND, *Ex p.* REID (1814), 2 Rose, 84.

3811. Surplus of both estates insufficient to pay interest to both joint & separate creditors.]—Prior to 1856 A. carried on a banking business in partnership with B. On Mar. 13, 1856, A. died. On Aug. 4, 1856, the bank stopped payment, & on the 27th B. was adjudicated bkpt. Several actions were commenced for the administration of the estate of A. By an order made in 1861 in one of those actions, it was declared that the separate creditors of A. were entitled to be paid out of his estate in priority to the joint creditors, & also that the separate creditors of A., whose debts did not by law or special contract carry interest, were not entitled to interest in priority to the joint creditors in respect of the principal due to the joint creditors. B. died in 1863. The joint estate of the banking firm down to A.'s death, & the assets of the bank as carried on by B. down to his bkpcy., & the separate estate of B., were administered in bkpcy. The result of the actions to administer the estate of A., & of the administration in bkpcy., was to pay dividends amounting to 20*s.* in the pound to both the joint & separate creditors of the partners. It was then found that some surplus assets would remain, but not enough to satisfy all the interest on the joint as well as on the separate debts. A question having arisen between the creditors of the joint estate & those of the separate estate of A., whose debts did not by law carry interest, whether such creditors of the separate estate of A. were entitled to take the interest on their debts out of the surplus in priority to the joint creditors, or whether the surplus should be distributed between the joint & separate creditors *pari passu*:—*Held:* the question of interest should be decided in accordance with the established rule as to the principal, & the separate creditors were entitled to take their interest in priority to the joint creditors.—WHITTINGSTALL *v.* GROVER (1886), 55 L. T. 213; 35 W. R. 4.

SUB-SECT. 4.—PROOF.

A. Against joint Estate.

3812. General rule—Separate creditors may prove.]—Separate creditors may come in under a joint commission of bkpcy. against two partners. —*Ex p.* CROWDER (1715), 2 Vern. 706; 23 E. R. 1064.

Annotations:—**Apld.** Wickes *v.* Strahan (1741), 2 Stra. 1157. **Distd.** Crispe *v.* Perrit (1744), Willes, 467.

3813. —— ——.]—*Semble:* separate creditors may come in under a joint commission of bkpcy. against two traders.—GRACE *v.* HEYHAM (1731), Fitz-G. 281; 94 E. R. 757.

3814. —— ——.]—Separate creditors may come in under a joint commission of bkpcy.—HOWARD *v.* POOLE (1734), Cunn. 111; 2 Stra. 995; 94 E. R. 1095.

Annotation:—**Folld.** Wickes *v.* Strahan (1741), 2 Stra. 1157.

3815. *S. P. Ex p.* BAUDIER (1742), 1 Atk. 98; 26 E. R. 64, L. C.

3816. —— —— **Separate creditors of firm of three—Proof against firm of such three & another.**] —Where a firm of four persons becomes bkpt., the creditors of a firm of three of such bkpts. may prove under the commission against the four.—*Re* GRAY, *Ex p.* WORTHINGTON (1818), 3 Madd. 26; 56 E. R. 419.

3817. In respect of what debts—Sums borrowed applied to partnership purposes—Bond by one partner—Copartner acting as witness.]—Two partners agreed to borrow a sum of money for the use of the partnership, but one of them only gave a bond for securing the payment, the other being a witness to it. The money was afterwards entered in the cash book of the partnership. A joint commission having been taken out against them:—*Held:* the obligee ought to be admitted a creditor.—*Ex p.* BROWN (1725), cited 1 Atk. at p. 225; 26 E. R. 144.

3818. —— —— —— **Copartner acting as surety.**]—The directors of a co. applied to prove for money advanced to B. & R., bkpts., for partnership purposes. The debt was the subject of a deed under seal, in which B. was described as the borrower, & R. as a surety. It was contended that the debt must be treated as the separate debt of B.:—*Held:* where two partners agreed to borrow money for the purpose of the partnership, & one was described in a bond as the principal, & the other as a surety, the lender might treat it as a joint debt, & the proof should be admitted.—ANON. (1847), 10 L. T. O. S. 191.

3819. —— —— **Loan to one partner on his security—Money lent by partner to firm.**]—A. lent money to one partner on his own security, & the partner lent it to the partnership trade. A joint commission having been taken out:—*Held:* A. should not come in as a creditor upon the joint estate of bkpts. immediately & directly, with the rest of the partnership creditors, but by way of circuity he was entitled, as standing in the place of that partner who had paid the money to the use of the partnership trade.—*Re* HUNTER, *Ex p.* HUNTER (1742), 1 Atk. 223; 26 E. R. 143.

Annotation:—**N.F.** *Ex p.* Hargreaves (1788), 1 Cox, Eq. Cas. 440.

3820. —— —— **Bills signed by partner in own name.**]—A. & B. were partners, carrying on business at different places. A. drew bills, sometimes in the firm's name, sometimes in his own name, on the clerk managing the partnership business in London, & discounted them, & applied the proceeds to partnership purposes:—*Semble:* the bills drawn in bkpt.'s own name were not a partnership debt.—*Re* LYE, *Ex p.* EMLY (1811), 1 Rose, 61, L. C.

3821. —— —— **Loan to one partner with sureties—Sureties paying & seeking to prove against firm.**]—A. & B. were partners. B., to obtain capital for the business, borrowed money, & for security entered into a bond, in which C. & D. became his sureties for the repayment of the money & interest, & also effected & deposited with the lenders a policy of assurance on his life. One of the conditions of the bond was, that the money should be repayable on either B., C., or D. becoming bkpt. The two partners entered into a deed of covenant to indemnify C. & D., as sureties, from all loss by reason of their entering into the bond. A. & B. became bkpt., & C. & D. were called on for payment of the whole money, which C. paid, together with interest & expenses:—*Held:* C. was not entitled to prove for the money as a creditor on the joint estate.—*Re* MEYER, *Ex p.* MEYER (1848), 6 De G. M. & G. 775; 18 L. J. Bcy. 4; 11 L. T. O. S. 248; 12 Jur. 447; 43 E. R. 1434.

Annotation:—**N.F.** *Re* Willis, *Ex p.* Brook (1850), 6 De G. M. & G. 771.

3822. —— **Sums in breach of trust lent to partnership—No privity of contract.**]—Where one of two assignees advances money which he has as assignee to a partnership, of which he is a partner, & becomes bkpt., the solvent assignee cannot prove for such debt under the joint commission against the partnership, there being no contract with him.—*Re* ALLEN, *Ex p.* APSEY (1791), 3 Bro. C. C. 265; 29 E. R. 528; L. C.

3823. —— **Debt incurred in separate business of one partner.**]—A. carried on the business of a

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PART XI. SECT. 2, SUB-SECT. 4.—A.

3819 i. *In respect of what debts—Sums borrowed applied to partnership purposes—Loan to one partner—Adoption of debt.*]—In order to entitle a creditor to prove on the joint estate of a partnership firm, for a debt which was originally the separate debt of one of the partners, there must be proved a positive agreement to adopt the debt as that of the firm, or facts from which the ct. will be justified in deducing an agreement or consent to the adoption. It is not sufficient that the money lent to one partner has been ultimately applied to the purposes of the firm.—*Re* FERRAR, *Ex p.* DAVIS (1859), 9 I. Ch. R. 554; 12 Ir. Jur. 40.—**IR.**

m. —— *Money applied to partnership purposes—Obtained on notes forged by partner in separate business.*]—One of two partners carried on the business of bill broker on his own account, & in that capacity received from pltf. money by cheques & proceeds of drafts on pltf., as the price of certain promissory notes, & the money was by the broker paid into & used with the partnership funds. It was afterwards discovered that they had been all forged by the broker, who absconded, & the remaining partner assigned all the joint effects to trustees for the benefit of all the creditors; but on a bill filed for that purpose:—*Held:* pltf. had a right to be paid his claim out of the partnership assets.—WALLACE *v.* JAMES (1854), 5 Gr. 163.—**CAN.**

3823 i. —— *Debt incurred in separate business of one partner—After assignment for creditors.*]—A. & B. being bankers, on Dec. 16, 1815, stopped payment, & upon the 24th, there was a meeting of their creditors, when it was agreed that the property & effects of the partners, as well as their separate properties, should be vested in trustees, & a deed was executed in Jan., 1816, limiting the trusts according to 33 Geo. 2, c. 14. In May, 1822, A. being dead, a commission of bkpcy. issued against B. at the suit of creditors, with whom he contracted debts as a corn factor, subsequent to the execution of the trust deed. In June, C., a creditor of B.'s, by judgment acknowledged in Trinity Term, 1815, filed a bill against the trustees in the deed of 1816, & against the assignees of B. & charged that the trustees had permitted the partners to call in several sums of money, & to remain in possession of their private properties, & also allowed B. to continue carrying on trade & business as a corn factor. Upon such bill the ct. decreed an account of the real & personal estate of B. on Dec. 16 1815, an account of the debts then due & how circumstanced, & what sums were due at that time, & also that the creditors of A. & B. were entitled to be paid their demands out of the real & personal estate of A. & B. To the latter part of such decree the assignee of B. objected, & on petition for rehearing, the bill was dismissed with costs.—VINCENT *v.* HACKETT (1829), 2 Ir. L. Rec. 1st ser. 258, 265, 295, 451. —**IR.**

Sect. 2.—Rights of separate creditors: Sub-sects. 4, A. & B. Sect. 3: sub-sects. 1 & 2, A.]

grocer separately, & also that of an ironfounder in partnership with B. After thus trading for four years, he sold off the stock of the grocery business, & retired wholly from that trade, investing the proceeds in the iron-foundry business, which, with the exception of a small sum brought in by B. constituted the whole capital of the partnership. A joint fiat was issued against A. & B. sixteen months after A. had retired from his separate grocery trade:—*Held:* the creditors of A. in the grocery trade could not prove against the joint estate of A. & B.—*Re* TURNER, *Ex p.* GRAHAM (1842), 2 Mont. D. & De G. 781.

3824. —— —— Funds deposited with firm.]—N., a member of the firm of N., J. & Co., was employed by T. & Co., manufacturers of cotton goods, to sell cotton for them. For such goods of T. & Co. as N. sold, he accounted to them monthly, & paid at the end of another month a price fixed between himself & T. & Co. The money which N. received from customers he used, by an arrangement between himself & his own firm, to carry to an account opened between himself & the firm, & the payments which he made to T. & Co. were in many cases made by means of cheques drawn in the name of N., J. & Co. N., J. & Co. became embarrassed, & executed a deed of arrangement with their creditors. When the deed was executed, a balance stood to the credit of N. in the account with N., J. & Co., & for such balance T. & Co. sought to prove against the joint estate in the hands of the trustees of N., J. & Co., on the ground that the money was trust money in the hands of N., J. & Co., with knowledge of the trust:—*Held:* the relation of principal & agent did not subsist between T. & Co. & N., & as the proceeds of the sales received by N. were his own, the claim of T. & Co. failed.—TOWLE (J.) & Co. *v.* WHITE (1873), 29 L. T. 78; 21 W. R. 465 H. L.

3825. —— Money in hands of one partner as co-assignee in another bankruptcy.]—One of two assignees in bkpcy. having money in his hands belonging to the estate, used it for the purposes of a firm in which he was a partner. On a commission of bkpcy. issuing against the firm, the other assignee claimed to prove against the firm estate for the money so misapplied:—*Held:* he could not prove.—*Re* ALLEN, *Ex p.* APSEY (1791), 3 Bro. C. C. 265; 29 E. R. 528, L. C.

3826. —— Debt incurred before partnership—Whether partnership adopted as debtor—By receipt of interest from firm.]—A sole trader, indebted by bond, took in a nominal partner, but without fraud. Two years afterwards the partnership failed:—*Held:* the separate debt could not be proved under the joint commission, unless there were something (& very little would be sufficient), as payment of interest by both, to make the partnership liable.—*Ex p.* JACKSON (1790), 1 Ves. 131; 30 E. R. 265.

Annotations:—**Apld.** *Re* Houghton, *Ex p.* Kedie (1832), 2 Deac. & Ch. 321; Rolfe & Bank of Australasia *v.* Flower, Salting (1866), L. R. 1 P. C. 27, P. C.

3827. —— —— —— By inclusion of creditor in schedule to partnership deed.]—A., a trader being indebted to several persons, entered into partnership with B., & brought his stock-in-trade into the partnership. By the partnership articles it was agreed that the joint trade should pay the creditors of A. named in a schedule:—*Held:* a separate creditor of A. named in the schedule did not by the articles become a joint creditor of A. & B.—*Re* JOSEPH & HUGHES, *Ex p.* WILLIAMS (1817), Buck, 13.

3828. —— —— —— By not answering letters asking for time.]—A. being indebted to C., B. guaranteed payment of bills of exchange. A. & B. subsequently entered into partnership. When the first bill became due, A. & B. remitted a portion & asked C.'s indulgence for the remainder. When another bill became due, A. & B. wrote to C. that they were arranging to pay all their liabilities in full, including their debt to C. C. had not answered these letters, but took no proceedings against A. or B., who became bkpt.:—*Held:* C. was not entitled to prove against the joint estate, for although very little was required to affect partnership property with the liability of one of the firm, that little was wanting, the creditor not having consented to the conversion of the debt, except such consent as was to be implied by his not answering bkpt.'s letters.—*Re* WORTH, *Ex p.* HITCHCOCK (1839), 3 Deac. 507; Mont. & Ch. 60, Ct. of R.

3829. —— —— —— By accepting statements of account rendered in firm name.]—A trader being indebted to a lunatic in the amount of the purchase-money of a business, & the machinery & stock-in-trade, after carrying on the business alone for some time, entered into partnership, under an agreement by which the stock-in-trade & property of the sole business were to belong to the firm, which was to take upon itself the liabilities of the sole business. The firm rendered an annual account, in its own name, in respect of the debt to the committee of the lunatic, who made no objection to the form of the account. On the firm becoming bkpt.:—*Held:* the committee was not entitled to prove against the joint estate.—*Re* STOCKS, *Ex p.* PARKER (1842), 2 Mont. D. & De G. 511; 11 L. J. Bcy. 26; 6 Jur. 541, Ct. of R.

3830. —— —— —— By parol agreement.]—A father took his son into partnership. A creditor of the father was told by one of the partners that the firm was liable for the debt, & the creditor assented. The subsequent transactions proceeded on that footing:—*Held:* the parol agreement was valid, & was not affected by Stat. Frauds, & proof could be made against the joint estate.—*Re* LENDON, *Ex p.* LANE (1846), De G. 300; 16 L. J. Bcy. 4; 7 L. T. O. S. 118; 10 Jur. 382, Ct. of R.

3831. —— Debt incurred by one partner while trading with substituted partner.]—A. & B. were in partnership. A. retired, & B. & C. entered into partnership. D., a creditor of the firm of A. & B., continued for many years to deal with B. & C. without any settlement of the accounts taking place. On the bkpcy. of B. & C., D. was a creditor to a considerable amount, part of which was owing to him from A. & B.:—*Held:* he could not, unless he had assented to take B. & C. as his debtors, prove for the whole amount against B. & C.—*Re* ROSS, *Ex p.* CROWN (1835), 4 L. J. Bcy. 88, Ct. of R.

PART XI. SECT. 2, SUB-SECT. 4.—B.

o. *Right not lost through advance made to firm—Security given by one partner—Over separate property.*]—Where a mtge. bond has been passed by one member of a firm in his own name, specially hypothecating property registered in his name, though the consideration given for the bond had been advanced to the firm, & the estate of the firm & the separate estate of the partner were both placed under sequestration, the holder of the mtge. bond was held entitled to prove the bond on the separate estate of the partner, in competition with the private creditors.—BENJAMIN *v.* BENJAMIN (1881), 1 E. D. C. 274.—S. AF.

B. Against separate Estate.

3832. Whether right lost by dealings with firm formed after debt—Improper pledge of deposited securities by sole debtor & thereafter by firm.]—H. deposited with W., his agent, bonds for $50,000, which W. in July, 1836, pledged with a third party, as security for his own debt. In Sept., 1836, H. applied to W. to grant him a credit for £10,000 on the security of the bonds, which W. agreed to do, but said nothing about having previously pledged them for his own purposes. On Oct. 1, 1836, H. drew bills on W. to the amount of £10,000, which were accepted by W. & C., W. having taken C. into partnership on the very day the bills were drawn. The bills were duly paid by W. & C. at maturity, H., at the request of W. & Co., remitting £7,000 towards payment of them. Subsequent dealings took place between H. & W. & C., until the latter stopped payment, when they made a balance to be due to them from H., but took no notice of the bonds, the chief part of which had been already redeemed by W. & C. & pledged again with another person for a partnership debt from W. & C. :—*Held :* the subsequent dealings of H. with the partnership of W. & C. did not deprive him of his right to prove the amount of the bonds against the separate estate of W., & the proof should stand against the separate estate of W., but without prejudice to the reduction of it by set-off or otherwise.—*Re* WARWICK, *Ex p.* MEINERTZHAGEN (1838), 3 Deac. 101.

SECT. 3.—RIGHTS OF JOINT CREDITORS.

SUB-SECT. 1.—AGAINST SEPARATE ESTATE.

3833. To contribution—Overpayment by joint estate.]—Contribution was decreed between the joint & separate estates, the former having paid beyond the proportion of a debt to the Crown under an extent, & bkpts. being bound jointly & severally.—ROGERS *v.* MACKENZIE (1799), 4 Ves. 752 ; 31 E. R. 389.

Annotation :—**Mentd.** R. *v.* Edwards (1853), 9 Exch. 32.

SUB-SECT. 2.—TO WHAT PROPERTY.

A. Partnership Property existing at Dissolution on subsequent Bankruptcy of continuing Firm.

3834. Partnership effects remaining in specie—No equity to.]—A fair dissolution of partnership between two, one retiring, & assigning the partnership property to the other, & taking a bond for the value & a covenant of indemnity against the debts. The other continued the trade separately a year & a half, & then became bkpt. :—*Held :* the joint creditors had no equity attaching upon partnership effects remaining in specie.—*Ex p.* RUFFIN (1801), 6 Ves. 119 ; 31 E. R. 970.

Annotations :—**Expld.** *Ex p.* Williams (1805), 11 Ves. 3. Among partners, clear equities subsist, amounting to something like lien, but, while they remain solvent, & the partnership is going on, the creditor has no equity against the effects of the partnership ; *Ex p. Ruffin* was no more than that, a bkpcy. happening a considerable time after the execution of the deed, the effects came to be considered the separate effects of the trader, in whose hands they were left, & the other was only to come in as a creditor (LORD ELDON, C.). **Distd.** *Re* Ancell, *Ex p.* Rowlandson (1813), 1 Rose, 416. **Consd.** *Re* Christopher, *Ex p.* Harris (1816), 1 Madd. 583 ; *Re* Lightoller, *Ex p.* Peake (1816), 1 Madd. 346 ; Campbell *v.* Mullett (1819), 2 Swan. 551. **Apld.** *Re* Stewart, *Ex p.* Fisher (1855), 2 Bankr. & Ins. R. 67 ; *Re* Streatfeild, Laurence, *Ex p.* M'Kenna, *Re* Streatfeild, Laurence, *Ex p.* Bank of England (1861), 30 L. J. Bcy. 28, n. **Refd.** *Re* Henderson & Morley, *Ex p.* Freeman (1819), Buck, 471 ; *Re* Fear & Coward, *Ex p.* Clarkson, *Re* Moore, *Ex p.* Clarkson (1834), 4 Deac. & Ch. 56 ; Thompson *v.* Derham (1842), 1 Hare, 358 ; *Re* Edwards-Wood, *Ex p.* Mayou (1865), 4 De G. J. & Sm. 664. **Mentd.** Duff *v.* East India Co. (1808), 15 Ves. 198 ; Buckley *v.* Barber (1851), 6 Exch. 164.

3835. —— Right depends on bona fides of agreement.]—Upon a dissolution of partnership by the retirement of a partner, followed by bkpcy., the right of the joint creditors against joint property, remaining in specie, depends upon the *bona fides*. Where the transaction had that character, the petition of joint creditors was dismissed.—*Ex p.* WILLIAMS (1805), 11 Ves. 3 ; 32 E. R. 988.

Annotations :—**Consd.** *Re* Coward, *Ex p.* Gibson (1834), 2 Mont. & A. 4, Ct. of R. LORD ELDON in *Ex p. Williams* recognises that creditors have no specific lien on the partnership property ; but, if the transaction be incomplete at the bkpcy. or there be any equities remaining in the outgoing partner, the cts. gladly avail themselves of

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PART XI. SECT. 3, SUB-SECT. 1.

3833 i. *To contribution—Judgment obtained against surviving partners unsatisfied.*]—Where one of three joint debtors has died & the creditor sues the two surviving debtors & recovers judgment, his several right of action against the estate of the third is not extinguished, unless the former judgment has been satisfied.—HENDERSON'S CREDITOR'S TRUSTEE *v.* DIVER (1882), 1 N. Z. L. R. 369.—**N.Z.**

p. *Joint estate existing—Though of doubtful value.*]—Where there is any joint estate of a firm, the joint creditors cannot participate in the separate estate until the separate creditors have been paid in full, even although all the joint estate consists of some book debts of doubtful value.—*Re* SIEGERT (1888), 6 N. Z. L. R. 257. —**N.Z.**

q. *Joint estate ceasing to exist—Between sequestration of partner & lodging of proof by joint creditor.*]—If in the case of a bkpcy. of one partner of a firm there was a joint estate of the firm existing at the date of the sequestration of such partner's separate estate, but not any at the date of the lodging of a proof of debt by a joint creditor, the joint creditor is not entitled to have his debt paid out of the separate estate of bkpt. partner in competition *pari passu* with the separate creditors.—*Re* FISHER, *Ex p.* PETERSEN (1899), 20 N. S. W. B. 42. —**AUS.**

PART XI. SECT. 3, SUB-SECT. 2.—A.

3834 i. *Partnership effects remaining in specie.*]—One of the two partners of a co. let to the co. a mill, with the large machinery fixed therein ; he thereafter died in debt to the co., & the mill with its appurtenances was sold, & the full rent stipulated in the lease for the buildings & machinery was paid by the surviving partner, who by the lease was allowed to continue lessee, & afterwards became bkpt. :—*Held :* the trustee in his sequestrated estate was not entitled to appropriate the large machinery as co. estate.—COX *v.* STEAD (1834), 11 Sh. (Ct. of Sess.) 672. —**SCOT.**

3834 ii. —— *Business continued by one partner.*]—Where, upon the dissolution of a firm, the business is continued by one of the partners, who assumes the liabilities, the joint assets remaining in specie are primarily applicable to the payment of the joint creditors of the firm.—*Re* WALKER (1880), 6 A. R. 169.—**CAN.**

3834 iii. —— *Assignment for creditors by continuing partners—To pay creditors ratably without priority.*]—On the dissolution of a partnership between L. & W., the latter transferred all his interest in the partnership to L., who subsequently became insolvent & assigned all his estate, including that part of it which had formerly been assets of the partnership, to deft., in trust to pay " the claims of his creditors ratably & proportionately, & without preference or priority, recognising such liens, claims, charges, & priorities as the law directs " :—*Held :* under the terms of the deed there was no priority between the separate creditors of L. & the joint creditors of L. & W., all being creditors of L., & both classes of creditors were entitled to be paid *pari passu*.—MOOREHOUSE *v.* BOSTWICK (1885), 11 A. R. 76.—**CAN.**

3835 i. —— *Right depends on bona fides of agreement.*]—A partnership existing between two persons was within three months of the issue of the writ of attachment in insolvency dissolved, & one of the partners transferred his interest in the partnership property to the other, but at the time of such transfer the firm, as well as the partners individually, were insolvent, which they were aware of or had probable cause for believing. Afterwards the remaining partner & the firm were placed in insolvency by compulsory liquidation, & a different assignee appointed for each :—*Held :* the transfer was fraudulent & void, & nothing passed under it, & the assignee of the firm, & not of the separate partner, was entitled to the effects of the partnership, & an order made by the county judge for the transfer of such property from the separate to the joint assignee, confirmed.—*Re* CATON (1876), 26 C. P. 308.—**CAN.**

s. *Death of partner—Subsequent insolvency of surviving partners.*]—Upon the death of one member of the firm & the subsequent insolvency of the surviving partners, the joint estate passes to their assignee in insolvency.—DAVIDSON *v.* PAPPS (1880), 28 Gr. 91.—**CAN.**

Sect. 3.—*Rights of joint creditors: Sub-sect.* 2, *A.*]

such circumstances in order to preserve the property for the creditors (SIR G. ROSE). **Distd.** *Re* Stokes, *Ex p.* Pemberton, *Re* Stokes, *Ex p.* Hancox (1835), 1 Deac. 421. **Consd.** Powles *v.* Hargreaves (1853), 3 De G. M. & G. 430, L. C. & L. JJ.; Kendall *v.* Hamilton (1879), 4 App. Cas. 504, H. L. **Refd.** *Ex p.* Rowlandson (1813), 2 Ves. & B. 172; *Re* Lightoller, *Ex p.* Peake (1816), 1 Madd. 346; *Re* Henderson & Morley, *Ex p.* Freeman (1819), Buck, 471; *Re* Edwards-Wood, *Ex p.* Mayou (1865), 4 De G. J. & Sm. 664.

3836. —— ——.]—The question of the validity or otherwise of a transaction, whereby one partner conveys to his copartners his whole interest in the partnership property, thereby converting the joint assets of the firm into the separate estate of the assignee partners, must depend in every case upon the *bona fides* of the transaction.

A partner made an assignment to his copartner of all his interest in the joint estate, at a time when the partnership itself, & each of the partners separately, were in a state of insolvency:—*Held:* the deed of assignment was fraudulent & void, & the property purported to be assigned remained the property of the joint creditors.—*Re* EDWARDS-WOOD, *Ex p.* MAYOU (1865), 4 De G. J. & Sm. 664; 34 L. J. Bcy. 25; 12 L. T. 254; 11 Jur. N. S. 433; 13 W. R. 629; 46 E. R. 1076, L. C.

3837. —— **Dissolution not completed.**]—At the death of one of two partners, a considerable balance belonging to the partnership was in the hands of their bankers, a specific portion of which the surviving partner drew out & handed over to sureties for the completion of a previous arrangement for the purposes of the partnership, upon the understanding that if the arrangement was not carried into effect, the money should be returned. The arrangement was not completed, & the surviving partner became bkpt., the money still remaining in the hands of the trustees:—*Held:* the money belonged to the joint estate of the two partners, & not to the separate estate of the surviving partner.—*Re* SIMPSON & WINDROSS, *Ex p.* LEAF (1840), 4 Deac. 287; Mont. & Ch. 662; 9 L. J. Bcy. 9, Ct. of R.

Annotations:—**Mentd.** *Re* Hayward, *Ex p.* Burdekin (1842), 2 Mont. D. & De G. 704; Wickham *v.* Wickham (1855), 2 K. & J. 478.

3838. —— ——.]—Upon the dissolution of partnership between A. & B., the former, who was the retiring partner, assigned all his interest in the partnership estate & effects to the latter, who, on his part, covenanted with the former to pay all the debts & liabilities of the partnership within twenty-four months from the time of the dissolution. Separate fiats having afterwards issued against A. & B.:—*Held:* certain debts owing to A. & B., when in partnership, & which were outstanding at the time the fiats were issued, were the joint estate of the partnership, & as such distributable amongst their joint creditors.—*Re* TAYLOR, *Ex p.* HAWTREY (1842), 7 Jur. 71.

3839. —— **Transfer of share to surviving partner set aside.**]—A. authorised the sale of his share in a brewery to B., his surviving partner, whom he appointed one of his exors. B. conceiving he had duly become the purchaser, carried on the business until his death, & it was subsequently carried on by C. his exor. Afterwards the sale was set aside, & the estate of A. became entitled to share in the profits made subsequent to A.'s death. C. afterwards became bkpt., having the whole trade property in his possession:—*Held:* the trade creditors during the time the business was carried on by C. had no lien for their debts on A.'s share.—STOCKEN *v.* DAWSON (1845), 9 Beav. 239; 50 E. R. 335; *affd.* (1848), 17 L. J. Ch. 282, L. C.

3840. —— **Assignment to continuing partner to make good misappropriations by assigning partners.**]—Soon after the commencement of a partnership between H. & W. it was discovered that H. had drawn a large sum from the account of the partnership at the bankers' & applied the money to his own purposes. Thereupon the partnership was dissolved, & H. assigned his share of the assets to W., in order that the money misappropriated might in the first place be restored, & the assets realised for the benefit of the two according to their respective interests. After the dissolution both W. & H. became bkpt., & the comrs. decided that the whole assets were subject to a trust for the payment of the joint debts of W. & H.:—*Held:* the assignment by H. converted his former joint estate into the separate estate of W.—*Re* WALKER, *Re* HARDY, *Ex p.* WALKER (1862), 4 De G. F. & J. 509; 31 L. J. Bcy. 69; 6 L. T. 631; 10 W. R. 656; 45 E. R. 1281, L. JJ.

3841. —— **Effect of provision in partnership deed—Restricting transfer of property on death to surviving partner.**]—A partnership deed provided that A. & B. should be partners in the profits of the business, the capital of which belonged to A., & that on his death the partnership should be dissolved, & B.'s share of profits should thenceforth belong to A.'s representatives, who should carry on the business, paying B. his share of the profits up to A.'s death. A. died, having appointed B. his exor. B. carried on the trade for several months, & filed a petition for liquidation. Part of the stock-in-trade which existed at A.'s death still remained in specie, but the greater part had been disposed of by B. in the course of the business, & fresh stock-in-trade bought by him:—*Held:* the partnership deed had not the effect of converting the stock-in-trade into separate estate of A., but so much of the present assets as had been in existence at A.'s death was applicable as joint estate to pay the joint creditors of the firm, & so much as had been bought since A.'s death was applicable as separate estate of B.—*Re* WHITE, *Ex p.* MORLEY (1873), 8 Ch. App. 1026; 43 L. J. Bcy. 28; 29 L. T. 442; 21 W. R. 940, L. JJ.

Annotations:—**Explд. & Distd.** *Re* Simpson (1874), 9 Ch. App. 574, n. **Apld.** *Re* White, *Ex p.* Dear (1876), 1 Ch. D. 514, C. A.; *Re* Mellor, *Ex p.* Manchester Bank (1879), 12 Ch. D. 917. **Explд. & Apld.** *Re* Mellor, *Ex p.* Butcher (1880), 13 Ch. D. 465, C. A. **Apld.** *Re* Head, *Ex p.* Kemp (1893), 10 Morr. 76, D. C.; *Re* Daniel (1896), 3 Mans. 312, D. C.

3842. —— —— ——.]—D. carried on business in partnership for a term with W. & Y., under articles providing that D. should be a partner in the profits, but not in the capital, & should not be required to bring in any capital. After allowing interest at 5 per cent. on the capital, which belonged solely to W., the net profits were to be divided half-yearly in certain shares. At the expiration of the term D.'s interest in the concern was to cease. If D. died during the term, his representatives were to receive nothing more than a proportionate part of his share of the profits of the current half-year for the period up to his decease, such proportionate part to be ascertained, not by a fresh stock-taking, but according to the average of the last two preceding half-yearly stock-takings. D. died. Afterwards W. died, & the business was carried on by Y., who was also exor. of W., & who afterwards went into liquidation. There were at that time assets existing in specie which belonged to the business during the partnership between the three:—*Held:* the assets remaining in specie were primarily applicable to payment of the joint debts of D., W., & Y., & those joint creditors could not come against the

separate estate of Y., till his separate creditors had been paid in full.—*Re* WHITE, *Ex p.* DEAR (1876), 1 Ch. D. 514; 45 L. J. Bcy. 22; 34 L. T. 631; 24 W. R. 525, C. A.

Annotations:—**Refd.** *Re* Daniel, *Ex p.* Powell (1896), 75 L. T. 143, D. C. **Mentd.** *Re* Somes, Stewart *v.* Somes (1895), 73 L. T. 359, C. A.

3843. —— —— ——.]—*Re* HEAD, *Ex p.* TRUSTEE, No. 3848, *post.*

3844. —— —— **Permitting transfer of property on death to surviving partner.**]—Four persons carried on a business in partnership, under a deed which provided that the death of a partner should not dissolve the partnership, but that the business should be carried on by the survivors, & the share of the deceased partner ascertained at the next half-yearly stock-taking, & paid to his representatives by instalments. Two of the partners died, & afterwards the survivors became bkpt. No steps had then been taken to ascertain the shares of the deceased partners:—*Held:* the creditors of the four partners had no right to have the joint assets of the four which remained in specie applied first in payment of their debts.—*Re* SIMPSON (1874), 9 Ch. App. 572; 43 L. J. Bcy. 147; 30 L. T. 448; 22 W. R. 697, L. JJ.

Annotations:—**Distd.** *Re* White, *Ex p.* Dear (1876), 1 Ch. D. 514, C. A.; *Re* Mellor, *Ex p.* Manchester Bank (1879), 12 Ch. D. 917; *Re* Mellor, *Ex p.* Butcher (1880), 13 Ch. D. 465, C. A.; Hills *v.* Reeves (1882), 31 W. R. 209, C. A. **Consd.** *Re* Daniel (1896), 3 Mans. 312, D. C.

3845. —— **Business carried on ultra vires after partner's death.**]—A father & son were partners. The machinery employed in the business formed no part of the capital, but belonged to the father. The father died, having by his will appointed his wife, his son, & his son-in-law trustees. He authorised them to continue the business, either alone or in conjunction with other persons, & to employ in it any money, part of his general estate. The widow & the son continued to carry on the business until they became bkpt. The son-in-law took no part in the business, though he knew that it was being continued:—*Held:* as the carrying on of the business by two trustees was not authorised by the will, the machinery was not converted into assets of the new firm, & the unpaid creditors of the old firm were entitled to such of the machinery as remained in specie at the date of the bkpcy. of the new firm.—*Re* MELLOR, *Ex p.* BUTCHER (1880), 13 Ch. D. 465; 42 L. T. 299; 28 W. R. 484, C. A.

Annotation:—**Mentd.** *Re* Daniel (1896), 3 Mans. 312, D. C.

3846. Agreement for dissolution executory at date of bankruptcy.]—On Nov. 2, 1815, A. & B. agreed to dissolve partnership. A., the continuing partner, was to pay B. an annuity to be secured by a surety, but the surety refused to guarantee the annuity. On Dec. 1 a separate commission of bkpcy. was issued against A. & on Dec. 14 a joint commission issued against A. & B. The assignee under the joint commission contended that the assignees under the separate commission had obtained property belonging to the joint estate, & prayed that the separate commission should be superseded & the property of A. & B. should be declared joint property:—*Held:* (1) the agreement was executory, as the assent of the proposed surety was necessary to complete the agreement; (2) the partnership property was not transferred to the continuing partner but remained partnership property.—*Re* MALLAM, *Ex p.* WHEELER (1817), Buck, 25.

Annotations:—**Distd.** *Re* Coward, *Ex p.* Gibson, *Re* Fear, *Ex p.* Clarkson (1834), 2 Mont. & A. 4, Ct. of R. **Apld.** *Re* Johnston & Danson, *Ex p.* Cooper (1840), 1 Mont. D. & De G. 358.

3847. ——.]—Two partners in pursuance of a prior agreement dissolved partnership, & notice of the dissolution was published in the *Gazette*, stating that the debts due to & by the firm would be received by the continuing partner, who continued to trade under the original firm name, but no assignment of the property was made to him. Both partners became bkpt.:—*Held:* the agreement was executory, & so remained at the time of the bkpcy., & the partnership property not having been converted into the separate property of the continuing partner, that which remained in his possession at the time of the bkpcy. was joint estate, & must be applied in payment of the joint creditors of bkpts.—*Re* JOHNSTON & DANSON, *Ex p.* COOPER (1840), 1 Mont. D. & De G. 358; 10 L. J. Bcy. 11; 5 Jur. 10, Ct. of R.

Annotations:—**Distd.** *Re* Glasscott, *Ex p.* Gurney (1842), 2 Mont. D. & De G. 541. **Consd.** Graham *v.* McCulloch (1875), L. R. 20 Eq. 397. **Refd.** *Re* Webber, *Ex p.* Slater (1891), 64 L. T. 426.

3848. ——.]—A partnership deed between father & son provided that, on the father's death, his capital should remain in the business for a year, & then should belong to the son on payment of its value as at the date of the death. It was further provided that the surviving partner should by bond indemnify the estate of the deceased partner against the partnership debts, & release them, if called on to do so by the personal representatives of the deceased partner. The father died, & the son became bkpt.:—*Held:* there had been no conversion of the joint estate into separate estate, the agreement being an executory rather than an executed one, & the intention being that the father's lien should remain until the assets had been paid for.—*Re* HEAD, *Ex p.* TRUSTEE (1893), 9 T. L. R. 237; *sub nom. Re* HEAD, *Ex p.* KEMP, 10 Morr. 76, D. C.

3849. Agreement for dissolution executed at date of bankruptcy.]—A partnership of three was dissolved under an agreement, by which the continuing partners were to pay the outgoing partner £550 in discharge of his share in the stock & profits. £50 was paid on the execution of the agreement, & the remainder by bills of varying dates. The continuing partners agreed to pay the firm debts. Notice of the dissolution was inserted in the *Gazette*. The continuing partners became bkpt. before all the bills became due, & subsequently the retired partner also became bkpt. The creditors of the three claimed to have the property which once belonged to the three distributed among them:—*Held:* the agreement was not executory, but executed, & the creditors had no lien on the partnership property.—*Re* COWARD, *Ex p.* GIBSON, *Re* FEAR & COWARD, *Ex p.* CLARKSON (1834), 2 Mont. & A. 4; 4 Deac. & Ch. 56, Ct. of R.

3850. ——.]—A firm consigned goods to another firm through a third, who made an advance to the consignors, on an agreement for a lien upon the return proceeds which were remitted to them. Before their arrival the consignors had dissolved partnership, & separate fiats had issued against each member. By the dissolution deed, a portion of the partnership credits belonged to one of the partners, who was to pay a portion of the partnership debts. In pursuance the assignee of the other partner transferred all his interest in the return proceeds:—*Held:* this interest constituted separate, & not joint estate.—*Re* KRAUSS, *Ex p.* BIRLEY (1841), 2 Mont. D. & De G. 354, Ct. of R.

Annotations:—**Consd.** *Re* Rogers (1843), 2 L. T. O. S. 53. **Distd.** Lodge *v.* Prichard (1863), 1 De G. J. & Sm. 610, L. JJ.

Sect. 3.—Rights of joint creditors: Sub-sect. 2, A., B. & C.]

3851. ——.]—C. & S. carried on business in partnership under the style of C. & Co. C. afterwards retired from the firm with the knowledge of the joint creditors; the dissolution was advertised, & S. continued the business in his own name. He was afterwards adjudicated bkpt.:—*Held:* the partnership property was in the order & disposition of bkpt., & belonged to his separate estate.—*Re* STEWART, *Ex p.* FISHER (1855), 2 Bankr. & Ins. R. 67.

3852. —— **Effect of retiring partner obtaining injunction & receiver—On failure of copartner to fulfil contract.**]—Distribution in bkpcy. of partnership effects, as joint property, after assignment under an agreement for dissolution, the retiring partner having obtained an injunction & receiver upon the failure of the other to fulfil his contract.—*Re* Ancell, *Ex p.* ROWLANDSON (1813), 2 Ves. & B. 172; 1 Rose, 416; 35 E. R. 284, L. C.

Annotations:—**Mentd.** *Re* Lightoller, *Ex p.* Peake (1861), 1 Madd. 346; *Re* Windross, *Ex p.* Leaf (1835), 1 Deac. 176, Ct. of R.

3853. —— **New partner assumed by continuing partner—Retiring partner interested in continuing partner's share of profits in new firm.**]—Upon a dissolution of partnership between A. & B., it was agreed that, until A. should be provided for, B. should allow him a third of the profits. B. entered into partnership with C., & carried in the stock of A. & B. A commission having issued against A. & B.:—*Held:* A. was a partner with B., as to a third of his interest, but not a partner with B. & C., & after the satisfaction of the creditors of B. & C., the joint effects were the separate property of B. & not the joint property of A. & B.—*Re* SLYTH, *Ex p.* BARROW (1815), 2 Rose, 252.

Annotation:—**Refd.** Lovegrove *v.* Nelson (1834), 3 My. & K. 1, L. C.

B. Surplus of separate Estate.

See 1914 Act, s. 33 (6).

3854. Joint creditors entitled to surplus.]—If there be a surplus of the separate estate, beyond what will satisfy the separate creditors, it shall go to supply any deficiency that may remain as to the joint creditors.—*Ex p.* COOK (1728), 2 P. Wms. 500; 24 E. R. 834, L. C.

Annotations:—**Refd.** Wickes *v.* Strahan (1741), 2 Stra. 1157; Crispe *v.* Perrit (1744), Willes, 467.

3855. ——.]—If there be any surplus of the separate estate, it shall be applied to the discharge of the moiety of the joint debts.—HOWARD *v.* POOLE (1734), Cunn. 111; 2 Stra. 995; 94 E. R. 1095.

Annotation:—**Mentd.** Wickes *v.* Strahan (1741), 2 Stra. 1157.

See 1914 Act, s. 33 (6).

3856. ——.]—In bkpcy. the separate estate is to be applied to the separate debts, & after they are paid the surplus, if any, to the joint debts.—*Ex p.* ABELL (1799), 4 Ves. 837; 31 E. R. 434, L. C.

3857. —— **Apportionment of costs of commissions.**]—*Held:* any surplus of the separate estate was to be carried to the account of the joint estate, a proportionate part of the costs of the commissions to be borne by each separate estate.—*Ex p.* POWEL & POWEL (1742), 2 Eq. Cas. Abr. 112, pl. 7; 22 E. R. 95, L. C.

See 1915 Rules, rr. 120, 121.

3858. —— **Before separate creditors receive interest.**]—*Held:* separate creditors having received 20*s.* in the pound, & there being a deficiency for the joint creditors, the separate creditors should not receive subsequent interest until the joint creditors were satisfied.—*Ex p.* BOARDMAN (1786), 1 Cox, Eq. Cas. 275; 29 E. R. 1164, L. C.

See 1914 Act, s. 63.

3859. *S. P. Ex p.* CLARKE (1799), 4 Ves. 677; 31 E. R. 349, L. C.

3860. *S. P. Re* MINCHIN, CARTER & KELLY, *Ex p.* MINCHIN (1827), 2 Gl. & J. 287, L. C.

3861. —— ——.]—Joint creditors, who have proved under a separate fiat, are entitled to receive a dividend on their proofs out of the surplus of the separate estate, before the separate creditors are paid interest on their debts.—*Re* WEBSTER, *Ex p.* WOOD (1841), 2 Mont. D. & De G. 283; 10 L. J. Bcy. 73; 5 Jur. 1115, Ct. of R.

3862. —— ——.]—A creditor, whose proof had been admitted against both the joint & separate estates of bkpt. partners, elected to receive, & did receive, dividends from the separate estates, whereby his debt was paid in full. He then claimed to receive further dividends from the separate estates until he had received interest on his debt from the date of the adjudication until it was paid:—*Held:* he was not entitled to the interest he claimed until the joint creditors had received 20*s.* in the pound.—*Re* COLLIE, *Ex p.* FINDLAY (1881), 17 Ch. D. 334; 50 L. J. Ch. 696; 45 L. T. 61; 29 W. R. 857, C. A.

Annotation:—**Apld.** Whittingstall *v.* Grover (1886), 55 L. T. 213.

3863. —— **More than one set of joint creditors—In proportion to debts proved against each joint estate.**]—Where a man is a partner in separate firms, each of which becomes bkpt., the surplus of his separate estate shall be applied in discharge of the partnership debts of the respective firms in proportion to the respective amount of the debts proved against the joint estates of such firms respectively.—*Re* JAMES, *Ex p.* FRANKLYN (1819), Buck, 332.

See 1914 Act, s. 33 (6), & 1915 Rules, r. 295.

3864. —— **Before payment on voluntary bond.**]—A surplus of separate estate must be carried to a deficient joint estate before payment is made on a voluntary bond.—*Re* SPURRIER, *Ex p.* SPURRIER (1831), Mont. 246.

3865. —— **Before bankrupt entitled to allowance.**]—Joint creditors are entitled to the surplus estate of individual partners after payment of their separate debts, & are also entitled to priority of payment out of the surplus of the separate estate, which surplus is divisible amongst that class of creditors, before bkpt. is entitled to his allowance.—*Re* GRANT, *Ex p.* BEGBIE (1864), 10 L. T. 276; 12 W. R. 690.

3866. Joint creditors entitled to interest—Subsequent to date of commission—Before payment of debt owing from separate & joint estate.]—Under a joint commission of bkpcy. the right of the creditors to interest, subsequent to the date of the commission in the case of a surplus on a separate estate, preferred to a debt from the separate to the joint estate, upon the principle, that neither the partnership nor the individual debtor could claim in competition with the creditors.—*Ex p.* REEVE (1804), 9 Ves. 588; 32 E. R. 731.

Annotations:—**Apld.** *Re* Hurst, *Ex p.* Ogle (1831), Mont. 350. **Consd.** *Re* Webster, *Ex p.* Wood (1841), 2 Mont. D. & De G. 283, Ct. of R. **Refd.** *Ex p.* Morris (1790), 1 Ves. 132; *Re* Minchin, *Ex p.* Minchin (1827), 2 Gl. & J. 287, L. C.; Whittingstall *v.* Grover (1886), 55 L. T. 213.

3867. Duty of trustee to transfer surplus.]—It is the duty of the trustee appointed by the joint creditors to administer the separate estate in accordance with the resolutions of the separate creditors, & then to carry over the surplus to the joint estate.—*Re* MOORE, *Ex p.* PHILPS (1874), L. R. 19 Eq. 256; 44 L. J. Bcy. 40; 31 L. T. 735.

Annotation:—**Apld.** Ebbs *v.* Boulnois (1875), 10 Ch. App. 479, L. JJ.

3868. Creditor electing to proceed against joint estate—No preference as regards surplus from separate estate.]—A joint & separate creditor, electing to go against the joint estate, has no preference to the other joint creditors upon the surplus of the separate estate beyond the separate debts.—*Ex p.* BEVAN (1804), 10 Ves. 107; 32 E. R. 784, L. C.

Annotations:—**Consd.** *Re* Barrow, *Ex p.* Moult (1832), 1 Deac. & Ch. 44, Ct. of R. **Folld.** *Re* Biddulph, *Ex p.* Barnewall (1855), 6 De G. M. & G. 795, L. JJ. **Mentd.** *Re* Deane & Youle, *Ex p.* Goldsmid (1856), 25 L. J. Bcy. 26, n., L. JJ.

See 1914 Act, Sched. II., r. 19.

3869. Surplus of both estates insufficient to pay interest to both joint & separate creditors.]—WHITTINGSTALL *v.* GROVER, No. 3811, *ante*.

C. Other Cases.

3870. Benefit of separate insurance of joint property.]—Upon a separate commission of bkpcy. the benefit of an insurance effected by bkpt. upon his own account on a ship, of which he was joint owner, is not liable to the joint creditors.—*Ex p.* PARRY (1800), 5 Ves. 575; 31 E. R. 746.

3871. Property purchased by partner with firm funds—Purchase made without fraud.]—If one partner takes money out of the firm & buys real estate with it, if it is done by contract & not by fraud the estate will go to the separate creditors (LORD ELDON, C.).—*Re* LYE, *Ex p.* EMLY (1811), 1 Rose, 61, L. C.

3872. Joint property put into sole possession of one partner.]—If one partner puts another into the sole possession of the partnership estate & effects, & leaves them in his sole order & disposition, giving him title under an instrument upon the face of it giving title, it would be difficult to insist, that he would have a lien upon that property for the consideration money against the separate creditors of the other, considering that he had by title, & by his own act, left this property in the sole order & disposition of the other (LORD ELDON, C.).—*Re* ANCELL, *Ex p.* ROWLANDSON (1813), 2 Ves. & B. 172; 1 Rose, 416; 35 E. R. 284, L. C.

Annotations:—**Refd.** *Re* Windross, *Ex p.* Leaf (1835), 1 Deac. 176. **Mentd.** *Re* Lightoller, *Ex p.* Peake (1816), 1 Madd. 346.

3873. Property held by one partner—As trustee for firm.]—Two partners carried on business as bankers. Certain property was purchased with the money of the firm in the name of one only of the partners, but the property was dealt with by the firm as the joint property of the partnership:—*Held:* such partner was only a trustee for the firm with respect to such property, & the property was divisible under the bkpcy. amongst the joint creditors.—*Re* CHAMBERS & CHAMBERS (BANKRUPTS) (1845), 5 L. T. O. S. 456.

3874. Ship registered in name of firm & individual partners of another firm—Not joint property of both firms.]—W. & Co. being indebted to D. & Co., it was agreed that as security for the debt D. & Co. should be interested in a moiety of ships, of which W. & Co. were the owners, & the names of the partners in D. & Co. were inserted in the registers with those of W. & Co. Debts were incurred for goods supplied to the ships on W. & Co.'s orders, & without knowledge of any interest of D. & Co. The ships were sold & the proceeds divided before the bkpcy. of the two firms. There were no joint effects of W. & Co. & D. & Co.:—*Held: primâ facie* the individuals, whose names appeared on the registers, were liable, & as there were no joint effects of the two houses, proof might be made against the respective estates, first against W. & Co. in order to exonerate the firm of D. & Co. as much as possible.—*Re* DAWES, *Ex p.* MACHEL (1813), 1 Rose, 447.

3875. Ship registered in name of one partner—Circumstances excluding claim by other partner.]—Where ships were purchased by, & were registered in the name of, one partner only, & were afterwards continued for a purpose that would have prevented any claim of the other, *viz.*, a fraud upon an Act of Parliament:—*Held:* they were separate property on the bkpcy. of that partner after the death of the other, as being in the ownership & disposition of the surviving partner.—CURTIS *v.* PERRY (1802), 6 Ves. 739; 31 E. R. 1285.

Annotations:—**Refd.** *Ex p.* Houghton, *Ex p.* Gribble (1810), 17 Ves. 251; Cecil *v.* Butcher (1821), 2 Jac. & W. 565; The John (1830), 2 Hag. Adm. 305; Chasteauneuf *v.* Capeyron (1882), 7 App. Cas. 127, P. C. **Mentd.** *Ex p.* Yallop (1808), 15 Ves. 60; Mestaer *v.* Atkins (1814), 1 Marsh. 76; Platamone *v.* Staple (1815), Coop. G. 250; Roberts *v.* Roberts (1818), Dan. 143; Barnard *v.* Sutton (1843), 7 Jur. 685; Barton *v.* Muir (1874), L. R. 6 P. C. 134, P. C.; Crichton *v.* Crichton (1895), 65 L. J. Ch. 13.

3876. —— In order & disposition of both partners.]—Under a commission of bkpcy. against two partners, ships registered in the name of one of them, but in the ordering & disposition of both, form part of the joint estate.—*Re* GOODCHILD, *Ex p.* BURN (1817), 1 Jac. & W. 378; 37 E. R. 419.

3877. Shares standing in names of individual partners—Bought with firm's funds.]—C. & M., who carried on business as ship chandlers, each applied in his own name for certain shares in a shipowners' co. Each paid the application & allotment money on the shares allotted to him, & the shares were registered in the names of the partners severally. Each partner drew upon the partnership funds for the payment of calls upon the shares, & the amounts so drawn were debited in the books of the firm to the individual partners, & opposite to the entries in the books of the firm each partner signed his initials in red ink. The dividends on the shares were carried to the profit & loss account of the firm. The holding of ships or shares in shipowning cos. formed no part of the business of the firm, but it appeared that the partners had purchased the shares under the impression that the possession of them would be the means of introducing custom & business to the partnership. C. became bkpt., & M. claimed the shares standing in C.'s name, as joint estate of the firm:—*Held:* the entries in the books of the firm amounted to a statement in writing, signed by the partners, that the shares were to be separate & not joint estate, & the mode of dealing with the dividends was not contradictory of that statement, as the effect of it was the same as if the partners, who each held an equal number of the shares, had been separately credited with the dividends.—*Re* CLINT, *Ex p.* BOLLAND (1873), 29 L. T. 525, L. C. & L. J.

3878. Ostensible partnership—One partner only interested in salary or share of profits—Firm assets—Individual interests in capital immaterial.]—P. & G. were partners, P. having two-thirds interest of the capital & profits, & G. the other third. B. was subsequently admitted as a partner, & had a share of the profits but not of the capital. A joint commission issued against the partners. The separate creditors of P., on the ground that B. had no interest in the capital, claimed a declaration that there was no joint property of P., G. & B., but only of P. & G., that the joint creditors of P., G. & B. had no right to the property of P. & G., & that as there were no joint creditors of P. & G., their joint property was divisible amongst their separate creditors:—*Held:* upon bkpcy. of

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a partnership, whatever the different interest of the members might have been, the creditors took their property as the promiscuous joint property of them all.—*Re* PAYTON, *Ex p.* HUNTER (1816), 2 Rose, 382.

Annotations:—**Expld.** *Re* Fear, *Ex p.* Hare (1835), 1 Deac. 16. **Apld.** *Re* Williams & Staines (1845), 5 L. T. O. S. 370. **Refd.** *Re* Ashley, *Ex p.* Murton (1840), 4 Jur. 894, Ct. of R.; *Re* Chambers (1845), 5 L. T. O. S. 456.

3879. —— —— ——.]—A trader, who did not reside on his business premises, associated the name of his son with his own in the business, the son having no share in the profits, but merely a salary. The business house was leased to the father, the ground floor being used for the purposes of the business, & the other parts let as lodgings, the rents of which were placed to the father's private account, & all taxes & other outgoings were also placed to his debit. The son was permitted to occupy apartments in the house, but the father had the control over the entire property:—*Held:* this property was not distributable among the joint creditors, but belonged to the separate estate of the father.—*Re* ASHLEY, *Ex p.* MURTON (1840), 1 Mont. D. & De G. 252; 4 Jur. 894, Ct. of R.

Annotations:—**Apld.** *Re* Williams & Staines (1845), 5 L. T. O. S. 370. **Refd.** *Re* Chambers (1845), 5 L. T. O. S. 456.

3880. —— —— **Stock-in-trade—Household furniture.**]—A sole trader, possessed of stock-in-trade & household furniture at the place of business, took two partners without any agreement, except that they were to participate in the profits of the concern. They brought in no capital, & paid no premium, & no deed or agreement was executed. On the firm becoming bkpts.:—*Held:* the stock-in-trade must be treated as joint estate, & the household furniture as separate estate.—*Re* BOWERS, *Ex p.* OWEN (1851), 4 De G. & Sm. 351; 20 L. J. Bcy. 14; 15 Jur. 983; 64 E. R. 865.

3881. —— —— —— **Book debts.**]—C. entered into an agreement with R. that R. should buy & sell goods on behalf of C., & that the business should be carried on as R. & Co., R. being paid by a salary & a percentage on profits. The business was managed by R., but C. had bought goods for it. Each became bkpt.:—*Held:* the book debts & stock-in-trade of R. & Co. were joint estate of the two.—*Re* ROWLAND & CRANKSHAW (1866), 1 Ch. App. 421, L. C.

Annotation:—**Follo.** *Re* Pulsford, *Ex p.* Hayman (1878), 8 Ch. D. 11, C. A.

3882. —— **Intention to become partners—Party held out as partner—Firm assets joint estate.**]—On the dissolution of a partnership between H., C. & P. notice was given to the creditors that the business would thenceforth be carried on by P. alone, under the firm of P. Son & Co. The business was carried on under that firm, & a banking account was opened in that name. P.'s son constantly signed cheques upon that account in the name of the firm. He also accepted bills in the name of the firm, negotiated loans to the firm, & sometimes ordered goods in the name of the firm. The name P. alone appeared on the outside of the business premises. P. & his son were, on the petition of a creditor, jointly adjudicated bkpts., as having traded as partners. They did not resist the adjudication. H. with whom, on the dissolution of the old partnership, P. had covenanted for the payment of part of the capital of H. in that partnership, applied for a declaration that the assets of the business were separate estate of the father. Both father & son deposed that no actual partnership had subsisted between them, but that it was intended from the first that the son should be a partner, if the business had turned out profitable. Petitioning creditor deposed that the son had been held out to him as a partner. Evidence tending in the same direction was given on behalf of another creditor. Eight other creditors, the whole number who had proved being eighty-two, deposed that they had always treated the son as being a partner, & constituting with the father the firm of P. Son & Co.:—*Held:* the assets must be treated as joint estate of father & son.—*Re* PULSFORD, *Ex p.* HAYMAN (1878), 8 Ch. D. 11; 47 L. J. Bcy. 54; 38 L. T. 238; 26 W. R. 597, C. A.

Annotation:—**Consd.** *Re* Webber, *Ex p.* Slater (1891), 64 L. T. 426.

3883. Trust property employed in trading concern.]—A trust-fund, which the settlor authorises the trustees to employ in a trading concern, becomes part of the capital embarked, to which the creditors of the firm have priority of resort as against all claims on behalf of the *cestuis que trust.*—*Re* EDMONDS & WEBB, *Ex p.* EDMONDS (1867), 16 L. T. 718.

See, generally, PARTNERSHIP.

Property in reputed ownership of firm.]—*See* Part XX., Sect. 9, *post.*

SUB-SECT. 3.—PROOF.

A. Against joint Estate.

3884. Debts arising out of insurance of ships.]—Proof of debts arising upon insurances of ships, must be against the separate, not joint estate.—*Ex p.* ANGERSTEIN (1784), 1 Bro. C. C. 399; 28 E. R. 1203.

3885. ——.]—A petition to be admitted to prove debts arising on insurances of ships under a joint commission, was dismissed.—*Ex p.* LEE (1784), 1 Bro. C. C. 400; 28 E. R. 1203.

3886. Debts arising out of bill transactions—Bills drawn or accepted by partner for private debt—No inference of debtor's separate account.]—A., B. & C. carried on business in partnership. Under a joint commission of bkpcy. against the partnership, D. proved a debt for money advanced on bills, drawn by A. without the privity of his partners, & the proceeds of which were applied to the use of A. & not of the partnership. A petition that the proof of D. under the joint commission might be expunged was refused, as a partner had power to bind the partnership, unless from the nature of the transaction it could be

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t. *Goods supplied to partner—After notice of dissolution of firm.*]—After publication of notice of dissolution of the firm, its estate was sequestrated. Customers of the firm claimed to prove debts against the firm's estate for goods supplied to one of the partners after publication of the said notice:—*Held:* if, notwithstanding the notice, the firm still existed *de facto*, the customers were entitled to prove as claimed.—SHAPIRO *v.* SHAPIRO & KETZ'S TRUSTEE (1907), T. S. 472.—**S. AF.**

u. *Debt on promissory note—Given by squatting partner on behalf of firm.*]—Proof of debt as a partnership liability, admitted on the promissory note given by one member of a squatting partnership on behalf of the firm.—GLASS *v.* HIGGINS (1871), 2 V. R. 28.—**AUS.**

w. *Debt on joint promissory note—For accommodation of one partner.*]—A debt on a joint promissory note which was really for the accommodation of one partner, was not allowed to be proved against the joint estate.—*Re* BURNETT & LEVY (1878), 14 N. S. W. S. C. R. 528.—**AUS.**

inferred to be separate, in which case previous authority or subsequent approbation must be shown.—*Ex p.* BONBONUS (1803), 8 Ves. 540; 32 E. R. 465.

Annotations:—**Folld.** *Re* Riches & Marshall's Trust, *Ex p.* Darlington, etc., Banking Co. (1865), 4 De G. J. & Sm. 581, L. C. **Refd.** *Ex p.* Wensiay (1813), 2 Ves. & B. 254, L. C.; *Re* Barrow, *Ex p.* Moult (1832), Mont. 321, Ct. of R.; *Re* Acraman, *Ex p.* Bushell (1844), 3 Mont. D. & De G. 615, Ct. of R. **Mentd.** *Re* Deane, *Ex p.* Goldsmid (1857), 1 De G. & J. 257, L. JJ.; Leverson *v.* Lane (1862), 13 C. B. N. S. 278.

3887. —— —— **Transaction primâ facie fraudulent—Assent of partners.**]—A creditor drew a bill upon a firm for a separate debt due from one partner, & that partner accepted it in the name of the firm:—*Held:* the transaction was *primâ facie* fraudulent, on the part of debtor & the creditor, & the creditor could not prove against the joint estate, without showing the assent of the other partners to the firm being liable.—*Re* WARDLEY & HODSON, *Ex p.* THORPE (1836), 3 Mont. & A. 716; 2 Deac. 16, Ct. of R.

3888. —— —— **Circumstances known to party taking bill—Fraud on part of taker.**]—A firm, No. 1, consisted of three partners, A., B. & C. Another firm, No. 2, was composed of the same A., B. & C. together with D. & E. The trade of the former was that of merchants, & the latter were ship-builders & engineers. A. & B. were at the same time partners with several others in another concern, No. 3, called "the tea concern," of whom F. was one, but by agreement between F., G., the father of F., & H., the uncle of F., he became partner on their behalf, & was to account to them for the profits. In May, 1841, firm No. 2 applied to bill-brokers for money, which was advanced on bills drawn by D. in his own name, upon & accepted by firm No. 1, & which money was wholly used by firm No. 2. The bills fell due between Aug. 30 & Oct. 4, but before they became due, firm No. 1 took up money from H. & Co. & retired the bills before they became due. On Aug. 10, without privity of any member of firm No. 2, except such as were members also of firm No. 1, A. applied to part payment of H. & Co. a sum of £8,700 in his hands, for which he was accountable to F. as part of his share of profit in firm No. 3, which A. had been appointed to wind up. The day after that sum had been so applied a new partner, J., joined firm No. 2. The bills were subsequently indorsed by A. in the name of firm No. 2, to a holder for valuable consideration, & they were sought to be admitted to proof against the estate of firm No. 2, to which the assignees objected that the debt, in respect of which they were given, was a debt due from A. to the estate of F. on an account unconnected with firm No. 2:—*Held:* (1) the case was governed by the rule that where one partner gave the acceptance of the firm in payment of his separate debt, without authority, in fact, from his co-partners, such acceptance did not render the firm liable to the person who took the bill with knowledge that it had been so drawn or accepted; (2) fraud on the part of the taker of the bill was no necessary ingredient to the application of the rule.—*Re* ACRAMAN (1850), 16 L. T. O. S. 84.

3889. —— —— —— **Duty of taker to investigate.**]—Although, generally speaking, a partner has full authority to deal with the partnership property for partnership purposes, &, if the business of the partnership is such as ordinarily requires bills of exchange, to draw, accept & indorse bills, in the name of the partnership, yet, if a person discounting bills drawn & indorsed by a partner in the partnership name, has notice that the partner is dealing with the bills for his private purposes, he is bound to ascertain the extent of the authority of the individual partner, & if the dealing be not authorised, he has, upon the bkpcy. of the firm, no right to prove against the joint estate of the partnership, except to the extent to which the partnership may be indebted to the individual partner.—*Re* RICHES & MARSHALL'S TRUST DEED, *Ex p.* DARLINGTON, ETC., BANKING CO. (1865), 4 De G. J. & Sm. 581; 5 New Rep. 287; 34 L. J. Bcy. 10; 11 L. T. 651; 11 Jur. N. S. 122; 13 W. R. 353; 46 E. R. 1044, L. C.

Annotation:—**Folld.** *Re* Croudace (1866), 15 L. T. 19.

3890. —— **Bill drawn by one partner—Indorsed by dormant partner—Money received for partnership purposes.**]—If A. & B. are partners in a trade carried on in the name of A. only, & A. draws bills in his own name payable to his order, which he indorses, & afterwards B. also indorses & procures them to be discounted, there is no legal contract for a holder to maintain an action against A. & B. upon the bills, unless it appear that A. drew & indorsed the bills in the character of & as representing A. & B.

A person discounting the bills may have a right of action against A. & B. jointly for money had & received, if he can show that they received the money by means of the bills for partnership purposes.—*Re* BLACKBURN, *Ex p.* BOLITHO (1817), Buck, 100, L. C.

Annotations:—**Refd.** Yorkshire Banking Co. *v.* Beatson, Leeds & County Banking Co. *v.* Beatson (1880), 5 C. P. D. 109, C. A. **Mentd.** Wintle *v.* Crowther (1831), 1 Cr. & J. 316; Trueman *v.* Loder (1840), 3 Per. & Dav. 267; Furze *v.* Sharwood (1841), 2 Q. B. 388; Harrison *v.* Heathorn (1843), 6 Man. & G. 81; Yorkshire Banking Co. *v.* Beatson, Leeds & County Banking Co. *v.* Beatson (1879), 4 C. P. D. 204.

3891. —— **Bill accepted by solvent partner in firm name—After act of bankruptcy of copartner—Holder without notice.**]—An acceptance given by a solvent partner, after an act of bkpcy. committed by his copartner, to a creditor of the firm having notice of that act of bkpcy., is provable by a holder without such notice, under a commission of bkpcy. subsequently issued against both partners.—*Re* HOUGHTON, *Ex p.* ROBINSON (1833), 3 Deac. & Ch. 376; 1 Mont. & A. 18; Coop. *temp.* Brough. 162, L. C.; *revsg.* S. C. *sub nom.* *Re* HOUGHTON, *Ex p.* ELLIS, Mont. & B. 249, Ct. of R.

Annotation:—**Expld.** *Re* Bentley, *Ex p.* Vere (1835), 2 Mont. & A. 123, Ct. of R. The point raised in this ct. in *Ex p. Ellis* was lost sight of on appeal (SIR G. ROSE).

3892. —— **Bill signed by agent of one partner—In breach of partnership agreement.**]—A. & B., as joint exors., carried on their testator's trade in copartnership, for the benefit of his family, & it was arranged between them that A. should alone draw & accept bills, & manage the cash transactions. A. having refused to accept any more bills drawn by H. & D., B., unknown to A., authorised her son to accept them. A. & B. afterwards became bkpt.:—*Held:* the holders of the bills could not prove them against the joint estate.—*Re* ROBINSON, *Ex p.* HOLDSWORTH (1841), 1 Mont. D. & De G. 475, Ct. of R.

3893. —— **Notes signed by servant of firm in favour of some partners—For excess of capital contribution—No fraud on part of indorsee.**]—Six partners gave a clerk authority in writing to sign bills & notes on behalf of the firm. Two of the partners, claiming to be creditors for advances made by them to the firm beyond their proper capital, directed the clerk to sign four promissory notes, payable to one or other of the two, &

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indorsed the notes to a separate creditor of one of them. There was no proof of fraud or collusion in the transaction on the part of the indorsee. The firm became bkpt. :—*Held :* although the transaction, as between the two & their partners, was an unjustifiable act on the part of the two, the firm were liable, & the holder had a right of proof for the amount of the notes against their joint estate.—*Re* ACRAMAN, *Ex p.* BUSHELL (1844), 3 Mont. D. & De G. 615 ; 3 L. T. O. S. 264 ; 8 Jur. 937, Ct. of R.

Annotation :—**Distd.** *Re* Riches & Marshall's Assignment (1864), 10 L. T. 662.

3894. —— Payments in respect of note given as surety for firm.]—A trader made a promissory note, as a surety for a debt due to one of the creditors of a firm. The firm & the trader became bkpt., & the creditor proved against the estate of the trader on the note, & against the separate estate of a partner in the firm on the debt. A dividend was declared & paid on the former proof, but not on the latter :—*Held :* the assignees of the trader were not entitled to an order to prove against the joint estate of the firm, for the amount of the dividend which they had paid on the promissory note.—*Re* CAMPION, *Ex p.* BROWN (1842), 2 Mont. D. & De G. 718 ; 11 L. J. Bcy. 43 ; 6 Jur. 1021, Ct. of R.

3895. —— Accommodation bill accepted by one partner—With knowledge of other.]—An accommodation bill was accepted by B. with the knowledge of C., his partner. The drawer indorsed it for value, & the indorsee accepted a composition in respect of it from the drawer. B. & C. became bkpts. :—*Held :* the indorsee might prove against the joint estate of B. & C. for the amount of the bill, less the composition.—*Re* BLACK & COPE, *Ex p.* FREW (1853), 1 Bankr. & Ins. R. 156 ; 22 L. T. O. S. 307.

3896. —— Bills deposited as security by party in partnership with partner of separate business.]—A., being in partnership with B., entered, without the knowledge of B., into partnership with C., an agent of the firm of A. & B., for the sale of timber. The firm of A. & C. employed R., F. & Co. as their bankers, & C. brought cheques & bills to the bank with the names of A. & B. attached to them, which the bank held as collateral security to cover C.'s overdrafts. Upon A.'s death C. failed, & B. became bkpt. :—*Held :* the bankers were not in a position to prove their collateral security against B.'s partnership estate, as they neglected to ascertain the extent of either A.'s or C.'s authority to pledge B.'s credit, &, no account being produced, it was impossible to distinguish any agency transactions from the general dealings of A. & C. with the bankers, whose title could not be higher than that of the parties with whom they dealt.—*Re* CROUDACE (1866), 15 L. T. 19.

3897. —— Joint & several note by partners—Separate indebtedness of one partner cancelled by provisions in holder's will.]—Testator by his will bequeathed all debts & sums of money which should at the time of his death be due to him by B., to B., his exors., administrators, & assigns, for his & their own use & benefit, & he directed his trustees to deliver up to B., his exors., administrators, or assigns, all securities which he should at the time of his death hold for such debts & sums of money, & also, when required by B., his exors., administrators, or assigns, to execute to him or them a release from all such debts & sums of money. At the date of the will & of testator's death, B. owed testator a debt of £50, & he & his partner owed testator £2,600, which the latter had lent to the firm, & for which B. & his partner had given testator their joint & several promissory notes. B. & his partner having filed a liquidation petition, testator's exors. claimed to prove in the liquidation for the £2,600 :—*Held :* as there was a separate debt due from B. to which the release could apply, it could not be extended to the partnership debt, & the exors.' proof must be admitted.—*Re* BENNETT, *Ex p.* KIRK (1877), 5 Ch. D. 800 ; 46 L. J. Bcy. 101 ; 36 L. T. 431 ; 25 W. R. 598, C. A.

3898. Transfer of credit in books of firm—By partner to his son.]—A father, member of a bank, transferred a sum of money to the credit of his son with the partnership :—*Held :* the son was entitled to prove under a commission against the firm for such credit.—*Re* HEWITT, *Ex p.* SKERRATT (1816), 2 Rose, 384, L. C.

3899. —— By firm to trustees of partner.]—A partner covenanted to pay £4,000 to the trustees of his marriage settlement, by instalments, & assigned £3,000 of his portion of the partnership capital to them as security, & the firm gave the trustees credit for £3,000 in their books, & wrote to them so stating. The firm became bkpt. before the first instalment was due :—*Held :* the £3,000 was provable against the firm.—*Re* BROWN, *Ex p.* HILL (1837), 2 Deac. 249 ; 3 Mont. & A. 175, Ct. of R.

3900. Debt arising out of breach of trust by one partner—With knowledge of copartners.]—Where some of the members of a firm are trustees of funds which they misapply, by making use of them for partnership purposes, if such misapplication be with the knowledge of the other members of the firm, the *cestuis que trust* may prove against the joint estate.—*Re* MOXON, *Ex p.* HEATON (1819), Buck, 386.

3901. —— Limited to proceeds in hands of firm at time of bankruptcy.]—A trustee under a will permitted the trust fund, as the money was from time to time realised, to be paid into the hands of certain bankers, who had knowledge of the trusts. One of the partners, without the assent of the trustee, dealt with a portion of the fund, by investing it on mtge. :—*Held :* the bankers were not jointly & separately liable in the character of trustees, but they only incurred a liability as between banker & customer, &, on the bkpcy. of the bankers, the trustee could only prove against their joint estate, for such balance as was in their hands at the time of the bkpcy. *Semble :* the sum laid out on mtge. must be considered as in their hands at the time of the bkpcy., although the mtge. itself might enure for the benefit of the *cestui que trust.*—*Re* BIDDULPH, *Ex p.* BURTON (1843), 3 Mont. D. & De G. 364, Ct. of R. ; *subsequent proceedings, sub nom. Re* BIDDULPH, *Ex p.* BARNEWALL (1855), 6 De G. M. & G. 795, L. JJ.

3902. Debt arising out of fraud of one partner.]—A customer deposited with his bankers a box of securities for safe custody. He afterwards lent the securities to one of the partners in the bank for his own private purposes, upon his depositing in the box shares to secure the replacement of the borrowed securities. The partner for his own purposes, without the knowledge of the customer, subtracted the shares :—*Held :* the banking firm were not liable for the tortious act of their partner for his own benefit, & the customer had no right of proof against the joint estate.—*Re* BIDDULPH, *Ex p.* EYRE (1843), 3 Mont. D. & De G. 12 ; *sub nom. Re* Wright, *Ex p.* Eyre, 1 Ph. 227 ; 12 L. J. Ch. 266 ; 7 Jur. 162 ; 41 E. R. 618, L. C.

Annotation :—**Refd.** Bury *v.* Allen (1845), 1 Coll. 589.

3903. Joint debt to become separate on demand—No demand before bankruptcy.]—Partners expressly stipulated that until an actual demand was made an existing debt should remain a joint debt. No actual demand was made before their bkpcy. :—*Held :* the debt was provable against the joint estate, but not against the separate estates.—*Re* CHRISTIE, *Ex p.* FAIRLIE (1830), Mont. 17, L. C.

Annotations :—**Consd.** *Re* Wyatt, *Ex p.* Thompson (1832), 2 L. J. Bcy. 5 ; *Re* Rodham, *Ex p.* Flintoff (1844), 8 Jur. 766, Ct. of R.

See, also, No. 3964, *post.*

3904. Joint debt secured on separate property of bankrupt — Other partners solvent.]—Petitioners were equitable mtgees. of separate property of bkpt., the mtge. being made to secure a debt due from bkpt. jointly with several solvent partners. The ct. granted an order for sale, proof for the deficiency to be against the joint estate only.—*Re* WILDERS, *Ex p.* LEICESTERSHIRE BANKING CO. (1846), 1 De G. 292, Ct. of R.

3905. Joint bond by partners—Securing repayment of loan from trustees of one partner.]—A partner previous to his marriage withdrew £1,000 from the partnership funds, & presented it to his intended wife. He afterwards withdrew £1,500 more to provide for the children of the marriage, the trusts of which were declared by an antenuptial settlement. The trustees, in the exercise of a power given by the settlement, lent the two sums to the partnership, & took the joint bond of the partners to secure repayment : — *Held :* the trustees might prove against the joint estate for the amount secured by the bond.—*Re* LAST, *Ex p.* CROFTS (1837), 2 Deac. 102, Ct. of R.

3906. Judgment against one partner on partnership debt—Other partners solvent & abroad.]—A creditor of a firm of three, two of whom resided in America, recovered judgment against the third alone, who resided in England, & who afterwards became bkpt., his partners remaining solvent :—*Held :* the creditor might, notwithstanding the separate judgment, prove against the joint estate.—*Re* MORRISON, *Ex p.* WATERFALL (1851), 4 De G. & Sm. 199 ; 64 E. R. 797 ; *sub nom. Re* MORRISON, *Ex p.* JONES, 20 L. J. Bcy. 5 ; 16 L. T. O. S. 346 ; 15 Jur. 214.

Annotations :—**Folld.** *Re* Wiffin, *Ex p.* Cripps (1858), 30 L. T. O. S. 296. **Refd.** *Re* Tyler, *Ex p.* Higgins (1858), 3 De G. & J. 33, L. JJ. **Mentd.** Kendall *v.* Hamilton (1879), 4 App. Cas. 504, H. L.

3907. —— Debt merged in judgment.]—Two partners, acting by one of them, bought goods. Afterwards the vendor, with notice of the partnership, brought an action & recovered judgment against the one partner alone, & issued execution, which was defeated by an adjudication of bkpcy. against him, followed by an adjudication against his partner :—*Held :* the original debt was merged in the judgment, & there could be no proof upon it against the joint estate.—*Re* TYLER, *Ex p.* HIGGINS (1858), 3 De G. & J. 33 ; 27 L. J. Bcy. 27 ; 31 L. T. O. S. 47 ; 4 Jur. N. S. 595 ; 6 W. R. 406 ; 44 E. R. 1181, L. JJ.

Annotations :—**Refd.** *Re* Wheal Ludcott & Wrey Consols Mines Co., *Ex p.* Jackson (1869), 21 L. T. 67, L. JJ. ; *Re* Davison, *Ex p.* Chandler (1884), 13 Q. B. D. 50.

3908. Loss from disclaimer of lease by trustee of bankrupt firm.]—A lease was granted to four partners, who jointly & severally covenanted to pay the rent. On the surviving three becoming bkpt. their trustee disclaimed the lease, & the lessor relet for the residue of the term at a lower rent :—*Qu. :* whether, at the end of the term, the lessor could prove against the joint estate of bkpts.—*Re* SHAND, *Ex p.* CORBETT (1880), 14 Ch. D. 122 ; 49 L. J. Bcy. 74 ; 42 L. T. 164 ; 28 W. R. 569, C. A.

3909. Debt due by old firm—New firm composed of old partners with addition of dormant partner.]—In July, 1820, W. advanced to A. & B., then carrying on business in partnership as brewers, the sum of £24,000, & all three executed a deed, by the express terms whereof a partnership stock was created, in which they had all a joint property, but W. was not to have any definite aliquot proportion of the profits, but was to have an account of the profits as between themselves, so as to get £2,000 to £2,400 a year, as the case might be, out of the clear profits. W.'s name never appeared to the world as a partner :—*Held :* W. was a partner, & the new firm having become bkpt. in 1826, the creditors of the old firm & the creditors of the new firm were both entitled to prove against the property of the new firm.—*Re* STARKEY & WHITESIDE, *Ex p.* CHUCK (1832), 8 Bing. 469 ; Mont. 364 ; 1 Moo. & S. 615 ; 1 L. J. Ch. 197 ; 131 E. R. 473, L. C.

Annotations :—**Mentd.** Reynolds *v.* Bowley (1866), 7 B. & S. 67.

3910. —— Not incurred after dissolution—One partner retiring with knowledge of creditors.]—C. & S. carried on business in partnership under the style of C. & Co. C. afterwards retired from the firm with the knowledge of the joint creditors ; the dissolution was advertised, & S. continued the business in his own name. He was afterwards adjudicated bkpt. :—*Held :* the petition of joint creditors to be at liberty to prove against the partnership property must be dismissed.—*Re* STEWART, *Ex p.* FISHER (1855), 2 Bankr. & Ins. R. 67.

3911. Debt incurred before partnership—Partnership adopted as debtor.]—Upon the formation of a partnership between W. & C., W. proposed to J. & Co., to whom he was indebted for previous advances, to "consider all credits, advices, & instructions then in force from him as extending to the new firm, & to transfer any balances, that may be either due to or from him, to the new firm." J. & Co. acceded to the proposal, & drew bills on W. & C., on account of former dealings with W. The bills were not paid when due, &

3911 i. *Debt incurred before partnership—Partnership adopted as debtor.*]—R., F. & R., partners dealing with F. S. & Co., took T. & S. into partnership. The partnership was constituted by deed, to continue for three years, & a balance-sheet showing the liabilities & assets of the existing firm was drawn up & admitted by all the partners. The new firm continued to trade, up to the period of its insolvency, upon the same footing & with the same books as the old firm, no distinction being made in their payments, or balances, or between the debts or assets of the new or what was the old firm. F. S. & Co. continued to deal with the new as they had done with the old firm. R., F. & R. having become insolvent, F. S. & Co., creditors to a large amount, proved against the estate of the new firm. R. & B., also creditors of the new firm, proved against their estate, & sought to expunge the proof of F. S. & Co., on the ground that their debt having accrued previous to the new partners being taken in, was due from the old, & not from the new firm :—*Held :* there was sufficient proof in the dealings & transactions of the several parties to show that the new firm on its formation adopted the liabilities of the old firm, & that F. S. & Co. had consented to accept the liability of the new firm, & to discharge the old firm, their original debtors.—ROLFE & BANK OF AUSTRALASIA *v.* FLOWER (1865), L. R. 1 P. C. 27 ; 35 L. J. P. C. 13 ; 14 L. T. 144 ; 14 W. R. 467 ; 12 Jur. N. S. 345, P. C.—**AUS.**

3911 ii. —— —— *Special provisions in assignment for creditors.*]—Two traders, E. & R., having become insolvent, an agreement was entered into between them & their creditors, whereby it was stipulated that R. should retire from the partnership & that E. & G. should form a new copartnership, & that the creditors of E. & R. should accept the notes of the new firm for 15*s.* in the pound of their claims. By the deed of composition it was expressly agreed that in the event of E. & G. becoming insolvent before the notes were paid, the original debts should revive against E., G., & R.,

Sect. 3.—Rights of joint creditors: Sub-sect. 3, A. & B. (a), (b) & (c).]

W. & C. became bkpt. :—*Held:* J. & Co., after the adoption of W. & C. as their joint debtors, could not prove against the separate estate of W., but only against the joint estate of W. & C.—*Re* WARWICK, *Ex p.* WHITMORE (1838), 3 Deac. 365, Ct. of R.

3912. Partner common to creditor & debtor firms—Each firm carrying on distinct trade.]—A. & B. were partners as grocers, & B. & C. as ironmongers. A. & B. made an assignment for the benefit of their creditors, & B. & C. became bkpt. :—*Held:* the trustee for A. & B.'s creditors could prove in the bkpcy., B. & C. being partners in a distinct trade.—*Re* WILKS, *Ex p.* THOMPSON (1834), 3 Deac. & Ch. 612; 1 Mont. & A. 324, Ct. of R.

B. Against separate Estate.

(a) In General.

See, now, 1914 Act, s. 33 (6), Sched. II., r. 19.

3913. General rule—No right of proof—Separate commissions against both partners after dissolution.]—Where there are two persons who have been partners, & yet the commissions are taken out against them as separate traders, their creditors upon the joint estate cannot prove their debts under each commission.—*Ex p.* BAUDIER (1742), 1 Atk. 98; 26 E. R. 64, L. C.

3914. —— —— In competition with separate creditors.]—A partnership debt may not be proved against the separate estate of a bkpt. partner, so as to come in competition with the separate creditors.—*Re* SABBERTON, *Ex p.* CLARK (1864), 10 L. T. 165.

See, also, Nos. 3903, 3911, *ante,* & Nos. 3982, 3983, 3986, 3993, 4007, *post.*

3915. Previous rule—Right of proof.]—Joint creditors were let in to prove against a separate estate, by consent.—*Ex p.* COBHAM (1784), 1 Bro. C. C. 576; 28 E. R. 1307, L. C.

3916. —— ——.]—A partnership debt may be proved under a separate commission.—*Ex p.* HODGSON (1785), 2 Bro. C. C. 5; 29 E. R. 3.

3917. —— ——.]—Joint creditors were admitted to prove on a separate commission.—*Ex p.* HAYDEN (1785), 1 Bro. C. C. 454; 28 E. R. 1236.

3918. —— ——.]—A joint creditor is entitled to prove his debt under a separate commission taken out against one partner.—*Ex p.* COPLAND (1787), 1 Cox, Eq. Cas. 420; 29 E. R. 1230, L. C.

3919. —— ——.]—A joint bond:—*Held:* in the circumstances several against creditors in bkpcy.—BURN *v.* BURN (1798), 3 Ves. 573; 30 E. R. 1162, L. C.

Annotation:—**Consd.** Ferguson *v.* Gibson (1872), 41 L. J. Ch. 640.

3920. —— ——.]—Petitioners in Hilary Term obtained a verdict as joint creditors of G., W. & P. A separate commission of bkpcy. had previously issued against G.; in May a separate commission issued against W., & another in July against P., & they were all declared bkpts. The petition prayed liberty to prove under the separate commissions or any of them, & to vote in the choice of assignees under the commission against P., that distinct accounts might be kept of the joint & separate estates, etc., & that petitioners might be at liberty to assent to, or dissent from, the certificates. W. had obtained his certificates & the others were before the Lord Chancellor for allowance:—*Held:* petitioners, having a joint judgment, though a commission issued before any separate execution, still continued joint creditors, & as such were entitled to an account & application of the joint effects, but only under one of these commissions, & under all the three commissions any surplus would go to the joint creditors.—*Ex p.* WILSON (1811), 18 Ves. 439; 34 E. R. 383, L. C.

See, also, Nos. 3928 *et seq., post.*

3921. —— —— **Right to dividends.**]—Joint creditors may prove & take dividends under a separate commission.—*Re* OYSTON, *Ex p.* FLINTUM (1786), 2 Bro. C. C. 120; 29 E. R. 69, L. C.

See 1914 Act, ss. 33 (6), 63.

3922. —— —— ——.]—Joint creditors were admitted to prove & take dividends under a separate commission against one partner.—*Re* REMNANT, *Ex p.* PAGE (1786), 2 Bro. C. C. 119; 29 E. R. 69, L. C.

3923. —— —— **Dividends retained—Until rights from partnership ascertained.**]—Upon petition of joint creditors to be admitted to prove under a separate commission:—*Held:* they should be admitted, but not to receive a dividend, which should be reserved, until an account was taken of what they had or might have received from the partnership effects.—*Ex p.* ELTON (1796), 3 Ves. 238; 30 E. R. 988, L. C.

Annotations:—**Folld.** *Ex p.* Hill (1802), 2 Bos. & P. N. R. 192, n., L. C.; *Ex p.* Chandler (1803), 9 Ves. 35, L. C.; *Ex p.* Ackerman (1808), 14 Ves. 604, L. C. **Consd.** *Ex p.* Kensington, *Ex p.* Taylor (1808), 14 Ves. 447, L. C. **Folld.** *Ex p.* Taitt (1809), 16 Ves. 193, L. C.

3924. —— —— —— **Until separate creditors paid in full.**]—Upon the proof of a joint debt under a separate commission of bkpcy. no dividend can be taken, until the separate creditors have received 20*s.* in the pound.—*Ex p.* ABELL (1799), 4 Ves. 837; 31 E. R. 434, L. C.

3925. —— —— —— ——.]—A., a shareholder in a banking co., which was itself bkpt., became bkpt., & obtained his certificate. A creditor of the bank having obtained the requisite order for execution against A., tendered a proof against his estate for the amount of his debt, but it was

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& that the creditors should be entitled to rank on the estate of E. & G. for the full amount of their respective claims against the firm of E. & R., less any sum which might have been paid them by E. & G. on account of the debts. Before the notes were all satisfied E. & G. were compelled to make an assignment in insolvency:—*Held:* the creditors were entitled to prove against the estate of E. & G. for the full amount of their original claims against E. & R., giving credit for such sums as had been paid to them by E. & G. in respect of the composition notes, & the agreement for the revivor of the original demands was not in the nature of a penalty.—WATSON *v.* MASON (1875), 22 Gr. 180.—**CAN.**

y. Solicitors' costs of trustees of estate—Trustees carrying on business—Proof against firm estate.]—Solrs. acted for the trustees of an estate in defending an action brought against them as such trustees. The trustees were carrying on business in partnership. The firm became bkpt., the solrs. having received only a portion of their costs of the action:—*Held:* the solrs. had a right of proof against bkpt. estate of the firm.—*Re* GRAHAM, PITT & BENNETT, *Ex p.* NOLAN & SKEET (1891), 9 N. Z. L. R. 617.—**N.Z.**

PART XI. SECT. 3, SUB-SECT. 3.—B. (a).

3914 i. *General rule—No right of proof—In competition with separate creditors.*]—The partnership creditors shall rank upon the separate estate & shall not be permitted to rank upon the separate estate until the separate creditors are satisfied.—*Re* MARTIN, WINTER *v.* BANK OF MONTREAL (1907), 9 Nfld. L. R. 357.—**NFLD.**

3914 ii. —— *Right of proof—In competition with separate creditors—After dissolution of partnership.*]—Where an assignment for the benefit of creditors is made by an assignor carrying on business by himself, creditors having claims against him for goods sold to a firm, in which he was formerly a partner, are entitled to rank against his estate ratably with creditors having claims for goods sold to the assignor alone. R. S. O. 1887, c. 124, s. 5, does not apply to such a case, but only to the case of an assignor, who has both separate & joint estate.—MACDONALD *v.* BALFOUR (1893), 20 A. R. 404.—**CAN.**

admitted as claimed only, & the dividend payable thereon was ordered to be reserved:—*Held:* the claim was provable under the bkpcy., but no dividend should be paid thereon, until all the separate creditors of A. had been paid in full.—*Re* HILL, *Ex p.* HILL'S ASSIGNEES (1858), 30 L. T. O. S. 372.

See, also, Nos. 3928, 3929, 3931, *post.*

3926. —— —— Creditor suing two partners—Duty to relinquish action.]—*Held:* 49 Geo. 3, c. 121, s. 14, which enacted that creditors, who should have brought an action against bkpt., should not be at liberty to prove under the commission without relinquishing such action, extended to prevent a creditor, who was suing two partners, from proving his debt under a separate commission issued against one.—BLANNIN *v.* TAYLOR (1820), Gow, 199, N. P.

3927. —— —— Consent of Court of Review necessary.]—A partnership creditor cannot prove against the estate of bkpt., against whom a separate fiat only has been issued, without an order from the Ct. of Review.—*Re* ROGERS (1843), 2 L. T. O. S. 53.

(*b*) *For what Purpose.*

3928. Assenting or dissenting from certificate—Not for dividends—Keeping separate accounts.]—Joint creditors were admitted to prove under a separate commission, for the purpose of keeping separate accounts & assenting to or dissenting from the certificate, but not to receive dividends with the separate creditors.—*Ex p.* CLAY (1802), 6 Ves. 813; 31 E. R. 1322, L. C.

Annotations:—**Consd.** *Re* Hill, *Ex p.* Hill (1850), 14 L. T. O. S. 380. **Refd.** *Re* Budgett, Cooper *v.* Adams, [1894] 2 Ch. 557.

3929. —— ——.]—Joint creditors were admitted to prove under a separate commission of bkpcy. for the purpose of assenting to, or dissenting from, the certificate, but not to receive dividends with the separate creditors.—*Ex p.* TAITT (1809), 16 Ves. 193; 33 E. R. 957, L. C.

See, also, Nos. 3920, 3923 *et seq., ante.*

3930. —— Voting for assignees.] — Creditors of a joint stock banking co., may prove under a separate fiat issued against one of that co., for the purpose of voting in the choice of assignees, & of assenting to, or dissenting from, the certificate of such bkpt.—*Re* MARSTON, *Ex p.* MARSTON, *Ex p.* BROOME (1839), Mont. & Ch. 576; *Re* MARSTON, 4 Deac. 191; 9 L. J. Bcy. 5; 3 Jur. 1079, Ct. of R.

Annotations:—**Expld.** *Re* Hayne & Shadwell, *Ex p.* Law (1840), 1 Mont. D. & De G. 16, Ct. of R. **Mentd.** *Re* Dobbs, *Ex p.* County of Gloucester Bank (1866), 15 L. T. 53.

3931. Voting for assignees—Dividends—Provided separate creditors paid.]—A separate commission having issued on the petition of a joint creditor, the joint creditors were permitted to prove for the purpose of voting in the choice of assignees & taking dividends, provided they paid the separate creditors.—*Ex p.* CHANDLER (1803), 9 Ves. 35; 32 E. R. 513, L. C.

Annotations:—**Folld.** *Ex p.* Hubbard (1807), 13 Ves. 424, L. C. **Consd.** *Ex p.* Taitt (1809), 16 Ves. 194, L. C.

3932. —— Provided separate creditors paid.]—On a petition by joint creditors to be admitted to prove their debts under a separate commission of bkpcy., & to vote in the choice of assignees:—*Held:* joint creditors could not vote in the choice of assignees under a separate commission, unless they paid the separate creditors 20*s.* in the pound.—*Ex p.* HUBBARD (1807), 13 Ves. 424; 33 E. R. 353, L. C.

Annotation:—**Refd.** *Ex p.* Taitt (1809), 16 Ves. 194, L. C.

See, also, Nos. 3920, 3930, *ante,* Nos. 4001 *et seq., post.*

3933. Competing with separate creditors.]—A fiat was issued by bkpt., at his own instance, as a common carrier, he being such only as a member of a co. for carrying parcels, which did not reach complete registration, & of which he was a provisional director:—*Held:* a creditor of the co. was entitled, under 6 Geo. 4, c. 16, to prove under the fiat, he not claiming to compete with the separate creditors.—*Re* HILL, *Ex p.* HILL (1850), 14 L. T. O. S. 380; 14 Jur. 474.

(*c*) *Against whose Estate.*

3934. Estate of deceased partner—Proof under common decree for proof of debts—Direction of court necessary.]—Equitable creditors cannot prove their debts, under a decree for the proof of debts, without a declaration of their right by the ct., or some special direction to the master; & one partner having died, & the surviving partners afterwards becoming bkpt., creditors, by promissory notes of the original partnership, cannot, under a common decree, prove their claims against the estate of deceased partner.—BOWLES *v.* YORK (1823), 1 L. J. O. S. Ch. 134.

See, further, EXECUTORS & ADMINISTRATORS.

3935. —— Continuing firm adopted as debtor—Evidence of adoption—Failure to claim.]—Where money has been lent originally to a partner in an old firm, & he dies, & the creditor, being also one of the exors. of his original debtor, makes no demand for many years upon the new firm to pay the sum to the original debtor's estate, he will not be allowed, after the bkpcy. of the new firm, to claim it as a debt due to him from his testator's assets.—CAMPBELL *v.* CAMPBELL (1825), 3 L. J. O. S. Ch. 129.

3936. —— —— —— —— Receipt of interest from firm.]—A firm of bankers, consisting of two partners, A. & B., received money on deposit at interest, for which they gave deposit notes in the usual form to the depositors, who, when the amount on deposit was increased or diminished, gave up their old notes & received fresh ones for the new amount. X. & Y. were admitted into the partnership, & notice of the change in the firm was given to the depositors. A fortnight afterwards A. died, & the business was carried on under the same firm by B., X. & Y. B. then died & the business was carried on by X. & Y. still under the same firm, until they went into liquidation. All the depositors knew of A.'s death, & none of them made any claim against his estate. Some of them had not altered the amount of their deposit, but retained the notes they had received in his lifetime, but they had received interest from X. & Y. Others had increased, & others had diminished, the amount of their deposit, after A.'s death, receiving in each case fresh deposit notes, & they had all proved in the bkpcy. of X. & Y. for the amount due on their notes as money "advanced & lent" to bkpts.:—*Held:* in each case there had been a complete novation, & none of the depositors were entitled to prove against the estate of A.—BILBOROUGH *v.* HOLMES (1876), 5 Ch. D. 255; 46 L. J. Ch. 446; 25 W. R. 297.

Annotations:—**Consd.** Rouse *v.* Bradford Banking Co., [1894] 2 Ch. 32, C. A. **Refd.** Scarf *v.* Jardine (1882), 7 App. Cas. 345, H. L.; *Re* Head, Head *v.* Head, [1893] 3 Ch. 426. **Mentd.** *Re* Head, Head *v.* Head, [1894] 2 Ch. 236, C. A.

3937. —— Proof under decree for administration.]—Testator was a partner in a trading firm, & shortly after his death the surviving partner became bkpt. A dividend was paid on the joint debts, & after the joint estate had been fully distributed a decree was made for the administration of testator's estate:—*Held:* the joint creditors

Sect. 3.—Rights of joint creditors: Sub-sect. 3, B. (c).]

were not entitled to prove under the decree for the unpaid residue of their debts *pari passu* with testator's separate creditors, but must be postponed to them.—LODGE *v.* PRICHARD (1863), 1 De G. J. & Sm. 610; 2 New Rep. 537; 32 L. J. Ch. 775; 9 L. T. 107; 11 W. R. 1086; 46 E. R. 242, L. JJ.

Annotations:—**Consd.** *Re* Barned's Banking Co., Kellock's Case, *Re* Xeres Wine Shipping Co., *Ex p.* Alliance Bank (1878), 3 Ch. App. 769, L. JJ.; *Re* Budgett, Cooper *v.* Adams, [1894] 2 Ch. 557.

3938. Estate of retired partner—For bills indorsed between transfer of shares & making of return—Country Bankers Act, 1826 (c. 46).]—A. appeared, by the return under the above Act, to be a shareholder up to Nov., 1838. He then agreed to assign his shares to B., who was appointed by the co. a director in respect of those shares. In Feb., 1839, the co. indorsed bills to petitioners. No new return was made, & not till Mar. was the deed of transfer executed between A. & B.:—*Held:* A. continued a partner to the world until Mar., & was liable to payment of the bills, & proof against A.'s estate should be admitted.—*Re* PHILLIPS, *Ex p.* PRESCOTT (1839), 4 Deac. 253; Mont. & Ch. 611, Ct. of R.

3939. Estate of original sole partner—Admission of partner advertised by circular—Admission on salary only.]—A wine merchant carrying on business under the firm of J. R. & Co. announced by a circular that he had taken his nephew into partnership. The business was thenceforth carried on under the style of J. R. Sen. & Co. but, as between uncle & nephew, the latter received a salary only & did not participate in the capital, profits or losses of the concern. On both becoming bkpt.:—*Held:* a creditor who supplied goods to the firm might prove against the separate estate of the uncle.—*Re* REAY, *Ex p.* ARBOUIN & ALLNUTT, *Re* REAY, *Ex p.* GONNE (1846), De G. 359, Ct. of R.

Annotation:—**Refd.** *Re* Pulsford, *Ex p.* Hayman (1878), 8 Ch. D. 11, C. A.

3940. Estate of surviving partner.]—A surviving partner became bkpt.:—*Held:* a creditor of the firm might receive dividends out of bkpt.'s estate with the separate creditors.—*Re* CARWOOD, *Ex p.* BINGLEY (1848), De G. 635.

3941. —— For joint & several notes given by firm & surety—For bills indorsed by partner in name of firm after death of copartner.]—A. & B., partners, & C., as their surety, gave a joint & several promissory note to D., by which they "jointly & severally promised to pay" to D. the amount of a partnership debt, due from A. & B. The note was signed by A. & B., not as individuals, but in their partnership firm, & by C., the surety:—*Held:* the note could not be treated as the several note of each one of the three, but as the several note only of the surety, & the joint note of A. & B., &, on the bkpcy. of A., who had survived his partner B., the holder of the note could only rank as a creditor against the joint estate.

A. survived B. his partner, & continued the business in the same firm of A. & B. At the time of B.'s death, a large balance was owing by them to their bankers, to whom A., some time after B.'s death, indorsed several bills in the partnership firm of A. & B.:—*Held:* it could not be inferred from that circumstance alone, that the bills were so indorsed upon a partnership transaction of A. & B., & the bankers might prove the amount of the bills against the separate estate of A.—*Re* MANLEY, *Ex p.* WILSON (1842), 3 Mont. D. & De G. 57.

Annotation:—**Expld.** *Re* Carwood, *Ex p.* Bingley (1848), De G. 635.

3942. Estate of continuing partner—Continuing partner not accepted as sole debtor.]—By deed the stock & effects of a partnership were assigned to the continuing partner, who covenanted to pay the joint debts. The partners became bkpts.:—*Held:* the joint creditors not having, previous to the bkpcy., accepted the continuing partner as their sole debtor, had not an election to prove against the separate estate of the continuing partner.—*Re* HENDERSON & MORLEY, *Ex p.* FREEMAN (1819), Buck, 471.

3943. —— —— Whether acceptance by agent after lunacy of principal sufficient.]—A., a creditor of B. & C., gave D. a general power of attorney for the management of his affairs, dated July 4, 1834, under which D. consented to an arrangement between B. & C., on the dissolution of their partnership, that C. should become solely responsible for A.'s debt. That being still unpaid, C. became bkpt., B. remaining solvent, & D. proved the debt against the separate estate of C. After the fiat A. was found to have been lunatic since July 1, 1834. On petition to expunge, on the ground that D.'s adoption of C. as sole debtor was under a void power, & without authority, & that B. remained solvent, & liable:—*Held:* the proof was properly made.—*Re* WALDEN, *Ex p.* BRADBURY (1839), Mont. & Ch. 625; 4 Deac. 202; 9 L. J. Bcy. 7; 3 Jur. 1108, Ct. of R.

See, further, AGENCY, Vol. I., p. 692.

3944. —— —— Sufficiency of evidence of acceptance.]—A. & B. being jointly indebted to C., B. became bkpt., but the joint effects, not being more than equal to the payment of the partnership debts, were left in the possession of A., who afterwards made an arrangement with C. for the payment of his debts by instalments, &, as a further security, handed over the deeds of certain leasehold pro-

PART XI. SECT. 3, SUB-SECT. 3.—B. (c).

3938 i. *Estate of retired partner—Assigning for benefit of creditors—Debt of firm.*]—Where an assignment for the benefit of creditors is made by an assignor carrying on business by himself, creditors having claims against him for goods sold to a firm in which he was formerly a partner are entitled to rank against his estate ratably with creditors having claims for goods sold to the assignor alone.—MACDONALD *v.* BALFOUR (1893), 20 A. R. 404. —**CAN.**

3942 i. *Estate of continuing partner—Fraudulent assignment of partnership property—Discretion of court.*]—A partnership existing between two persons was, within three months of the issue of a writ of attachment in insolvency, dissolved, & one of the partners transferred his interest in the partnership property to the other, but at the time of such transfer the firm, as well as the partner individually, were to their knowledge insolvent. Afterwards the remaining partner & the firm were placed in insolvency by compulsory liquidation; a different assignee appointed for each, & an order was made transferring the effects of the partnership from the separate assignee to the assignee of the firm on the ground of fraud:—*Held:* even if the partnership creditors could prove against the effects in the hands of the separate assignee, so that all that was required was a direction to that effect, as the making of the order was purely a matter of discretion, the ct. would not interfere.—*Re* CATON & COLE (1876), 26 C. P. 308.—**CAN.**

b. *Joint estate of surviving partner—Formerly partner in debtor firm.*]—A claim on behalf of a bank, to prove on the joint estate of bkpts. (one of them being the surviving partner of an original firm, which had become shareholders in said bank), for the amount of calls due previous to the date of the commission, refused, but allowed to be proved on the separate estate of one of the partners. A claim for a further amount of calls made subsequent to that date, refused altogether.—*Re* LITTLE, *Ex p.* FIFE BANKING CO. (1843), 6 I. Eq. R. 197. —**IR.**

perty, to which he was separately entitled, for the purpose of preparing an assignment. A. only paid some of the instalments, & a separate fiat afterwards issued against him:—*Held:* there was no evidence of the conversion of the joint debt of A. & B. into the separate debt of A., & C. could only prove against the joint estate.—*Re* HEATLEY, *Ex p.* SMITH (1840), 1 Mont. D. & De G. 165, Ct. of R.

Annotation:—**Mentd.** *Re* Early & Smith, *Ex p.* Early's Exors. (1866), 14 L. T. 296.

3945. ——— ——— ———.]—A. & B. dissolved partnership, & notice thereof was published in the *Gazette* & several country newspapers. A. retired from the firm. B. continued the business under the style of B. & Co., the former style having been A. & B. A. assigned his moiety of the partnership effects to B., who agreed to indemnify A. against the partnership debts. At the time of the dissolution A. & B. owed a joint debt of £1,270 to C., who continued to deal with B. without any rest in the account until B.'s bkpcy., when the debt had increased:—*Held:* the £1,270 could not be proved under the fiat against B., there being no satisfactory evidence that C. had accepted B. as his separate debtor.—*Re* LIVERSIDGE, *Ex p.* APPLEBY (1837), 2 Deac. 482, Ct. of R.

3946. Joint estate of continuing partners—Two partners & another forming debtor firm.]—One of three partners assigned his interest in the partnership property to the two continuing partners, who covenanted to pay the debts of the three, & afterwards became bkpt.:—*Held:* joint creditors of the three were not entitled to prove against the estate of the two.—*Re* ASPINALL, *Ex p.* FRY (1821), 1 Gl. & J. 96.

3947. ——— ———.]—A., B. & C. dissolved their partnership, when C. executed a regular assignment of the partnership effects to A. & B., & notice of the dissolution appeared in the *Gazette*. A. & B. continued the business in the same firm until their bkpcy., which was more than twelve months after the dissolution & assignment:—*Held:* a joint creditor of A., B. & C. could not prove against the estate of A. & B.—*Re* GLASSCOTT, *Ex p.* GURNEY (1842), 2 Mont. D. & De G. 541; 13 L. J. Bcy. 17; 6 Jur. 630, Ct. of R.

3948. ——— ——— **Continuing firm adopted as sole debtors—Acts showing adoption.**]—Slight circumstances are sufficient to prove a contract between creditors of a dissolved firm & continuing partners, that the debts due from the dissolved shall become debts due from the new firm.

A new firm, consisting of two of the partners of a dissolved firm of three, sent a circular to the creditors of the three, stating that the debts of the three would be paid by the two, & creditors of the three sent to the two accounts, debiting them with debts due from the three:—*Held:* the creditors were entitled to prove not only those, but the other debts of the three against the two.—*Re* NICHOLSON, *Ex p.* CHANINEL (1861), 3 De G. F. & J. 752; 45 E. R. 1070, L. JJ.

3949. Joint estate of several partners—Carrying on business as separate firm—Debtor firm composed of such partners & others.]—A., B. & C. carried on trade in partnership. A. & B. were partners in a distinct trade, & became bkpt.:—*Held:* D., a creditor of the three for goods sold & delivered, could not prove his debt against the joint estate of the two, but should be admitted to prove against the separate estate of each.—*Ex p.* CLEGG (1793), 2 Cox, Eq. Cas. 372; 30 E. R. 171.

3950. Joint adventure.]—Where several firms are engaged in a joint adventure, the creditors of the adventure, in the event of bkpcy., & there being no joint property, must prove against the estates of the individuals, not of the firms.—*Re* HUMBLE, *Ex p.* WYLIE (1816), 2 Rose, 393.

Annotation:—**Dbtd.** *Re* Crowder, *Ex p.* Nolte (1826), 2 Gl. & J. 295, L. C. When I decided *Ex p. Wylie*, I must have seen it in a point of view, in which, after most laborious consideration, I cannot see it now (LORD ELDON, C.).

3951. ———.]—Where different firms are engaged in a joint adventure, the creditors of the adventure may prove against the joint estates of the minor partnerships.—*Re* CROWDER, *Ex p.* NOLTE (1826), 2 Gl. & J. 295, L. C.

3952. ———.]—A., B. & C., who were in partnership, were joint owners of ships with D. A., B. & C. became bkpt. Creditors for goods supplied to the ships on account of the owners sought to prove against their joint estate:—*Held:* there was no right of proof against the joint estate of three out of four joint contractors, for a debt contracted by the four, even for the purpose of voting in the choice of assignees.—*Re* ACRAMAN, *Ex p.* BENSON (1842), 2 Mont. D. & De G. 750; *sub nom. Re* ACREMAN, *Ex p.* BENSON, 11 L. J. Bcy. 55, Ct. of R.

3953. Joint & several bond by partners & others as sureties.]—Two partners with two others executed a joint & several bond as sureties. The partners became bkpt. in respect of both their joint & separate estates. The debt under the bond was unconnected with their partnership business:—*Held:* the creditors on the bond might prove against the joint estate *pari passu* with the partnership creditors.—HOARE *v.* ORIENTAL BANK CORPN. (1877), 2 App. Cas. 589; 37 L. T. 173; 25 W. R. 757, P. C.

3954. Joint estate of two of five co-obligants—On joint & several bond.]—The holder of a joint & several bond against five may not prove it against the joint estate of two of the five.—*Re* WHITTOW, *Ex p.* PHILLIPS (1835), 4 L. J. Bcy. 83.

3946 i. *Joint estate of continuing partners—Adoption of debt by continuing firm.*]—A., B., C. & X., being partners, A. & X. gave a bond to K., on which separate judgments were entered in 1818. B. became A.'s exor.; & in letters prior to 1822 treated the debt as due by him, but it did not appear whether it was as A.'s representative or a partner of the then firm. In 1822 K. proved the debt in a suit against X.'s estates. Of the original firm C. alone was a partner in 1829. In 1830 letters were written, but not to K., in the name of the firm, offering an arrangement by discharging the debts out of a debt due to them, which was never effected. The property was transferred to the successive firms. In 1834 the last firm became bkpt.:—*Held:* there was not sufficient to show a transfer of liability to the bkpt. firm so as to sustain a proof against their joint estate.—*Re* LITTLES (1847), 10 I. Eq. R. 275.— **IR.**

3946 ii. *S. P. Re* RUTLEDGE & CO., *Re* FLOWER SALTING & CO., *Ex p.* ROLFE & BAILEY (1863), 2 W. & W. 16, 51.—**AUS.**

3949 i. *Joint estate of several partners—Partners carrying on business as separate firm—All partners members of both firms.*]—A. & B. carried on two separate businesses in partnership under the firm of "A. & B.," & "B. & Co." All the capital went to the business of "A. & B." & all expenses connected with every branch of the partnership were debited to A. & B. The business of B. & Co. was carried on in the same buildings as that of A. & B., & the rent debited to "A. & B." The bookkeeper kept separate books for each business. "B. & Co." drew certain promissory notes against consignments, the profits arising from which would have been paid into the coffers of the firm "A. & B." & all loss would have been borne by it, had not the firm "A. & B." surrendered. The firm of "B. & Co." was not surrendered or sequestrated:—*Held:* the two firms constituted one partnership, & the holders of the promissory notes drawn by "B. & Co." could prove them upon the insolvent estate of "A. & B."—BATE *v.* HUNT (1883), 2 S. C. 179.—**S. AF.**

3954 i. *Joint estate of two of five co-obligants—On joint & several bond.*]—H. & C. having with S. & two other persons for themselves & each of them, & any two, three, or four of them, jointly & severally bound themselves to resp. to secure advances to be made to S.; H. & C., who carried on business in partnership,

Sect. 3.—Rights of joint creditors: Sub-sect. 3, B. (c) & (d).]

3955. Estate of partner misappropriating firm funds.]—Creditors of a partnership, which failed in two years, were allowed to come upon the separate estate of one partner in respect of effects taken out of the partnership by him without the privity of the other.—*Ex p.* LODGE & FENDAL (ASSIGNEES OF) (1790), 1 Ves. 166; 1 Cooke's Bankrupt Laws, 7th ed., p. 505; 30 E. R. 283.

Annotations:—**Consd.** *Ex p.* Reeve (1804), 9 Ves. 588; *Ex p.* Harris (1813), 2 Ves. & B. 210, L. C.; *Re* Higginson & Deane, *Ex p.* Hinds (1849), 14 L. T. O. S. 449; Read *v.* Bailey (1877), 3 App. Cas. 94, H. L. **Refd.** *Ex p.* Hamper (1811), 17 Ves. 403; *Re* Slaney, *Ex p.* Young (1814), 2 Rose, 40; *Ex p.* Yonge (1814), 3 Ves. & B. 31.

See, also, Nos. 4216, 4217, *post.*

(d) In respect of what Debts.

3956. Debt for goods sold—Joint note given for same.]—If a joint note of A. & B. is given for goods sold to A. only, & a receipt given as for money paid, & a joint commission issues against A. & B., the seller may still prove his debt for goods sold against the separate estate of A.—*Ex p.* SEDDON (1788), 2 Cox, Eq. Cas. 49; 30 E. R. 23.

3957. Debt due by partner carrying on separate business—Partnership bill not signed by partner individually taken for larger sum—Under obligation to repay excess.]—T. was in partnership with M. & F. He also carried on a separate trade, & being indebted in £100 on his separate account to K., he sent him a bill of exchange that wanted two months of becoming due for £300, indorsed by T., M., & F., but not by T. in his individual character, & requested K. to give him credit for £100, & to send him a bill for the remainder of the £300. K. gave him credit for £100, & sent him a banker's cheque for £200, which was duly paid. The bill for £300 was dishonoured, & T., M. & F. became bkpts.:—*Held:* K. was not entitled to prove for any part of the £300 against the separate estate of T.—*Re* MOORE, TENNANT & FOSTER, *Ex p.* KIRBY, *Ex p.* TODD (1819), Buck, 511.

3958. Balance of debt unsecured—Secured part proved against joint estate—Security consisting of joint property.]—A large sum was due from bkpts. to their banker, on the balance of their account, part of which was secured by joint securities, & had been proved against the joint estate:—*Held:* the creditor was entitled to prove the residue of the debt which was not covered by the joint securities, against the separate estate of one of bkpts.—*Re* PARKES, *Ex p.* MILLS (1826), 4 L. J. O. S. Ch. 192.

3959. Bill signed by continuing partners in old firm's name—Without consent of retiring partner.]—A partnership of A., B. & C. was dissolved, A. & B. agreeing to pay all partnership debts. D., a creditor of the old firm ignorant of the terms of dissolution, applied for payment. A. & B. by letter asked for time, & ultimately D. drew a bill on A., B. & C. which A. & B. accepted in the name of A., B. & C. but without C.'s authority. A. & B. also by letter signed by them alone promised payment of the bill. A., B. & C. became bkpt.:—*Held:* D. might recover the amount of the bill against A. & B.'s estate.—*Re* COWARD, *Ex p.* LIDDIARD (1835), 4 Deac. & Ch. 603; 2 Mont. & A. 87; 4 L. J. Bcy. 65, Ct. of R.

3960. Note signed by one partner for himself & copartners.]—M., who carried on business in partnership with C., P. & S. as bankers, signed one of the notes of the bank as follows: "I promise to pay, etc., for C., M., P. & S., M." On the firm becoming bkpt.:—*Held:* the holders could not prove on such note against the separate estate of M.—*Re* CLARKE, *Ex p.* BUCKLEY (1845), 14 M. & W. 469; De G. 153; 14 L. J. Ex. 341; 9 Jur. 931; 153 E. R. 559.

Annotation:—**Refd.** Maclae *v.* Sutherland (1854), 18 Jur. 942.

3961. Failure to deliver partnership property—Sold by partner on behalf of firm.]—L., one of three partners, contracted to sell to D. one hundred shares in a joint stock bank, which were standing in the name of J., one of L.'s partners, but which were, in fact, the property of the firm, & agreed in consideration of D. accepting a bill for the amount of the purchase-money, drawn in the name of the firm, to cause the shares to be duly transferred to D. The bill was negotiated by L. & Co., who became bkpt. before application could be made to the bank to transfer the shares to D., when the bank refused to make the transfer claiming a lien on the shares for their own advances:—*Held:* D. could not prove against the separate estate of L. for money had & received, but only against the joint estate of L. & Co.—*Re* ROSTRON, *Ex p.* RALEIGH (1838), 3 Deac. 160; 8 L. J. Bcy. 20.

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were adjudicated insolvents, both in respect of their separate estates & their joint estate, upon their own application, & each entered the debt (which was unconnected with their partnership business) to resp. under the bond in the schedule of his separate estate. Resp. was subsequently admitted to prove the same against the joint estate:—*Held:* under the bkpcy. law of England as it existed in 1841, which had been introduced into the colony concurrently with Insolvent Act, resp. was properly admitted to prove against the joint estate *pari passu* with the partnership creditors.

No distinction can be drawn between joint debts so as to exclude from proof against the joint estate any joint debt which is not shown to have been incurred in the strict sense of the term as a partnership transaction, & as arising out of partnership business, either under the said bkpcy. law or under Insolvent Act, ss. 4, 17.—HOARE *v.* ORIENTAL BANK CORPN. (1877), 2 App. Cas. 589, P. C.—**AUS.**

d. *Separate estate of one of two co-obligants—Composition accepted from other.*]—L. lodged a proof of debt against the estate of P. in respect of a promissory note made by P. & R. R. had held a meeting of his creditors & L. & the other creditors agreed to accept a composition, which was paid:—*Held:* such new agreement with one joint contractor discharged the other joint contractor, & L. was not entitled to prove at all upon P.'s estate.—*Re* PEARSE, [1905] V. L. R. 446.—**AUS.**

e. *Separate estate of trader in Scotland—Partner in English firm—Proof by creditor of firm against separate estate—Pari passu with personal creditors.*]—The estates of a party carrying on business in Scotland, but who was also a partner of an English co., were sequestrated under the Scottish Bkpt. Act:—*Held:* a creditor of the co. was entitled to be ranked upon his sequestrated estate, *pari passu* with his personal creditors, according to the Scottish law of ranking.—LUSK *v.* ELDER (1843), 5 Dunl. (Ct. of Sess.) 1279.—**SCOT.**

PART XI. SECT. 3, SUB-SECT. 3.—B. (d).

3956 i. *Debt for goods sold—Joint note given for same—By partner & partnership firm.*]—A member of a partnership joined with the partnership in making a promissory note for the price of goods supplied to the firm:—*Held:* the seller was entitled to rank upon the insolvent estate of the partner for the amount of the unpaid note, ratably with the individual creditors of the partner.—GORDON *v.* MATTHEWS (1909), 14 O. W. R. 873; 1 O. W. N. 103; 19 O. L. R. 564.—**CAN.**

f. *Debt arising out of contract with firm—Existing partnership assets.*]—Where the origin of debt for which pltf. claimed to rank against the separate estate of a partner is on a contract entered into with the firm, which also failed & has existing assets, pltfs. as such firm creditors cannot rank against separate estate of partner.—FROST & WOOD CO. *v.* STODDART (1908), 12 O. W. R. 1133.—**CAN.**

g. —— *Calls on shares.*]—A claim for calls due on shares by an original firm allowed to be proved on the separate estate of the surviving partner, where the calls were due before the date of the commission. A claim for calls subsequent to the date refused.—*Re* LITTLE, *Ex p.* FIFE BANKING CO. (1843), 6 I. Eq. R. 197.—**IR.**

3962. Joint & several bond by partners & surety—Surety's liability limited to amount due at date of bond.]—A., B. & C., partners in trade, together with D. as their surety, entered into a joint & several bond to their bankers, preparatory to the latter making further advances to the partnership firm. The bond was conditioned for the payment of £10,000 on demand, with interest from its date. At the date of the bond, there was a balance of £2,375 due to the bankers, which was discharged by subsequent payments, but, at the time of the bkpcy. of A., B. & C., a much larger balance was due from them to the bankers, than the sum secured by the bond. D., the surety, died, & in a creditor's suit brought by the bankers against his representatives, to which suit the assignees of A., B. & C. were also parties, it was found, that bkpts. intended that the bond should be held by the bankers, as a security for any general balance that should become due to them, but that the surety intended the bond to be a security only for the particular balance due to them at the date of the bond:—*Held:* the bond was, in the circumstances, provable by the bankers against the separate estate of A., for the whole amount of the principal & interest secured by it.—*Re* FIDGEON, *Ex p.* FIDGEON (1840), 4 Deac. 217, L. C.

3963. Joint & several covenant by two with surety—Joint judgment entered on warrant of attorney given by all—Debt not merged in judgment.]—A. & B., with C. as surety, jointly & severally granted an annuity, & covenanted that they, or one of them, would pay it. A warrant of attorney was given by the three as collateral security, & it was agreed that the judgment to be entered up should be considered as a further security. Judgment was signed jointly against the three. A. & B., who received consideration money for the annuity, became bkpt.:—*Held:* the grantee could prove against A. & B.

The merger of a debt in a higher security may be prevented by the act & intention of the parties, & a judgment does not necessarily extinguish a prior debt; & it seems repugnant to reason that a future annuity debt should be merged in a bygone judgment (SIR J. CROSS).—*Re* KEASLEY, *Ex p.* PENNELL (1841), 2 Mont. D. & De G. 273; 5 Jur. 899; *sub nom. Re* KEARSLEY, *Ex p.* PENNELL, 10 L. J. Bcy. 77, Ct. of R.

3964. Joint & several covenant to pay on demand made in particular way—No such demand made before bankruptcy.] — Where parties jointly indebted enter into a covenant, by which they promise on demand, jointly & severally, to pay, but expressly stipulate that the demand shall be in writing, & sent by post to a particular place, & no demand is made previously to the bkpcy., the debt is not provable against the separate estate of the respective parties.—*Re* RODHAM, *Ex p.* FLINTOFF (1844), 3 Mont. D. & De G. 726; 8 Jur. 766, Ct. of R.

See, also, No. 3903, *ante.*

3965. Guarantee signed by partners but not in firm name.]—A. & B., partners, trading as C. & Co., signed a guarantee in their private names only. B. became bkpt.:—*Held:* there was a joint contract which created a joint debt, & proof must be made against the joint estate, if any; in the present case, however, there being no joint assets, proof had been properly received against the separate estate.—*Re* HAYWARD, *Ex p.* BURDEKIN (1842), 2 Mont. D. & De G. 704; 6 Jur. 977, Ct. of R.

3966. Guarantee signed by firm & also by individual partners.]—A firm of S. & Co. consisted of three partners, F., R. & N., & carried on business in London. Another firm of N. & Co. consisted of five partners, F., R., N., H. & M., & carried on business in India. In Sept., 1872, N. & Co. applied by letter to a bank for a credit, agreeing to deliver to the bank as security "the personal obligation of this firm & individual partners, & a guarantee by S. & Co." The bank granted the credit, & under it N. & Co. received large advances. In Feb., 1874, a letter was addressed to the bank, signed by S. & Co. & also by F., R. & N., saying, "We hereby guarantee you payment of all sums which are or may at any time become due to you by N. & Co. under the credit applied for in Sept., 1872, & granted by you." That letter & the signature of S. & Co. to it were written by F., & he had negotiated the original transaction with the bank. S. & Co. filed a liquidation petition, & N. & Co. stopped payment, a large sum being due to the bank under the credit:—*Held:* the letter of Feb., 1874, pledged to the bank the joint liability of the firm of S. & Co., & also the separate liability of each of the three partners who signed it, & the bank were entitled to prove against the separate estate of F. for the amount due to them by N. & Co. under the credit.—*Re* SMITH, FLEMING & Co., *Ex p.* HARDING (1879), 12 Ch. D. 557; 48 L. J. Bcy. 115; 41 L. T. 517; 28 W. R. 158, C. A.

3967. Debt sworn to as joint debt in affidavit to petition for joint adjudication.]—A creditor, who has made an affidavit of debt as due from two bkpts. jointly in support of the petition for adjudication against the firm, is entitled to prove against the separate estate of one of bkpts. in respect of the same debt.—*Re* WIFFIN & KING, *Ex p.* CRIPPS (1858), 30 L. T. O. S. 296.

See, further, Part III., Sect. 1, sub-sect. 2, H, *ante.*

3968. Loss from disclaimer of lease by trustee of bankrupt firm.]—When the trustee in bkpcy. of partners disclaims a lease of premises used by the partners for partnership purposes, but which was granted to the partners as joint tenants, they entering into a joint & several covenant to pay the rent, 1869 Act, s. 23, gives the lessor a right to prove against the separate estate of each partner for the injury caused to him by the disclaimer.—*Re* SHAND, *Ex p.* CORBETT (1880), 14 Ch. D. 122; 49 L. J. Bcy. 74; 42 L. T. 164; 28 W. R. 569, C. A.

3969. Debt which bankrupt under no contract to pay.]—A. & B. traded in partnership as A. & Co. in England & abroad, A. managing the home business & B. the branch abroad. C. & D. carried on business in England as D. & Co., under an agreement by which C. was to be the sole principal of D., who was to be the manager of the business at a salary with a share of profits. Business

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3962 i. *Joint & several bond by partners & surety—Separate judgments against all obligors—Proof against joint estate.*]—Bankers having taken from a firm of four traders a joint & several bond & warrant to confess judgment, with two sureties, to secure whatever balance, not exceeding a certain amount, might be due at any time from the firm to the bank, entered under the warrant six separate judgments. The firm became bkpt.:—*Held:* the bank might prove for a balance due to them, within the amount covered by the bond & warrant, against the joint estate of bkpts.—*Re* CLARKES (1845), 8 I. Eq. R. 60; 2 Jo. & Lat. 212.—IR.

3962 ii. —— *Joint judgment—Proof against separate estate of continuing partner.*]—A. & B., to secure a partnership debt due, gave C. their joint & several bond & warrant of attorney, upon which C. entered judgment. On the dissolution of the partnership A. alone carried on the business, & later A. became bkpt.:—*Held:* C. could not prove for the amount secured by the bond upon A.'s estate; the several as well as the joint bond & warrant having been merged in the joint judgment.—*Re* GALLIE, *Ex p.* GALLIE (1859), 9 I. Ch. R. 188.—IR.

Sect. 3.—Rights of joint creditors: Sub-sect. 3, B. (d) & (e).]

transactions took place in England between A. & Co. & D. & Co., & on the bkpcy. of both firms a large balance was due to A. & Co. from D. & Co. C. was in fact the agent of A., who was the secret & sole principal of D., but that was unknown to B. & D. until after the bkpcy., & D. had held himself out to A. & Co. & others as a principal. The trustee of A. & Co. tendered a proof against the estate of D. for the balance due from D. & Co. to A. & Co.:—*Held:* the proof could not be sustained, for, in the circumstances, there was no contract between D. & A. that D. should pay for the goods that had been supplied.—*Re* WAKEHAM, *Ex p.* GLIDDON (1884), 13 Q. B. D. 43.

3970. Money deposited by treasurer in bank in which he was partner.]—The comrs. under a lighting Act being authorised to appoint a treasurer by writing under their hands & seals, instead of appointing one in the form prescribed by the Act, merely nominated F. as treasurer, who was a partner in a banking-house. F. did not receive or pay any money, as treasurer, but the collector received all the money, & paid the amount into the banking-house by authority of the comrs., who, nevertheless, when making disbursements, drew cheques upon F. individually, as treasurer, which cheques, however, were not presented to or paid by him, but by the banking-house. The account in the pass-book was kept between the banking firm & the comrs., & the account was from time to time signed & allowed by the comrs. The bankers became bkpt., having a large sum in their hands belonging to the comrs.:—*Held:* the comrs. could not prove for the amount against the separate estate of F., but could only come in as creditors against the joint estate of the firm.—*Re* FORSTER, *Ex p.* DOBINSON (1837), 2 Deac. 341, Ct. of R.

3971. Loss from breach of trust—Proof limited to amount actually received by bankrupt trustee.]—By an antenuptial settlement the intended wife assigned a debt due to her from A., & another debt due to her from B., to A. & B. upon trust to invest same & stand possessed thereof upon the trusts of the settlement. Neither of the debts was invested, but B. never had any control over the sum due from A., which never came into his hands. A. & B. continued to pay interest on their respective debts to the *cestuis que trust.* B. became bkpt. & A. insolvent:—*Held:* proof could only be made by the *cestuis que trust* for the amount of the debt due from B.—*Re* TURNER, *Ex p.* WOODWARD (1837), 2 Deac. 401; 3 Mont. & A. 232; 6 L. J. Bcy. 60; 1 Jur. 385, Ct. of R.

3972. —— Trustees paying fund into bank in which one trustee was partner.]—A marriage settlement recited that it had been agreed that a debt should be assigned to the trustees, upon trust, after calling it in, to invest the money upon such security as should be approved of by the husband & his father, either on govt., real, or personal security, &, by the witnessing part, the debt was assigned upon trust, on calling in & investing same on govt., real, or personal security, or in the purchase of lands, at the sole order, & by the sole direction, consent, & approbation of the husband & his father, or the survivor, to stand possessed thereof on the trusts therein mentioned. Then followed the trusts, & a power, in the usual form, for the trustees, with the consent of the husband & his father, or the survivor, in writing, to invest the trust money in the funds, or on real security, or in the purchase of freehold or leasehold estates:—*Held:* a loan of the trust fund to a bank, in which one of the trustees was a partner, on an interest note, without a written consent, was a breach of trust, constituting a provable debt against the separate estate of the trustee.—*Re* WISE, *Ex p.* HAKEWILL (1842), 2 Mont. D. & De G. 607; 6 Jur. 787, Ct. of R.

3973. —— ——.]—Trust funds were paid into a bank, in which one of the trustees was a partner. The banking firm became bkpt.:—*Held:* the administrator of the *cestui que trust*, who was also a co-trustee of bkpt., could prove against his separate estate, without prejudice to the right of contribution of the trustee in bkpcy. against bkpt.'s co-trustees.—*Re* RIDGWAY, *Ex p.* MEIN (1886), 2 T. L. R. 780; 3 Morr. 212.

3974. —— Trustee lending money to firm in which he was partner—Proof against all partners.]—Testatrix bequeathed money to trustees, with power to lend it to H. & Co., "or by whatever other firm name same might be called." H. & Co. then consisted of the two trustees & two other partners. One of the trustees died, & successive changes took place in the firm, which ultimately consisted of the surviving trustee & a new partner, who had notice of the trust. On every change in the firm, a fresh promissory note was given by the firm to the surviving trustee, but no security was given or required. On the bkpcy. of the surviving trustee & his partner:—*Held:* not only the surviving trustee but also his bkpt. partner had been guilty of a breach of trust, & the amount of the trust fund was not only the joint debt of bkpts., but also the separate debt of each, & the beneficiaries had a right of proof against each separate estate.—*Re* HARFORD, *Ex p.* POULSON (1844), De G. 79; 9 Jur. 262, Ct. of R.

3975. —— Bankers investing funds ultra vires—Not constituting themselves trustees.]—Exors. had a balance in that character with bankers, who, with the exors.' consent, invested part of it on securities not of a proper description for an investment by exors. The bankers made no inquiry as to the power of the exors. to make the investment, but if they had made the inquiry,

k. *For debt of one—Judgment recovered against debtor—Assignment for creditors during partnership—No proof against separate estate.*]—S. & M. were partners; S. became indebted to pltf., & S. & M. gave him their joint & several notes, on which judgment had been recovered against S. S. also carried on business alone. S. assigned his property to deft. G., during the continuance of his partnership with M. G. had not sufficient assets in hand to pay S.'s separate creditors in full; the partnership estate was not sufficient to pay its creditors in full. Pltfs. claimed to rank as creditors on S.'s estate in the hands of G.:—*Held:* pltfs. were not entitled to rank against the separate estate of S. under Assignments Act, s. 7.—FROST & WOOD CO. *v.* STODDART (1908), 12 O. W. R. 230, 688, 1133. —**CAN.**

l. *Indorsement of partner—On promissory notes drawn by partnership.*]—Deft. & his co-partner became insolvent, & pltfs. filed a claim against the partnership estate for the notes declared on, made by the partnership & indorsed by deft., without disclosing the security of deft. as indorser, or that they had attempted to rank on the individual estate. Deft. obtained the required number of signatures to a deed of composition & discharge, & very shortly before he applied for its confirmation, pltfs. attempted to amend their affidavit of claim against the partnership so as to disclose the security, but the affidavit was not resworn. At the same time a claim was filed against the individual estate. Deft., by his deed, covenanted in consideration of the discharge to pay a composition & give to each of the creditors his promissory notes secured by names approved of by the inspectors, but did not include pltfs.' claim in his schedule, or make or deliver any notes to them:—*Held:* the claim was a claim "provable" against deft.'s individual estate.—PICTOU BANK *v.* FRASER (1881), 2 R. & G. 116; 1 C. L. T. 567.—**CAN.**

m. *Joint promissory note—For accommodation of one partner—Provable against separate estate of partner accommodated.*]—*Re* BURNETT & LEVY (1878), 14 N. S. W. S. C. R. 528.—**AUS.**

all the information which they would probably have been able to obtain, would have shown that the exors. were residuary legatees, & that the balance was a part of the clear residue. The fact, however, was that the investment was a breach of trust, there being a codicil which the exors. had kept back, but afterwards proved, constituting them trustees only. On the bankers becoming bkpt. :—*Held :* they had not so participated in the breach of trust as to entitle the *cestuis que trust* to prove against their separate estates.—*Re* BIDDULPH, *Ex p.* BARNEWALL, DE FRONT'S (COUNTESS) EXECUTORS' CASE (1855), 6 De G. M. & G. 801 ; 43 E. R. 1444, L. JJ. ; *subsequent proceedings, sub nom. Re* BIDDULPH, *Ex p.* NORRIS (1869), 4 Ch. App. 280, L. JJ.

See. also, No. 4050, *post.*

3976. —— Trustee failing to pay out money deposited ultra vires with bank in which he was partner—Whether proof against separate estates of copartners.]—Trustees of a settlement only authorising investments in govt. or real securities, advanced part of the trust-money to a banking firm, in which one of the trustees was a partner, on the security of a mtge. of bonds in which some of the bankers were obligees. Afterwards another partner in the bank was appointed a new trustee of the settlement. The trust-money was not called in. On the bankers becoming bkpt. :—*Held :* there was a breach of trust on the part of the new trustee, constituting a provable debt against his separate estate.

Other part of the trust-money was paid with other money indiscrimately into the bank of the firm, to the private account of one of the partners, & an amount equal to the interest on that trust-money was credited regularly by his direction to one of the persons interested under the settlement, but no other circumstance was in evidence to affect the other partners with notice that the money thus paid in was subject to the trusts :—*Held :* the payment of interest was not sufficient for that purpose, & the money paid in did not constitute a provable debt, against the separate estates of the other partners.—*Re* STRAHAN, *Ex p.* GEAVES (1856), 8 De G. M. & G. 291 ; 25 L. J. Bcy. 53 ; 27 L. T. O. S. 129 ; 2 Jur. N. S. 651 ; 4 W. R. 536 ; 44 E. R. 402, L. JJ.

Annotations :—**Distd.** Cavendish *v.* Geaves (1857), 24 Beav. 163. **Refd.** *Re* Bankhead's Trust (1856), 2 K. & J. 560.

3977. —— Trustee carrying on testator's business ultra vires.]—Testator bequeathed certain sums to each of his children, & directed the trustees of his will to continue his business, & with the consent of his children to employ in the business any part of the general estate, paying interest for it. A bill in equity having been filed against the trustees by parties interested under the will, an arrangement was entered into, by which the sums to be paid to testator's children under the will were fixed at a certain amount, & the times of payment fixed, the trustees undertaking to secure payment by mtges. of testator's estate, & to make such assurances as the ct. should think necessary or proper. That arrangement was sanctioned by the ct., & applts., who were children of testator, assented to it. The mtges. were not executed, nor was the money due to applts. paid. One of the trustees became possessed of the whole property, & carried on the business alone, & afterwards filed a petition for liquidation. An order was made in the Ch. suit, declaring that applts. were entitled to a lien on the property for the money due to them. Applts. claimed to prove against the separate estate of the liquidating debtor :—*Held :* until the arrangement was carried out the trustees of the will remained trustees for applts. in respect of the money due to them, & were severally as well as jointly liable, & were also severally liable because they had agreed to give mtges., which, if properly drawn, would contain several covenants to pay, & applts. were entitled to prove against debtor's separate estate.—*Re* INGHAM, *Ex p.* CRAVEN, *Ex p.* KING (1885), 52 L. T. 714, C. A.

3978. Misappropriation by partner—Without knowledge of copartners—Whether proof against separate estates of continuing partners after his retirement.]—Money was deposited with a member of a firm of solrs. to invest upon mtge. Without the cognisance of his copartners, he purported to invest the money upon the security of a sum of consols, which he knew at the time had ceased to exist :—*Held :* the money was not a debt provable as against the separate estates of the continuing partners upon their bkpcy. subsequent to his retirement.—*Re* PARTRIDGE & EDWARDS, *Ex p.* BELLAMY (1862), 6 L. T. 696.

3979. Misappropriation by firm—Effect of proof against joint estate on joint judgment.]—Bkpt.'s firm were employed by exors. to sell trust property, & retained part of the proceeds, & the exors. proved on a judgment against the joint estate. Subsequently one of the firm became entitled to a legacy :—*Held :* where a judgment had been recovered against a firm jointly, & the firm became bkpt., if the partners were also severally liable in respect of the same matter by reason of its arising out of a breach of trust, the several liability of the partners was not, by reason of the creditor having obtained a joint judgment, merged in such judgment, so as to preclude proof by the judgment creditor against their separate estates.—*Re* DAVISON, *Ex p.* CHANDLER (1884), 13 Q. B. D. 50 ; *sub nom. Re* DAVISON, *Ex p.* BLENKIRON'S EXECUTORS, 50 L. T. 635.

Annotation :—**Mentd.** *Re* King & Beesley, *Ex p.* Horner (1894), 64 L. J. Q. B. 126.

Debts incurred by fraud—Whether against separate estate of all partners or only against separate estate of partner committing fraud.]—*See* Nos. 3887–3889, 3893, 3902, *ante,* Nos. 4018–4020, *post.*

(e) Where neither joint Properly nor solvent Partner.

3980. General rule.]—Proof by joint creditors allowed under a separate commission, there being no joint estate or solvent partner.—*Ex p.* SADLER & JACKSON (1808), 15 Ves. 52 ; 33 E. R. 675.

Annotations :—**Mentd.** Took *v.* Tuck (1827), 4 Bing. 224 ; Lee *v.* Lockhart (1837), 3 My. & Cr. 302 ; Kitchin *v.* Hawkins (1866), L. R. 2 C. P. 22.

3981. ——.]—A joint creditor, where there is no joint estate & no solvent partner, can prove *pari passu* with the separate creditors against the separate estates.

1883 Act, s. 40, is in substance the same as Lord Loughborough's Order of 1794, & is to be construed in the same way, & is subject to the same exceptions.—*Re* BUDGETT, COOPER *v.* ADAMS, [1894] 2 Ch. 557 ; 63 L. J. Ch. 847 ; 71 L. T. 72 ; 42 W. R. 551 ; 38 Sol. Jo. 530 ; 1 Mans. 230 ; 8 R. 424.

3982. Application of rule—Only where partnership.]—The rule, that proof cannot be made on a joint note, if there be a solvent partner, until proceedings have been taken against such solvent partner, does not apply to a case where the joint makers are not actual partners.—*Re* COOPER, *Ex p.* CROSFIELD (1836), 2 Mont. & A. 543 ; 1 Deac. 405 ; 6 L. J. Bcy. 13, Ct. of R.

Sect. 3.—Rights of joint creditors: Sub-sect. 3, B. (e) & (f) & C.]

Annotations:—**Folld.** *Re* Bendell, *Ex p.* Buckingham (1840), 9 L. J. Bcy. 34. **Dbtd.** Hoare *v.* Oriental Bank Corpn. (1877), 2 App. Cas. 589, P. C.

3983. —— ——.]—The rule that a joint debt cannot be proved against the separate estate of one debtor, while his co-debtor remains solvent, applies only to cases where a partnership exists between debtors.—*Re* BENDELL, *Ex p.* BUCKINGHAM (1840), 1 Mont. D. & De G. 235; 9 L. J. Bcy. 34; 4 Jur. 612, Ct. of R.

Annotation:—**Dbtd.** Hoare *v.* Oriental Bank Corpn. (1877), 2 App. Cas. 589, P. C.

3984. —— **To joint contractors.**]—A. & B. jointly purchased a quantity of rum, which they pledged with petitioners, who lent their money on it. They had no other dealings together as partners. The rum pledged was sold, & did not produce the amount of the money lent. Petitioners brought a joint action, in which B. let judgment go by default, but a verdict was recovered against A. for £2,287 6*s.* 2*d.*, the amount of the money due after deducting the produce of the rum. A. & B. both became bkpts. under separate commissions. The comrs. under A.'s commission considered the debt as a joint debt, & refused to admit the proof of it except for the purpose of assenting to, or dissenting from the certificate. On a petition that the comrs. might receive the proof of the amount of the debt & costs, when taxed:—*Held:* the costs could not be proved.

When there are no joint effects, that takes the case out of *Ex p. Elton* (1796), 3 Ves. Jun. 238. Joint effects means such as are under the administration of assignees to distribute, not as in this case, where the only joint effects were those pledged to petitioners, to more than the amount (LORD ELDON, C.).—*Ex p.* HILL (1802), 2 Bos. & P. N. R. 191, n.; 11 Ves. 646; 127 E. R. 597, L. C.

Annotations:—**Consd.** *Re* Sill, *Ex p.* Geller (1817), 2 Madd. 262. **Mentd.** *Ex p.* Charles (1809), 16 Ves. 256; *Re* Cable, *Ex p.* Poucher (1824), 1 Gl. & J. 385; Haswell *v.* Thorogood (1828), 7 B. & C. 705; Simpson *v.* Mirabita (1869), L. R. 4 Q. B. 257.

3985. —— ——.]—*Qu.:* whether the rule that a joint creditor can prove against the separate estate, where there is no joint estate, & no solvent partner applies to persons who are not partners, but merely joint contractors.—*Re* LOMAX, *Ex p.* BAUERMAN (1838), 3 Deac. 476; Mont. & Ch. 569, Ct. of R.

Annotation:—**Mentd.** Lodge *v.* Prichard (1863), 1 De G. J. & Sm. 610.

See 1914 Act, Sched. II., r. 19.

3986. ——.]—The rule that a joint creditor cannot prove against one of his debtors, if another be solvent, is not confined to cases of partnership, but applies to co-contractors generally.—*Re* ROGERS, *Ex p.* FIELD (1842), 3 Mont. D. & De G. 95; 12 L. J. Bcy. 27; 7 Jur. 382, Ct. of R.

Annotation:—**Apprvd.** Hoare *v.* Oriental Bank Corpn. (1877), 2 App. Cas. 589, P. C.

3987. Partner solvent but abroad & unlikely to return.]—Petition to be at liberty to prove under a separate commission upon a bill of exchange, drawn by two persons, one of whom was solvent, but abroad & not likely to return, & the other was bkpt. They were connected only in the particular transaction. There was no joint property:—*Held:* petitioner should be admitted to prove his debt.

It seems very singular, that the nature of the debt should turn upon the fact whether there is joint property, or not (LORD ELDON, C.).—*Ex p.* PINKERTON (1801), 6 Ves. 814, n.; 32 E. R. 1322.

Annotation:—**Distd.** *Ex p.* Kensington (1808), 14 Ves. 447.

3988. Deceased partner's estate solvent.]—A joint creditor can prove against the separate estate, when there is no solvent partner, notwithstanding that the estate of a deceased partner may be solvent, the distinction between a solvent partner & the estate of a deceased partner being, that judgment can be obtained against a solvent partner, & execution issued, but in the case of a deceased partner the right of action is only against the surviving partners.—*Re* LOMAX, *Ex p.* BAUERMAN (1838), 3 Deac. 476; Mont. & Ch. 569, Ct. of R.

Annotation:—**Consd.** Lodge *v.* Prichard (1863), 1 De G. J. & Sm. 610.

See 1914 Act, s. 130.

3989. Partner insolvent but no commission issued.]—A commission had issued against one of two partners. The other partner was insolvent, but no commission had issued against him:—*Held:* the joint creditors could not come in competition with the separate creditors & receive a dividend out of the separate estate of bkpt., because it did not follow that a diligent creditor might not get the whole of his debt paid.—*Re* CORF, *Ex p.* JANSON (1818), 3 Madd. 229; Buck, 227; 56 E. R. 493.

Annotation:—**Apld.** *Re* Ingham, *Ex p.* Trustee (1884), 52 L. T. 299.

3990. Insolvency must be proved.] — Three out of five partners were bkpt. One was abroad, the fifth had applied to take the benefit of Insolvent Act, & had stated in his schedule that he had no assets, but on receiving notice from a creditor that his discharge would be opposed, he had paid that creditor's debt. On an application by a joint creditor to prove a debt against the separate estate of one of bkpt. partners, on the ground that there was no joint estate or solvent partner:—*Held:* one of the partners having paid the debt of a creditor, there was no proof that he was insolvent. —*Re* DESORMAUX, *Ex p.* MORRIS (1831), Mont. 218.

Annotations:—**Mentd.** *Re* Lomax, *Ex p.* Bauerman (1838) 3 Deac. 476; *Re* Marston, *Ex p.* Marston (1839), 9 L. J. Bcy. 5; *Re* Rogers, *Ex p.* Field (1842), 7 Jur. 382; *Re* Ingham, *Ex p.* Trustee (1884), 52 L. T. 299.

3991. —— **Oath of creditor insufficient.**]—If testator be indebted on a bond, &, his exors. being sued thereon, a joint judgment is taken out against them, & then one of them becomes bkpt., the creditor cannot prove under the separate commission, though he swears that the other exors. are insolvent.—*Re* FOXWELL, *Ex p.* PEARSE (1832), 2 Deac. & Ch. 451; 1 L. J. Bcy. 109, Ct. of R.

3992. —— **Admission by official receiver sufficient.**]—One of two partners became bkpt. There was no joint estate, but the other partner had not become bkpt. or been judicially declared insolvent. Proof of a joint debt was allowed against the separate estate of bkpt., on the admission of the official receiver, as trustee of bkpt., that the other partner was insolvent.—*Re* CARPENTER, *Ex p.* BESLEY & WILSON (1890), 7 Morr. 270.

Annotation:—**Folld.** *Re* Budgett, Cooper *v.* Adams, [1894 2 Ch. 557.

3993. Partner solvent—No joint property.]—A joint creditor was not admitted to prove under a separate commission of bkpcy. for the purpose of receiving dividends with the separate creditors, though there was no joint property, there being a solvent partner.—*Ex p.* KENSINGTON, *Ex p.* TAYLOR (1808), 14 Ves. 447; 33 E. R. 592.

Annotation:—**Refd.** *Re* Lightoller, *Ex p.* Peake (1816), 1 Madd. 346.

3994. Joint estate of trifling value—Criterion of value.]—On an application by joint creditors to

prove against the separate estate, there was uncontradicted evidence on affidavit that the joint effects were worth £1 11*s.* 6*d.* :—*Held :* although it was the established practice not to permit joint creditors to prove against the separate estate, if in fact there was any joint property, however trifling, yet, if the property was of such a nature, or in such a situation that an attempt to bring it within the reach of the joint creditors must be deemed desperate, or in point of expense unwarrantable, that would authorise a departure from the rule, for in truth there would be no joint property.—*Re* WARBURTON, *Ex p.* PEAKE (1814), 2 Rose, 54, L. C.

3995. —— Whether rule adhered to.]—A petition to receive dividends equally with the separate creditors was presented on behalf of the joint creditors of certain bkpts., whose copartnership had long since ceased & been wound up, the joint estate having been of trifling value. Petitioners had proved debts under the commission incurred by bkpts. while in copartnership :—*Held :* petitioners were not entitled to prove as against the separate estates.—*Re* BRIDGE (1808), 2 De G. M. & G. 233 ; 42 E. R. 860.

See 1914 Act, s. 33.

3996. —— ——.]—Where there was a debt of £1 14*s.* 6*d.* due to a firm before its dissolution :—*Held :* in the circumstances of the case, there was not joint property for the purpose of preventing a joint creditor from receiving dividends out of the separate estate.—*Re* KRAUSS, *Ex p.* BIRLEY (1841), 2 Mont. D. & De G. 354, Ct. of R.

Annotation :—**Mentd.** Lodge *v.* Prichard (1863), 1 De G. J. & Sm. 610.

3997. —— ——.]—Where there was joint estate to the amount of £13 :—*Held :* the joint creditors could not receive dividends from the separate estate until all the separate creditors were paid in full, although it did not appear that after payment of costs any part of the £13 would remain for distribution.—*Re* ENTWISLE, *Ex p.* KENNEDY (1852), 2 De G. M. & G. 228 ; 42 E. R. 859.

Annotation :—**Refd.** *Re* Budgett, Cooper *v.* Adams, [1894] 2 Ch. 557.

3998. Joint estate sold by pledgee—No other joint property.]—A creditor having joint property of bkpts. in pledge, & selling same, after the bkpcy., may notwithstanding prove the remainder of his debt, under the separate estates of bkpts., if there is no other joint property.—*Re* SILL, *Ex p.* GELLER (1817), 2 Madd. 262 ; 56 E. R. 331.

Annotations :—**Refd.** Lodge *v.* Prichard (1863), 1 De G. J. & Sm. 610. **Mentd.** *Re* Coles, *Ex p.* Twining (1841), 5 Jur. 536.

3999. Property remaining in partnership name—Sold to continuing partner under agreement for dissolution.]—On a dissolution of partnership, the retiring partner sold the concern, with the partnership property, to the other, but some of the partnership property remained in the partnership names, & in the order & disposition of both. They afterwards became bkpts., & separate commissions issued against them. There being property outstanding in the partnership names :—*Held :* the joint creditors could not prove under the separate commission against the retiring partner.—*Re* CHRISTOPHER, *Ex p.* HARRIS (1816), 1 Madd. 583 ; 56 E. R. 214.

4000. What evidence sufficient of existence of joint estate.]—The only evidence of the existence of joint estate was a statement that, at the dissolution of a partnership of which bkpt. was a member, three years previously, there were outstanding debts said to amount to £200, of which £10 was said to be good, without specifying from whom :—*Held :* such evidence was too loose for the ct. to act on.—*Re* HAYWARD, *Ex p.* BURDEKIN (1842), 2 Mont. D. & De G. 704 ; 6 Jur. 977, Ct. of R.

What property is joint property.]—*See* cases in Sub-sect. 2, *ante*.

(f) Where Creditor proving is petitioning Creditor.

4001. Whether proof allowed—Whether entitled to dividend.]—A joint creditor, being petitioning creditor under a separate commission of bkpcy. :—*Held :* entitled to prove, & vote in the choice of assignees, etc., with the separate creditors, not being within the rule, excluding the other joint creditors.—*Ex p.* HALL (1804), 9 Ves. 349 ; 32 E. R. 637, L. C.

4002. —— ——.]—A joint creditor, being petitioning creditor in a separate commission :—*Held :* entitled to receive dividends, etc., with the separate creditors, not being within the rule, excluding the other joint creditors.—*Ex p.* ACKERMAN (1808), 14 Ves. 604 ; 33 E. R. 653, L. C.

Annotation :—**Distd.** *Ex p.* Taitt (1809), 16 Ves. 194, L. C.

4003. —— —— Also trustee for another joint creditor.]—A joint creditor, taking out a separate commission of bkpcy., may prove, & receive dividends with the separate creditors, though, as to part, a trustee for another creditor, who, upon the general rule, could have proved only to affect the certificate, & not to receive dividends.—*Re* CORSON, *Ex p.* DE TASTET (1810), 1 Rose, 10 ; 17 Ves. 247 ; 34 E. R. 95, L. C.

Annotations :—**Refd.** Jones *v.* Broadhurst (1850), 9 C. B. 173. **Mentd.** *Re* Morris, James *v.* London & County Banking Co. (1899), 68 L. J. Ch. 299, C. A.

4004. —— —— Also separate creditor.]—The rule that a joint creditor suing out a separate fiat should receive dividends on his joint debt out of the separate estate *pari passu* with the separate creditors applies where, besides the joint debt, there is a separate debt due to the joint creditor from bkpt. sufficient to support a fiat.—*Re* BLAKE, *Ex p.* BURNETT (1842), 2 Mont. D. & De G. 357 ; 11 L. J. Ch. 180 ; 6 Jur. 331, L. C.

4005. —— Commission taken out against bankrupt "as surviving partner."]—Where a joint creditor sues out a commission against A. "as surviving partner of B.," he can claim only against the joint estate.—*Re* TARLTON, *Ex p.* BARNED (1823), 1 Gl. & J. 309.

C. Procedure and Order.

4006. Service of petition for leave to prove against surplus of separate estate.]—A petition by joint creditors to be allowed to prove on the surplus of the separate estate should be served on bkpt.'s exor.—*Re* WEBSTER, *Ex p.* WOOD (1841), 2 Mont. D. & De G. 283, 5 Jur. 115, Ct. of R.

4007. Inquiry ordered by court—As to existence of joint property.]—An inquiry was ordered as to whether there was any joint property, so as to import the rule that a joint creditor cannot prove against the separate estate, if there is joint estate or a solvent partner.—*Re* WARBURTON, *Ex p.* PEAKE (1814), 2 Rose, 54, L. C.

Annotation :—**Distd.** *Re* Krauss, *Ex p.* Birley (1841), 2 Mont. D. & De G. 354, Ct. of R.

4008. —— ——.]—Where a separate fiat issues against one of two persons who have been in partnership, & a joint creditor is permitted to prove his debt, the ct. will direct an inquiry, whether there is any joint estate, notwithstanding the partnership was dissolved before the issuing of the fiat.—*Re* KRAUSS, *Ex p.* BIRLEY (1840), 1 Mont. D. & De G. 387 ; *subsequent proceedings* (1841), 2 Mont. D. & De G. 354, Ct. of R.

Annotation :—**Distd.** *Re* Rogers (1843), 2 L. T. O. S. 53.

Sect. 3.—Rights of joint creditors: Sub-sect. 3, C. Sect. 4: sub-sects. 1 & 2.]

4009. Effect of order allowing proof where joint estate exists—Dividends to be refunded—All joint creditors proving exclusively against separate estate.]—D. & his partner at their bkpcy. were the owners of a ship, not as a chattel of the partnership, but in common. An order had been made for the creditors to prove against the separate estate of D., on the ground that there was no joint property. They received a dividend. The ship was afterwards sold, & a separate creditor of D. claimed to have repaid to D.'s separate estate out of the proceeds, so much as had been paid beyond its liability as proportioned to the estates of the partners. All the joint creditors had proved exclusively against the separate estate of D. :—*Held:* the creditor was entitled to the order claimed.—*Re* DAWES, *Ex p.* WILLOCK (1816), 2 Rose, 392, L. C.

4010. —— Dividends allowed to be received.]—A. & B. dissolved partnership, when B. assigned all the joint property to A., among which were debts due to the firm, to the amount of £60, but no notice of the assignment was given to debtors. A. & B. severally became bkpt. :—*Held:* a joint creditor, who had proved under the separate fiat against A., was entitled to receive dividends on his proof.—*Re* MORGAN, *Ex p.* TAYLOR (1842), 2 Mont. D. & De G. 753.

4011. Order as to costs—No joint effects or solvent partner.]—On a petition by joint creditors to prove against the separate estate, there being no joint effects or solvent partner, no order will be made as to costs.—*Re* AUBREY, *Ex p.* BRADSHAW (1821), 1 Gl. & J. 99.

SECT. 4.—ELECTION, DOUBLE PROOF, AND TRANSFER OF PROOF.

SUB-SECT. 1.—RIGHT TO ELECT.

When separate creditor may prove against joint estate.]—*See* Sect. 2, sub-sect. 4, A., *ante*.

When joint creditor may prove against separate estate.]—*See* Sect. 3, sub-sect. 3, B., *ante*.

Transfer of proof from joint to separate estate or vice versâ—Proof tendered in ignorance of right of election.]—*See* Nos. 4036 *et seq.*, *post*.

4012. Bond by partners individually—Money applied for firm purposes.]—A creditor of certain individual partners of a firm, on bond, for money which came to the use of the partnership, may prove against the joint or separate fund.—*Re* LIVESEY, *Ex p.* CLOWES (1789), 2 Bro. C. C. 595; 29 E. R. 327, L. C.

Annotations:—**Distd.** *Re* Allen, *Ex p.* Apsey (1791), 3 Bro. C. C. 266, L. C. **Consd.** *Ex p.* Bonbonus (1803), 8 Ves. 540, L. C.

4013. Commission in which proof tendered superseded.]—A joint & separate creditor, who sued out a separate commission & proved under it, was restored to his right of election to prove against the joint estate by the separate commission being superseded.—*Re* BROWN & SCOTT, *Ex p.* BROWN (1812), 1 Rose, 433, L. C.

4014. Dormant partner of debtor.]—If there is a dormant partner, the creditor is not obliged to have anything to do with him. In bkpcy. it is unquestionable, if I deal with A., he cannot with reference to that transaction say, there is a contract between him & B., of whom I know nothing, thus compelling me to be a joint creditor of those two, whose joint property may be scarcely anything, & not the sole creditor of the only man I knew. A man, purchasing from, or selling to A., not knowing of any partner, may consider A. as the sole vendor or vendee. He may, finding that B. has taken a share of the profits, elect to go against him also, but he cannot be compelled (LORD ELDON, C.).—*Ex p.* NORFOLK (1815), 19 Ves. 455; 34 E. R. 585, L. C.

Annotations:—**Folld.** *Re* Starkey & Whiteside, *Ex p.* Chuck (1832), 8 Bing. 469. **Mentd.** *Re* English & Irish Church & University Assce. Soc. (1863), 11 W. R. 681.

4015. Separate debt—Parol agreement that it should be treated as firm debt.]—The two trustees under the marriage settlement of H., bkpt., advanced him on the security of his bond the amount of the trust fund, which was his wife's fortune, for the purpose of being employed in his business, & one of the trustees afterwards entered into a parol agreement with H. & his partner that the loan should be considered a debt due from the partnership :—*Held:* such subsequent agreement was in the nature of a collateral security, & the trustees could prove both against the joint estate & the separate estate of H., making their election afterwards from which estate they would receive dividends.—*Re* HOUGHTON & WATTS, *Ex p.* KEDIE & HOUGHTON (1832), 2 Deac. & Ch. 321; 1 L. J. Bcy. 87, Ct. of R.

4016. Breach of trust—Administratrix carrying on testator's business in partnership.]—Proof in bkpcy., in respect of trust property of infants, continued by the administratrix in the trade in which testator was engaged, carried on by bkpts., constituting a new firm of which the administratrix was a member, & the infants may prove either against the separate estate of the administratrix, or the joint estate, as may be most advantageous for them.—*Ex p.* WATSON (1814), 2 Ves. & B. 414; 2 Rose, 259; 35 E. R. 378, L. C.

Annotations:—**Folld.** *Re* Moxon, *Ex p.* Heaton (1819), Buck, 386. **Mentd.** *Re* Biddulph, *Ex p.* Burton (1843), 3 Mont. D. & De G. 364.

4017. —— Partners having constituted themselves trustees.]—By a marriage settlement a sum of money was to be received by the trustees, & invested in govt. or real securities, & the interest was to be paid to the wife for life for her separate use, without a power of anticipation, with remainder to the children. One of the trustees received the money, & advanced it to a partnership of merchants, without taking any security. He received the interest from the partnership, & paid it over to the wife regularly up to the time of his death; afterwards, the partnership paid the interest to the wife directly, & without the intervention of the surviving trustee. In the partnership books the accounts relating to the whole transaction were entered, as between the wife & the partnership only. Upon the partnership becoming bkpt. :—*Held:* the partners had constituted themselves directly trustees, & the proof on behalf of the trust estate might be made either against the joint estate, or the separate estates.—*Re* ACRAMAN, *Ex p.* WOODIN (1843), 3 Mont. D. & De G. 399, Ct. of R.

4018. Fraud by partner—Proceeds paid into partnership account.]—A. employed B. & C. as his stockbrokers, &, for the purpose of more convenient transfer, allowed certain stock, belonging to him, to stand in the name of B. alone. B., without the consent or knowledge of A., sold the stock, & paid the produce into the partnership funds of B. & C. B. & C. having afterwards become bkpts. :—*Held:* A. was entitled to prove against the separate estate of B., or against the joint estate, as he should think.—*Re* TALBOT & FRANCIS, *Ex p.* TURNER (1829), Mont. & M. 255.

4019. Fraud by partnership.]—Where a partner-

ship debt has been incurred by means of a fraud on the part of the partners, the defrauded creditor has a right to prove at his election against either the joint estate of the firm or the separate estates of the partners, even though no judgment has been recovered by him against the partners.—*Re* COLLIE, *Ex p.* ADAMSON (1878), 8 Ch. D. 807; 47 L. J. Bcy. 103; 38 L. T. 917; 26 W. R. 890, C. A.

Annotations:—**Consd.** Watson *v.* Holliday (1882), 20 Ch. D. 780; *Re* Parker, *Ex p.* Sheppard (1887), 19 Q. B. D. 84; *Re* Giles, *Ex p.* Stone (1889), 6 Morr. 153, D. C. **Apld.** *Re* Macfadyen, *Ex p.* Vizianagaram Mining Co., [1908] 2 K. B. 817, C. A. **Refd.** Hillyer *v.* St. Bartholomew's Hospital, [1909] 2 K. B. 820, C. A. **Mentd.** Couldery *v.* Bartrum (1881), 19 Ch. D. 394, C. A.; Griffith *v.* Pound (1890), 45 Ch. D. 553; *Re* Newton, *Ex p.* National Provincial Bank of England (1896), 3 Mans. 200, D. C.; Whitechurch *v.* Cavanagh, [1902] A. C. 117, H. L.

4020. ——.]—In an action against liquidating debtors & their trustee, to recover advances of money obtained from pltfs. by debtors through false & fraudulent representations before the liquidation, pltfs. claimed, *inter alia*, a declaration that they were entitled to prove for the amount of the advances, & interest at 5 per cent., to the date of the liquidation, either against the joint estate of liquidating debtors or against the separate estate, as pltfs. might elect:—*Held:* the claim was good.—HALE *v.* BOUSTEAD (1881), 8 Q. B. D. 453; 51 L. J. Q. B. 255; 46 L. T. 533; 30 W. R. 677.

SUB-SECT. 2.—DOUBLE PROOF—WHETHER CREDITOR MUST ELECT.

See, now, 1914 Act, Sched. II., r. 19.

4021. Joint & several covenant—Money used for partnership purposes—Admissibility of oral evidence to show how money used.]—Where a joint & several covenant is entered into by partners for payment of a debt, & there is nothing in the instrument to show that they were jointly contracting as partners, parol evidence may be admitted to show that the money was used for partnership purposes, & if that is established proof may be made in bkpcy. against their joint as well as their separate estate.—*Re* WELCH, *Ex p.* STONE (1873), 8 Ch. App. 914; 42 L. J. Bcy. 73, L. JJ.

Annotations:—**Refd.** Simpson *v.* Henning (1875), L. R. 10 Q. B. 406; *Re* Laine & Longman, *Ex p.* Berner & Nielson (1886), 56 L. T. 170. **Mentd.** Banco de Portugal *v.* Waddell (1880), 28 W. R. 477, H. L.; *Re* Chapman, *Ex p.* Parker (1887), 35 W. R. 595; *Re* Browne & Wingrove, *Ex p.* Ador, [1891] 2 Q. B. 574, C. A.

4022. —— **Purpose for which advance made immaterial.**]—Two partners entered into a joint & several covenant to pay A. a certain sum. The firm having become bkpt., A. tendered proof against the joint estate as well as against the separate estates of the partners:—*Held:* there being a joint & several liability, the creditor was entitled to prove against both estates, & it was immaterial whether the money had been advanced for the purposes of the partnership or not.—*Re* LAINE & LONGMAN, *Ex p.* BERNER & NEILSON (1886), 56 L. J. Q. B. 153; 56 L. T. 170.

Annotation:—**Refd.** *Re* Parker, *Ex p.* Sheppard (1887), 57 L. T. 198.

4023. —— **Old rule—No double proof.**]—If A. & B., joint traders, become bkpt., & there are joint & separate commissions taken out against them, & A. & B. before the bkpcy. become jointly & severally bound to S., S. may choose under which commission he will come, but shall not come under both.—*Ex p.* ROWLANDSON (1735), 3 P. Wms. 405; 24 E. R. 1121.

Annotations:—**Dbtd.** *Ex p.* Bevan (1803), 9 Ves. 223. **Extd.** *Re* Brown, *Ex p.* Hill (1837), 2 Deac. 249. **Refd.** *Re* Barrow, *Ex p.* Moult (1832), 1 Deac. & Ch. 44, Ct. of R.; *Re* Deane & Youle, *Ex p.* Goldsmid (1856), 25 L. J. Bcy. 26, n.; *Re* Whitwell *v.* Bowbeer, *Ex p.* Bank of England (1859), 32 L. T. O. S. 358.

4024. —— —— ——.]—A joint & separate creditor must elect against which estate to go in the first instance.—*Ex p.* BEVAN (1804), 10 Ves. 107; 32 E. R. 784, L. C.

Annotations:—**Folld.** *Re* Barrow, *Ex p.* Moult (1832), 1 Deac. & Ch. 44, Ct. of R.; *Re* Biddulph, *Ex p.* Barnewall (1855), 6 De G. M. & G. 795. **Mentd.** *Re* Deane & Youle, *Ex p.* Goldsmid (1856), 25 L. J. Bcy. 26, n.

4025. —— —— —— **Although debt secured by two independent instruments.**]—A creditor, having a joint & several security for his debt, is not entitled to double proof against the joint & separate estates, although his debt is secured by two distinct & independent instruments.—*Re* BROWN, *Ex p.* HILL (1837), 2 Deac. 249; 3 Mont. & A. 175, Ct. of R.

4026. Joint & several bond—Old rule—No double proof.]—In bkpcy. a creditor by a joint & several bond must elect whether he will go against the joint or separate estate.—*Ex p.* HAY (1808), 15 Ves. 4; 33 E. R. 656.

4027. —— —— —— **Except for deficiency after other creditors paid.**]—A bond creditor, to whom partners are jointly & severally bound, may make his election to come against the joint or separate estate, but not against both, except for the deficiency, & after the other creditors are paid.—*Ex p.* BANKS (1740), 1 Atk. 106; 26 E. R. 70.

Annotation:—**Folld.** *Ex p.* Bond & Hill (1745), 1 Atk. 98.

4028. —— —— —— **Joint commission & separate commission against one.**]—Where a joint commission of bkpcy. has been taken out against two persons & a separate commission against one, a creditor upon their joint & several bond is not entitled to have a full satisfaction out of both estates at the same time, but must make his election upon which of the estates he will come, in the first place.—*Ex p.* BOND & HILL (1745), 1 Atk. 98; 26 E. R. 65, L. C.

Annotations:—**Consd.** Hoare *v.* Oriental Bank Corpn. (1877), 2 App. Cas. 589, P. C. **Refd.** *Re* Deane, *Ex p.* Goldsmid (1857), 1 De G. & J. 257, L. JJ.; *Re* Hill, Thomson *v.* Harding (1857), 3 C. B. N. S. 254.

4029. Joint & several promissory note—Proof against separate estate allowed—Though composition taken from joint estate.]—A. & B., who carried on business in copartnership, assigned their partnership property upon trust for the benefit of their creditors, & it was provided that it should not prejudice or affect the rights of the creditors against the respective separate estates of A. & B. Prior to the date of the assignment A. & B. had given their joint & several promissory note to C. for £1,500, & C. signed the deed of assignment in respect of a sum of £2,755, which included the sum of £1,500. A. was afterwards

PART XI. SECT. 4, SUB-SECT. 2.

4021 i. *Joint & several covenant—Deduction of amount received from separate estates of co-debtors.*]—A creditor is not entitled to rank for the full amount of his claim upon the separate estates of insolvent debtors jointly & severally liable for the amount of the debt, but is obliged to deduct from his claim the amount previously received from the estates of the other parties jointly & severally liable therefore.—ONTARIO BANK *v.* CHAPLIN (1891), 20 S. C. R. 152.—**CAN.**

4029 i. *Joint & several promissory note—Proof against both joint & separate estates.*]—Claimant held the joint & several notes of L. & Co. as a firm, & of each of the two partners in their individual capacity, as security for a debt due by the firm:—*Held:* claimants were warranted in ranking on the firm estate & also on the private estates of the copartners.—*Re* LADD, PORTER & CO., *Ex p.* HALL (1879), 1 R. & G. 32.—**CAN.**

4029 ii. —— —— *Amount of proof.*]

Sect. 4.—Election, double proof, and transfer of proof: Sub-sect. 2.]

adjudged bkpt. :—*Held:* the rule, that proof for the same debt was not allowed against the joint estate & the separate estates of partners, ought not to be extended, & C. was entitled to prove against the separate estate of A. for the amount due on the promissory note.—*Re* JOBSON, *Ex p.* THORNTON (1858), 3 De G. & J. 454; 28 L. J. Bcy. 4; 32 L. T. O. S. 153; 5 Jur. N. S. 212; 7 W. R. 70; 44 E. R. 1343, L. JJ.

4030. —— Signed by partners & firm.]—To secure a sum of money borrowed by one of the partners in a firm a joint & several promissory note was given, signed by the partner who borrowed the money, by another of the partners, & by the firm. A joint adjudication of bkpcy. having been made against all the partners in the firm :—*Held:* the lender could prove against the joint estate of the firm, as well as against the separate estate of each of the partners who signed the note.—*Re* JEFFERY, *Ex p.* HONEY (1871), 7 Ch. App. 178; 41 L. J. Bcy. 9; 25 L. T. 728; 20 W. R. 223, L. JJ.

Annotations :—**Apld.** *Re* Welch, *Ex p.* Stone (1873), 8 Ch. App. 914. **Distd.** Simpson *v.* Henning (1875), L. R. 10 Q. B. 406. **Apld.** *Re* Laine & Longman, *Ex p.* Berner & Neilson (1886), 56 L. J. Q. B. 153. **Refd.** Hoare *v.* Oriental Bank Corpn. (1877), 2 App. Cas. 589, P. C.

4031. Distinct estates to be wound up—Partner carrying on distinct business.]—A., a partner in a cotton factory with B. & C., who carried on a separate business as grocers, in which A. had no concern, drew a bill in favour of B. & C. upon D. in payment for groceries. The holder of the bill was allowed to prove against the joint estate of B. & C. & the separate estate of A.—*Ex p.* BENSON (1798), 1 Cooke's Bankrupt Laws, 8th ed., p. 278.

Annotations :—**Consd.** *Re* Barrow, *Ex p.* Moult (1832), 1 Deac. & Ch. 44, Ct. of R.; *Re* Deane, *Ex p.* Goldsmid (1857), 1 De G. & J. 257, L. JJ.

4032. —— ——.]—B. being indebted to W., obtained the promissory note payable to himself of P. & B., who were then traders in partnership, for the amount of the debt, & indorsed same to W. B. was at the time also a sole trader, & the note was given to W. in respect of a private debt. Upon the bkpcy. of P. & B. :—*Held:* W. had a right to prove against the estate of P. & B., & also against the separate estate of B.—*Re* PETO & BETTS, *Ex p.* WAGSTAFF (1868), 16 W. R. 915.

4033. —— Agent firm & purchasing firm both bankrupt—One partner common to both firms.]—The firm of J. F. & Sons, as agents of pltfs., supplied goods to the firm of S. & W., upon the footing of the latter becoming debtors to pltfs. They also supplied the same firm with other goods on their own behalf. They made no distinction in their accounts between the goods supplied by them as agents of pltfs., & those which they supplied on their own behalf. E. F. was a partner in both firms. Under a deed of inspection, by which it was agreed that the several estates of the two firms should be administered upon the principles & according to the rules & practice of the bkpcy. law, & as if acts of bkpcy. had been committed by the members of such firms respectively :—*Held:* pltfs. were entitled to prove for the debts of S. & W. both against that firm & against the firm of J. F. & Sons, & their right was not affected by the circumstance that E. F. had survived the last of his partners in the firm of S. & W. upwards of two months, at the time when the act of bkpcy. was taken to have been committed.—WICKHAM *v.* WICKHAM (1855), 2 K. & J. 478; 69 E. R. 870.

Annotations :—**Consd.** *Re* Deane, *Ex p.* Goldsmid (1856), 25 L. J. Bcy. 26, n. **Mentd.** Sutton *v.* Grey (1893), 69 L. T. 354; Harburg India Rubber Comb Co. *v.* Martin, [1902] 1 K. B. 778, C. A.

4034. —— "Properties" in 1869 Act, s. 37—"Estates" in 1861 Act, s. 152.]—It is not sufficient for the application of 1869 Act, s. 37, that there be distinct contracts; there must also be distinct estates to be wound up in bkpcy.

The word "properties" in s. 37 must have the same meaning as the word "estates" in 1861 Act, s. 152.—*Re* HOOPER, *Ex p.* BANCO DE PORTUGAL (1879), 11 Ch. D. 317; 48 L. J. Bcy. 73; 40 L. T. 406; 27 W. R. 856 C. A.; *affd. sub nom.* BANCO DE PORTUGAL *v.* WADDELL, *Re* HOOPER (1880), 5 App. Cas. 161, H. L.

Annotation :—**Mentd.** *Re* Somes, *Ex p.* De Lemos (1896), 3 Mans. 131.

4035. Bill of exchange transactions between firms having common partner—Extent of rule against double proof.]—The rule which prohibits double proof is not confined to the case where one of two firms consists only of one person who is also a member of the other firm, but applies likewise to a case where the two firms consist of several persons some of whom are members of both firms. —GOLDSMID *v.* CAZENOVE (1859), 7 H. L. Cas. 785; 29 L. J. Bcy. 17; 34 L. T. O. S. 35; 5 Jur. N. S. 1230; 11 E. R. 313, H. L.; *affg.* S. C. *sub nom. Re* DEANE & YOULE, *Ex p.* GOLDSMID (1857) 1 De G. & J. 257, L. JJ.

Annotations :—**Distd.** *Re* Jobson, *Ex p.* Thornton (1858), 3 De G. & J. 454, L. JJ. **Mentd.** *Re* Laine & Longman, *Ex p.* Berner & Neilson (1886), 56 L. J. Q. B. 153; *Re* Parker, *Ex p.* Sheppard (1887), 19 Q. B. D. 84.

4036. —— Creditor ignorant of exact relationship.]—C. & G., in partnership as turpentine manufacturers, applied to petitioner to discount a bill of exchange for them. The bill was signed by C. & G. & addressed to W. & G., soap manufacturers. C. & G. received the value in cash from petitioner, less the legal discount. C. & G. were interested in the business of soap manufacturers, but petitioner did not know of it, & considered the two businesses as distinct & that he had the security of both. A joint commission issued against both concerns :—*Held:* the comrs. should inquire as to the knowledge or otherwise of petitioner that the different parties were engaged in one undertaking &, if petitioner knew, there was to be liberty to apply to the ct. for further directions, but if not, he was to be allowed to prove against the respective joint estates.—*Ex p.* LA FOREST (1797), 1 Cooke's Bankrupt Laws, 8th ed., p. 276, L. C.

Annotations :—**Distd.** *Re* Barrow, *Ex p.* Moult (1832), 1 Deac. & Ch. 44, Ct. of R. **Consd.** *Re* Brown, Danson & Duncan, *Ex p.* Hill (1837), 2 Deac. 249, Ct. of R.; *Re* Deane, *Ex p.* Goldsmid (1857), 1 De G. & J. 257, L. JJ.

—W. carried on business separately & as a member of the firm of W. & S. The joint & several notes of W. & S. & W. were given to secure debts due by the firm, & shortly afterwards both W. & S. & W. made assignments in insolvency :—*Held:* the holder of these notes was entitled to prove against the partnership estate for his claim, less the amount at which he valued the separate liability of W., & (the partnership not having assumed the liability) against W.'s estate for the full amount of the debt.—*Re* WILSON, CARTER *v.* WOODRUFF (1877), 3 A. R. 151.—**CAN.**

4030 i. —— *Signed by partner & firm.*]—A member of a partnership joined with the partnership in making a promissory note for the price of goods supplied to the firm. The seller proved against upon the insolvent estate of the partner for the amount of the unpaid note :—*Held:* the seller having elected, before accepting a dividend from the insolvent estate of the partnership, to pursue his remedy against the insolvent partner the question whether under Assignments & Preferences Act, s. 7, it was necessary to elect did not arise.—GORDON *v.* MATTHEWS (1909), 18 O. L. R. 340; 13 O. W. R. 649; 1 O. W. N. 103; *affd.* 19 O. L. R. 564; 14 O. W. R. 873. —**CAN.**

4037. ——— ———.]—A holder of a bill of exchange, drawn by a firm upon some of their members constituting a distinct firm, has a right to prove it against all the parties, according to their liabilities upon the bill, provided he was ignorant of their partnership.—*Re* COOKE, *Ex p.* ADAM (1813), 2 Rose, 36; *sub nom. Ex p.* ADAM, 1 Ves. & B. 493; 35 E. R. 191, L. C.

Annotations:—**Consd.** *Re* Barrow, *Ex p.* Moult (1832), 1 Deac. & Ch. 44, Ct. of R.; Wickham *v.* Wickham (1855), 2 K. & J. 478; *Re* Deane, *Ex p.* Goldsmid (1857), 1 De G. & J. 257, L. JJ. **Mentd.** Belton *v.* Hodges (1832), 9 Bing. 365; *Re* Smedley (1864), 10 L. T. 432; *Re* Purser, *Ex p.* Stevenson (1868), 19 L. T. 23.

4038. ——— ———.]—A., B. & C. trading at London & also at Rio de Janeiro under different styles, A. representing the London firm, & B. & C. that at Rio & residing there, were in the habit of drawing upon & accepting each other's bills of exchange. A. became bkpt., & shortly after B. & C. at Rio stopped payment:—*Held:* the ct. could not compel a creditor, who was secured upon both estates, & sought to prove against A.'s estate in respect of bills of exchange drawn by the firm at Rio upon & accepted by the London house, to elect between the joint & separate estates of both firms, but could admit the proof as against A.'s estate, notwithstanding he might receive a large dividend in respect of the same bills from the estate at Rio.—*Re* JEFFERIES, *Ex p.* BLACK (1856), 28 L. T. O. S. 53.

4039. ——— ——— **Knowledge that some partners common.**]—Where there are two firms, & the partners of the one are included among the partners of the other, & a bill of exchange is drawn by one of the firms & indorsed by the other, the taker of the bill, though aware at the time that some of the members of one firm were members also of the other, but was not aware that all were so, but believed to the contrary, will not be permitted to prove against both estates, but will be put to his election.—*Re* ACRAMAN (1850), 16 L. T. O. S. 84.

4040. ——— ——— ———.]—A. & B. were partners in Liverpool, & A., B. & C. were partners in Pernambuco. The two firms had dealings with each other. A., B. & C. drew a bill of exchange on A. & B., & sold it to persons at Pernambuco, who believed that the partnerships were distinct, but that A. & B. were partners in both. On arrival in Liverpool the bill was accepted by A. & B., but before the time for payment both firms became bkpt. Under the law of Brazil, the holders of the bill proved against the estate of A., B. & C. at Pernambuco, & received a dividend, & then claimed to prove under the English commission:—*Held:* they were not entitled to such double proof.—GOLDSMID *v.* CAZENOVE (1859), 7 H. L. Cas. 785; 29 L. J. Bcy. 17; 34 L. T. O. S. 35; 5 Jur. N. S. 1230; 11 E. R. 313, H. L.; *affg.* S. C. *sub nom. Re* DEANE & YOULE, *Ex p.* GOLDSMID (1857), 1 De G. & J. 257, L. JJ.

Annotations:—**Distd.** *Re* Jobson, *Ex p.* Thornton (1858), 3 De G. & J. 454, L. JJ. **Mentd.** *Re* Laine & Longman, *Ex p.* Berner & Neilson (1886), 56 L. J. Q. B. 153; *Re* Parker, *Ex p.* Sheppard (1887), 19 Q. B. D. 84.

4041. ——— **Creditor aware of relationship.**]—A holder of a bill of exchange, drawn by a firm upon some of their members constituting a distinct firm, has no right to prove it against all the parties, according to their liabilities upon the bill, where the holder was aware of the identity of the parties.—*Re* HARRISON, *Ex p.* BIGG (1814), 2 Rose, 37, L. C.

Annotation:—**Mentd.** *Re* Deane, *Ex p.* Goldsmid (1857), 1 De G. & J. 257, L. JJ.

4042. ——— ———.]—A bill drawn by a firm of three persons, who were also members of a firm of six persons, & indorsed by the latter firm:—*Held:* not provable against both of the joint estates by a person aware when he took the bill that the three were members of the firm of six.—*Ex p.* ALLSOPP (*circa* 1850) cited 16 L. T. O. S. at p. 85.

Annotation:—**Consd.** *Re* Acraman (1850), 16 L. T. O. S. 84. *See* 1914 Act, Sched. II., r. 19.

4043. Bill of exchange drawn by partner in firm—Holder ignorant that distinct accounts kept—Right to transfer proof reserved.]—A. carrying on business on his separate account, & also in partnership, with B. gave a bill of exchange, drawn by himself, to the order of A. & B., & indorsed by them. A separate commission issued against A., B. died, & the holder of the bills proved them under A.'s commission, but having afterwards learnt that distinct accounts were to be kept of the estates of A. & B., he applied to be at liberty to prove against the joint estate of A. & B. in addition to his proof against the separate estate of A.:—*Held:* he should be at liberty, either to retain his proof, or to withdraw it, & prove against the joint estate. —*Re* KIRBY, *Ex p.* MASSON (1811), 1 Rose, 159, L. C.

4044. Bill of exchange drawn by party on firm—Drawer, drawees & third party joint debtors—Creditors with knowledge of relationship.]—A., a sole trader, B. & C. partners, & D. also a sole trader, engaged in a joint adventure, & for a joint purchase of goods by them, the vendor, with a knowledge of their joint interest, received in payment a bill of exchange drawn by A. on, & accepted by B. & C.:—*Held:* on the bkpcy. of A., & of B. & C., the vendor was entitled to prove the bill against both their estates.—*Re* FORD, *Ex p.* WALKER, *Ex p.* WENSLAY (1813), 2 Ves. & B. 254; 1 Rose, 441; 35 E. R. 316, L. C.

Annotations:—**Distd.** *Re* Barrow, *Ex p.* Moult (1832), 1 Deac. & Ch. 44, Ct. of R. **Mentd.** *Re* Deane, *Ex p.* Goldsmid (1857), 1 De G. & J. 257, L. JJ.

4045. Bill of exchange drawn by all partners—Indorsed by one—Creditor with knowledge of relationship.] — A creditor who, knowing the partnership of the parties, takes a bill drawn by all & indorsed by one, is not entitled to double proof, upon the ground that, previously to the taking the bill, he required & had the indorsement of the one, & thereby raised a contract for double security.—*Re* GRAVES, *Ex p.* BANK OF ENGLAND (1814), 2 Rose, 82, L. C.

Annotations:—**Consd.** *Re* Barrow, *Ex p.* Moult (1832), 1 Deac. & Ch. 44, Ct. of R.; *Re* Deane, *Ex p.* Goldsmid (1857), 1 De G. & J. 257, L. JJ.

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n. *Joint judgment creditors—Against executors—After assignment of estate for creditors.*]—Exors., under a power in a will, continued testator's business, which they subsequently assigned, both that portion remaining left by testator (about one-ninth) & that acquired since his death, to certain trustees for all creditors of the estate, & each exor. severally assigned for the benefit of individual creditors. The trusts declared were for the benefit *pari passu* of creditors coming in, & who were not bound to release their claims. A judgment having been recovered against the exors. individually, upon a note made by them as exors., the judgment creditors claimed a right to seize the goods in the hands of the trustees, notwithstanding the assignment:—*Held:* the judgment creditors were entitled, if their judgment & execution were against the exors., to claim as creditors upon the estate assigned by them as such, & if necessary on the separate estate of each, the joint estate being exhausted.—KERR *v.* HALDAN (1864), 2 E. & A. 382; *affg.* HALDAN *v.* KERR (1862), 12 C. P. 620.—**CAN.**

o. *Promissory note by firm—Indorsed by one partner—Proof in administration suit against partner's estate.*]—The doctrine against double proof applies only when both estates are being administered in insolvency. A creditor who has proved in insolvency upon a promissory note made by an insolvent firm, can prove as a creditor in an administration suit against one of the parties deceased who has separately indorsed the note. —*Re* BAKER, BRAY'S CLAIM (1871), 3 Ch. Ch. 499.—**CAN.**

Sect. 4.—Election, double proof, and transfer of proof: Sub-sects. 2, 3 & 4.]

4046. Bill of exchange drawn by partner on secret partner—Creditor without knowledge of partnership.]—A. & B. were in partnership, B. being a secret partner. A., on the partnership account, drew bills in his own name on B., which were accepted by him. On the bkpcy. of A. & B.:—*Held:* the holder of the bills, who was ignorant of the partnership, was not entitled to prove them against the joint estate of A. & B., & the separate estate of B., but he was entitled to prove them against the separate estates of A. & B.—*Re* BLACKBURN, *Ex p.* HUSBANDS (1825), 2 Gl. & J. 4, L. C.

Annotations:—**Consd.** *Re* Barrow, *Ex p.* Moult (1832), 1 Deac. & Ch. 44, Ct. of R.; *Re* Deane, *Ex p.* Goldsmid (1857), 1 De G. & J. 257, L. JJ.

4047. Bills of exchange indorsed by three firms having common partner—No proof against one firm & common partner.]—B. & G. traded as B. & Co., G. traded separately as G. & Co., G. & J. traded as J. & Co., & G. & R. as R. B. & Co. drew bills of exchange on J. & Co. payable to the order of B. & Co., which J. & Co. accepted. They were indorsed by B. & Co., G. & Co. & R., & came into the hands of W. for valuable consideration, without knowledge of G.'s partnership with B. & J., & in the belief that the firms were composed of separate & distinct persons:—*Held:* W. could not prove in respect of the indorsement by B. & Co. against the joint estate of B. & G., & also against the separate estate of G., but must make his election.—*Re* BARROW & GEDDES, *Ex p.* MOULT (1832), 2 Deac. & Ch. 419; Mont. & B. 28, L. C.

Annotations:—**Consd.** Wickham *v.* Wickham (1855), 2 K. & J. 478. **Apprvd.** Goldsmid *v.* Cazenove (1859), 34 L. T. O. S. 35, H. L. **Mentd.** *Re* Brown, Danson & Duncan, *Ex p.* Hill (1837), 3 Mont. & A. 175, Ct. of R.

4048. Bill drawn by one partner on another.]—A. & B. carried on a partnership trade under their separate names, one residing at Manchester, & the other in London:—*Held:* the holder of bills drawn by one partner upon the other must elect whether he would prove against the joint or separate estates.—*Re* BAYLEY & CHAPMAN, *Ex p.* LAW (1839), 3 Deac. 541; *sub nom. Re* BAZLEY & CHAPMAN, *Ex p.* LAW, Mont. & Ch. 111, Ct. of R.

Annotation:—**Mentd.** *Re* Deane & Youle, *Ex p.* Goldsmid (1856), 2 Jur. N. S. 1109, n.

4049. Breach of trust—Firm liable in assumpsit.]—An administratrix employed the property of infants in testator's trade, a new firm being constituted, of which she was a member:—*Held:* (1) the administratrix was entitled to prove the amount due to the infants against the joint estate, the partnership having possessed itself of the trust property in circumstances raising a clear *assumpsit;* (2) proof could also be made against the separate estate of the administratrix, if any benefit could accrue therefrom to the infants.—*Ex p.* WATSON (1814), 2 Ves. & B. 414; 2 Rose, 259; 35 E. R. 378, L. C.

Annotations:—**Consd.** *Re* Moxon, *Ex p.* Heaton (1819), Buck, 386. **Mentd.** *Re* Biddulph, *Ex p.* Burton (1843), 3 Mont. D. & De G. 364, Ct. of R.

4050. —— Other partners not parties to breach.]—Two of a firm of bankers had drawn out a balance standing to the account of customers in the character of exors., & had invested it in the names of themselves & two other trustees upon an unauthorised security. On the bkpcy. of the bankers:—*Held:* not a case for double proof against the joint estate, & the separate estates of the two partners.—*Re* BIDDULPH, *Ex p.* BARNEWALL, WRIGHT'S EXECUTORS' CASE (1855), 6 De G. M. & G. 795; 43 E. R. 1442, L. JJ.

See, also, No. 3975, *ante.*

4051. —— Misappropriation by one partner.]—Money was paid by trustees to a firm of solrs. to be invested. One of the firm, who was also one of the trustees, misappropriated the money, & was removed from the trust. The firm having become bkpt., the trustees proved against the joint estate, & claimed also to prove against the estate of the defaulting trustee:—*Held:* the defaulting trustee was liable in respect of distinct contracts, (*a*) as member of the firm, (*b*) as trustee, & the trustees were entitled to prove against his separate estate as well as against the joint estate, under 1883 Act, Sched. 2, r. 18.—*Re* PARKERS, *Ex p.* SHEPPARD (1887), 19 Q. B. D. 84; 56 L. J. Q. B. 338; 57 L. T. 198; 35 W. R. 566; 3 T. L. R. 563; 4 Morr. 135.

Annotations:—**Consd.** *Re* Lake, *Ex p.* Howe, [1903] 1 K. B. 439. **Apprvd.** *Re* Macfadyen, *Ex p.* Vizianagaram Mining Co., [1908] 2 K. B. 817, C. A. **Distd.** *Re* Kent County Gas Light & Coke Co., [1913] 1 Ch. 92.

4052. —— Improper investment of trust funds.]—A trustee, a member of a firm of solrs., invested part of the trust funds in a contributory mtge., an unauthorised investment. On the bkpcy. of the firm:—*Held:* the trustees having by their action in compromising an action to set aside the mtge. estopped themselves from proving against the estate of bkpt. trustee as for a debt, might nevertheless prove for damages sustained by reason of the improper investment, but *primâ facie* there was no right to prove for damages against the joint estate of the firm unless it should appear that the firm had so acted as to make themselves liable for the breach of trust.—*Re* LAKE, *Ex p* HOWE TRUSTEES, [1903] 1 K. B. 439; 72 L. J. K. B. 213; 88 L. T. 31; 51 W. R. 496; 47 Sol. Jo. 205.

4053. —— —— Wrongful pledge of securities—Proceeds applied for firm purposes.]—Bkpt. was a director of a co. & also a partner in bkpt. firm, & he or his firm, who were general managers & agents to the co., improperly pledged bills of lading of the co. for advances of money which they wrongfully used for the purposes of the firm:—*Held:* bkpt. had been guilty of a breach of trust in his capacity as a director of the co., & the co. were entitled to prove, in respect of the contractual liability arising out of his breach of trust, against his separate estate as well as against the joint estate of his firm.—*Re* MACFADYEN, *Ex p.* VIZIANAGARAM MINING CO., LTD., [1908] 2 K. B. 817; 77 L. J. K. B. 1027; 99 L. T. 759; 52 Sol. Jo. 727; 15 Mans. 313, C. A.

Annotation:—**Distd.** *Re* Kent County Gas Light & Coke Co., [1913] 1 Ch. 92.

4054. —— Secret profits made by partners of firm of company promoters.]—The firm of L. & Co., in which G. & D. were the sole partners, were promoters of a co., & sold to the co. a business belonging to G. & D. at a secret profit. The co. went into compulsory liquidation. Both G. & D. were bkpt. G. had no assets, but the liquidator proved against D.'s estate for damages for breach

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p. —— —— *No double proof.*]—Aplts., in the matter of C. & Co., insolvents, had a claim upon a note made by C. & Co., payable to C., one of the firm, & by him indorsed to aplts. They proved against the firm in July, 1869, but afterwards withdrew it, & proved in Jan., 1870, under 1869 Act, s. 6, specifying & putting a value on the separate liability of C.:—*Held:* aplts., under 1864 Act could not rank both upon the separate estate of C. & on the estate of the firm, but must elect; but they might prove against the joint estate for their whole claim, without deducting from it the value of C.'s separate liability.—*Re* CHAFFEY, MERCHANTS BANK OF CANADA *v.* DAVIDSON (1870), 30 U. C. R. 64.—CAN.

of trust & received a dividend. Out of that money & other assets he was prepared to return to the preference shareholders a portion of their capital. Two preference shareholders were mere nominees of L. & Co. The liquidator claimed to retain the dividends payable to those nominees & set them off against the amount due from L. & Co., in respect of their secret profits :—*Held :* there were no distinct contracts between the firm of L. & Co. & the partners in that firm with the co. & there was no right of double proof, & the liquidator, having elected to prove against the estate of one of the partners, had no right to prove against the joint estate of the firm of L. & Co. & there could be no set-off.—*Re* KENT COUNTY GAS LIGHT & COKE CO., LTD., [1913] 1 Ch. 92 ; 82 L. J. Ch. 28 ; 107 L. T. 641 ; 57 Sol. Jo. 112 ; 19 Mans. 358.

4055. Sum paid by sureties for treasurer—Money deposited in bank in which treasurer partner—Right to transfer proof reserved.]—W., the treasurer of a union, lodged the union money to his account as treasurer at a bank, in which he was a partner. The partners assigned their property to trustees to be administered as in bkpcy. W.'s sureties paid the balance due, & received a dividend on a proof made in his name against the joint estate ; & claimed to prove against his separate estate :—*Held :* the claim must be rejected, without prejudice to any application to expunge the joint proof, & substitute a proof against the separate estate.—*Re* WHITFORD, *Ex p.* CARNE (1868), 3 Ch. App. 463, L. JJ.

Annotation :—**Refd.** *Re* Collie, *Ex p.* Adamson (1878), 8 Ch. D. 807, C. A.

SUB-SECT. 3.—WITHIN WHAT TIME.

See 1914 Act, Sched. II., r. 19.

4056. Before dividend—After proof on both estates.]—A creditor under a joint & several bond may prove against both the joint & separate estate, but must make his election before a dividend.—*Ex p.* BENTLEY (1790), 2 Cox, Eq. Cas. 218 ; 30 E. R. 101, L. C.

4057. —— ——.]—Creditors were given a right to prove on both estates & make their election afterwards from which they would receive dividends.—*Re* HOUGHTON & WATTS, *Ex p.* KEDIE & HOUGHTON (1832), 2 Deac. & Ch. 321 ; 1 L. J. Bcy. 87, Ct. of R.

4058. Creditor entitled to time to examine accounts.]—A creditor shall have time to look into the accounts of bkpt.'s joint & separate estate before he makes his election.—*Ex p.* BOND & HILL (1745), 1 Atk. 98 ; 26 E. R. 65, L. C.

Annotations :—**Refd.** *Re* Deane, *Ex p.* Goldsmid (1857), 1 De G. & J. 257, L. JJ. ; Hoare *v.* Oriental Bank Corpn. (1877), 2 App. Cas. 589, P. C. **Mentd.** Thomson *v.* Harding (1857), 3 C. B. N. S. 254.

4059. —— **Equalisation of dividends pending investigation.**]—Where a large number of creditors had a right of election to prove against the joint or separate estate, & the estates were not so ascertained as to enable the creditors to elect, a temporary order was made that no larger dividend should be declared on the joint than on the separate estate, without prejudice to any application to the comr. or the ct. to expunge or transfer any proof.—*Re* REAY, *Ex p.* ARBOUIN & ALLNUTT, *Re* REAY, *Ex p.* GONNE (1846), De G. 359, Ct. of R.

Annotation :—**Mentd.** *Re* Pulsford, *Ex p.* Hayman (1878), 8 Ch. D. 11, C. A.

4060. Within reasonable time.]—The rule, that where there is a choice of debtors an election must be made within a reasonable time, ought to be strictly applied, when a liability is sought to be created by estoppel & the remedy against the person who ought to pay is likely to be imperilled by delay.—FELL *v.* PARKIN (1882), 52 L. J. Q. B. 99 ; 47 L. T. 350.

SUB-SECT. 4.—WHAT AMOUNTS TO ELECTION.

4061. Taking joint security.]—A creditor on a joint & several bond, who takes a joint security, is not bound thereby, but may elect.—*Ex p.* HAY (1808), 15 Ves. 4 ; 33 E. R. 656.

4062. Proof under separate commission.]—A. & B., partners, gave a joint & several bond to C., who afterwards became indebted to A. B. became bkpt. & C. proved the bond under the commission, & then brought a joint action against A. & B., to which B. pleaded his certificate :—*Held :* A. being by such form of action precluded from setting off his separate debt, was entitled to an injunction against C.'s proceeding in the joint action, as C. must proceed against the solvent partner severally.

Though the holder of a joint & several security has it in his option either to proceed jointly or severally yet defts. have, in this case, elected to proceed severally by proving the bond under the commission. They are not at liberty to bring a joint action upon it, but must proceed against the solvent partner severally (LORD ELDON, C.).—BRADLEY *v.* MILLAR (1812), 1 Rose, 273, L. C.

4063. Proof under superseded commission.]—A joint & separate creditor, who sued out a separate commission, & proved under it, is, upon the *supersedeas*, restored to his right of election to prove against the joint estate.—*Re* BROWN & SCOTT, *Ex p.* BROWN (1812), 1 Rose, 433, L. C.

4064. ——.]—A separate commission against one of three partners, prior to a commission against two of the firm, was ordered to be superseded. Petitioning creditor under the first commission being a joint creditor :—*Held :* entitled to his election under the second commission to prove against the joint or separate estate.—*Re* MARTELLY, *Ex p.* SMITH (1823), 1 Gl. & J. 256.

4065. Proving on right to include or exclude dormant partner.]—A. holding the acceptance of B., which he had taken in ignorance that B. was a member of the firm of C. & Co., the drawers, & of which firm one of the members was an infant, proved a debt against the joint estates, under the separate commissions against B. & C. (the infancy of the other partner excluding a joint commission) making his proof, not as against the liability of the parties, arising from the contract on the bill, but upon his right to include or exclude the resort to a dormant partner :—*Held :* such mode of proof was a conclusive election to resort to the joint funds alone, & discharged the separate estate of the acceptor from the liability, which would otherwise have arisen out of the ignorance of the

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PART XI. SECT. 4, SUB-SECT. 4.

q. *Taking proceedings against separate estate.*]—*Semble :* proceedings taken to recover from the separate estate of a partner, an election to waive a claim on the joint estate.—*Re* LITTLE, *Ex p.* FIFE BANKING CO. (1843), 6 I. Eq. R. 197.—**IR.**

r. *Proof against joint estate—Right to amend.*]—In the bkpcy. of a firm a creditor proved against the joint estate for the whole amount due, but afterwards made two amended proofs for part of the amount against the joint estate, & the remainder against the separate estate of one of the partners :—*Held :* the original proof against the joint estate did not operate as an election to prove against that estate only, & the amended proof should be admitted.—*Re* ROBINS & DAY, *Ex p.* GALLAGHER (1884), 3 N. Z. L. R. 93.—**N.Z.**

Sect. 4.—Election, double proof, and transfer of proof: Sub-sects. 4 & 5. Sect. 5.]

holder that the acceptor was a member of the firm of the drawers.—*Re* DE PRADO, *Ex p.* LIDDEL (1814), 2 Rose, 34.

4066. Doing any act in character in which he has proved.]—A creditor's right of election is gone, if he does any act in the character in which he has proved.—*Re* BLACKBURN, *Ex p.* HUSBAND (1820), 5 Madd. 419; 56 E. R. 955; *revsd.* without reference to this point (1825), 2 Gl. & J. 4, L. C.

Annotations:—**Consd.** *Re* Barrow & Geddes, *Ex p.* Moult (1832), Mont. 321, Ct. of R.; *Re* Deane, *Ex p.* Goldsmid (1857), 1 De G. & J. 257, L. JJ. **Mentd.** *Re* Barrow & Geddes, *Ex p.* Moult (1832), Mont. & B. 28, L. C.; *Re* Buxton, *Ex p.* Davenport (1840), 10 L. J. Bcy. 1.

4067. Joint judgment taken on joint & several bond—Merger.]—B. & C. being indebted to A., gave a joint & several bond. A. took, as part of the same security, a joint warrant of attorney & entered up a joint judgment. B. & C. became bkpt.:—*Held:* the bond was merged in the judgment, & A. could only prove against the joint estate of B. & C.—*Re* BARROW & GEDDES, *Ex p.* CHRISTY (1832), 2 Deac. & Ch. 155; Mont. & B. 352; 1 L. J. Bcy. 103, Ct. of R.

Annotations:—**Apld.** *Re* Foxwell, *Ex p.* Pearce (1832), 1 L. J. Bcy. 109. **Distd.** *Re* Keasley, *Ex p.* Pennell (1841), 2 Mont. & De G. 273. **Refd.** *Re* Davison, *Ex p.* Chandler (1884), 13 Q. B. D. 50.

4068. Merely proving & receiving dividend from one estate.]—Where a creditor has a right of election, he does not lose it merely because he has proved & received dividend.—*Re* COLLIE, *Ex p.* ADAMSON (1878), 8 Ch. D. 807; 47 L. J. Bcy. 103; 38 L. T. 917; 26 W. R. 890, C. A.

Annotations:—**Mentd.** Couldery *v.* Bartrum (1881), 19 Ch. D. 394, C. A.; Watson *v.* Holliday (1882), 20 Ch. D. 780; *Re* Parker, *Ex p.* Sheppard (1887), 19 Q. B. D. 84; *Re* Giles, *Ex p.* Stone (1889), 61 L. T. 82, D. C.; Griffith *v.* Pound (1890), 45 Ch. D. 553; *Re* Newton, *Ex p.* National Provincial Bank of England (1896), 3 Mans. 200, D. C.; Whitechurch *v.* Cavanagh, [1902] A. C. 117, H. L.; *Re* Macfadyen, *Ex p.* Vizianagaram Mining Co., [1908] 2 K. B. 817, C. A.; Hillyer *v.* St. Bartholomew's Hospital, [1909] 2 K. B. 820, C. A.

See, further, Nos. 3270 *et seq.*, *ante*, Nos. 4077-4080, *post.*

4069. Proving against continuing partners.]—A., a partner in the firm of A., B. & Co., having retired from the partnership, B. entered into partnership with C. under the same style as before the retirement of A. J., a customer of the old firm, supplied goods to the order of the new firm after the change of partners, but before receiving notice of it. After receiving notice he continued his account with the new firm & supplied them with other goods. J. afterwards brought an action against the new firm for the balance due to him on the goods supplied before & after the notice. The firm having gone into liquidation, J. proved for that amount against their estate. He afterwards brought an action against A. for the price of the goods supplied before he had received the notice of the dissolution of partnership:—*Held:* by bringing the action against B. & C., & proving against their estate in bkpcy., he had made his election & could not sue A.—SCARF *v.* JARDINE (1882), 7 App. Cas. 345; 51 L. J. Q. B. 612; 47 L. T. 258; 30 W. R. 893, H. L.

Annotations:—**Folld.** Fell *v.* Parkin (1882), 52 L. J. Q. B. 99. **Consd.** Longman *v.* Hill (1891), 7 T. L. R. 639. **Apld.** Morel *v.* Westmoreland, [1904] A. C. 11, H. L. **Consd.** Harrisons & Crossfield *v.* L. & N. W. Ry. Co., [1917] 2 K. B. 755. **Refd.** James *v.* Young (1884), 27 Ch. D. 652; Griffith *v.* Pound (1890), 45 Ch. D. 553; *Re* Crook, *Ex p.* Collins (1891), 66 L. T. 29; British Homes Assce. Corpn. *v.* Paterson, [1902] 2 Ch. 404; Morel *v.* Westmoreland, [1903] 1 K. B. 64, C. A.; French *v.* Howie (1905), 93 L. T. 202, D. C.; Codling *v.* Mowlem (1913), 83 L. J. K. B. 445. **Mentd.** Jones *v.* Ashwin & Ivory (1883), Cab. & El. 159; *Re* Davison, *Ex p.* Chandler (1884), 13 Q. B. D. 50; *Re* Snyder Dynamite Projectile Co., Skelton's Case (1893), 68 L. T. 210; Burgess *v.* Morton (1894), 10 T. L. R. 339, C. A.; *Re* Law, Law *v.* Law (1904), 92 L. T. 1, C. A.; *Re* West Coast Gold Fields, *Ex p.* Salaman (1905), 75 L. J. Ch. 23, C. A.; Moel Tryvan Ship Co. *v.* Weir, [1910] 2 K. B. 844, C. A.; Willis, Faber *v.* Joyce (1911), 104 L. T. 576; Bradford Old Bank *v.* Sutcliffe, [1918] 2 K. B. 833.

See, generally, ESTOPPEL.

4070. Attending meeting of creditors of one debtor—Acting as chairman—Voting against composition.]—A creditor having a choice of debtors attended at a meeting of the creditors of one debtor, handed in a claim which was allowed, took the chair at the meeting, & voted against the acceptance of a composition:—*Held:* he had elected to accept the liability of that debtor & to give up his claim against the other.—FELL *v.* PARKIN (1882), 52 L. J. Q. B. 99; 47 L. T. 350.

SUB-SECT. 5.—TRANSFER OF PROOF.

4071. After election—Whether transfer matter of course.]—A creditor, who has exercised his right of election, cannot obtain permission, as a matter of course, to transfer his proof.—*Re* ROBINSON, *Ex p.* DIXON (1841), 2 Mont. D. & De G. 312, Ct. of R.

4072. Proof under one commission—Leave to waive proof & prove under other commission—Previous dividends not disturbed.]—Creditors, having proved under a joint commission of bkpcy. upon a joint & several obligation, but not having received a dividend, were permitted to waive their proof, & to prove against the separate estate, not disturbing any dividend already made.—*Ex p.* BIELBY (1806), 13 Ves. 70; 33 E. R. 221.

4073. —— In ignorance of rights under other commission.]—*Re* KIRBY, *Ex p.* MASSON, No. 4043, *ante.*

4074. —— —— Proof transferred.]—A creditor had proved against the joint estate of two partners for goods sold & delivered. The goods had, in fact, been bought by one partner, as the agent of the other on his separate account:—*Held:* on discovery of the truth, the creditor could transfer his proof to the separate estate of the partner, for whose benefit the goods had been purchased.—*Re* BOWERMAN, *Ex p.* VINING (1836), 1 Deac. 555; 5 L. J. Bcy. 44, Ct. of R.

4075. Proof & dividend declared under one commission—Leave to retire & prove under other commission.]—A. & B. were in partnership, B.

s. —— *By principal creditor—Effect on right of surety to prove on separate estate.*]—M. traded as M. & Co., & also in a separate business as M., with separate banking accounts for each. He obtained an advance from a bank in respect of M. & Co., J. giving the bank a continuing guarantee. By this guarantee it was agreed that, in case of the bkpcy. of M. & Co., all dividends should be received by the bank, & the guarantee should extend to the unpaid balance. M. at the same time gave J. certain mtges. over his private property, & in these mtges. covenanted to hold J. indemnified against all sums payable under the guarantee. Some time afterwards J. agreed to increase the guaranteed amount, & shortly before the bkpcy. of M., J. advanced him money on his separate account, indorsed promissory notes to cover these second advances, & to secure these, took a mtge. deed over other land. The mtge. deed contained a recital of the guarantee, & provided that the mtge. was to be redeemed, if M. should indemnify J. against his liability on the guarantee, M. & Co. became bkpt., as did M. in respect of his separate estate. The bank proved against the estate of M. & Co., received a dividend, & required J. to pay the whole amount secured by the guarantee. J. then put in a proof against M.'s separate estate, including in this proof the amount paid to the bank on M. & Co.'s account, & valuing his securities:—*Held:* the proof by the bank was not an election which would prevent J. from proving against M.'s private estate.—*Re* MOELLER, *Ex p.* JOSEPH (1884), 3 N. Z. L. R. 164.—N.Z.

being a secret partner. A., on the partnership account, drew bills in his own name on B., which were accepted by him:—*Held:* the holder, having proved against the joint estate, might, after a declaration of dividend of the joint estate, retire from that proof, & prove against the separate estates.—*Re* BLACKBURN, *Ex p.* HUSBANDS (1825), 2 Gl. & J. 4, L. C.

Annotations:—**Consd.** *Re* Barrow & Geddes, *Ex p.* Moult (1832), Mont. 321, Ct. of R. **Apld.** *Re* Barrow & Geddes, *Ex p.* Moult (1832), Mont. & B. 28, L. C. **Consd.** *Re* Buxton, *Ex p.* Davenport (1840), 10 L. J. Bcy. 1. **Refd.** *Re* Deane, *Ex p.* Goldsmid (1857), 1 De G. & J. 257, L. JJ.

4076. —— **In ignorance of true circumstances—Proof transferred.**]—A merchant issued a circular announcing that he had taken his nephew into partnership. In fact the nephew was not a partner, but a paid servant. Both became bkpt., & a dividend was declared on the supposed joint estate. A creditor, whose debt had been contracted since the date of the circular, having discovered that no partnership existed, sought to transfer his proof from the joint estate, to the separate estate of the merchant. By consent, the creditor brought an action against the merchant for the debt proved, & the defence was conducted by a separate creditor. A verdict was returned for pltf., & a rule for a new trial was refused. Subsequently the proof was transferred to the separate estate.—*Re* REAY, *Ex p.* ARBOUIN & ALLNUTT, *Re* REAY, *Ex p.* GONNE (1846), De G. 359, Ct. of R.

Annotation:—**Expld. & Distd.** *Re* Pulsford, *Ex p.* Hayman (1878), 8 Ch. D. 11, C. A.

4077. Proof & dividend received under one commission—Leave to retire & prove under other commission—On refund of dividend.]—A. & B., secretly partners, used the one his name as drawer, & the other his as acceptor of bills. A creditor holding such bills proved them first against the separate estate of A. under a separate fiat, then also against the joint estate of A. & B. He then received a dividend out of the separate estate, it being at that time intimated to him that one proof must be expunged, & one proof was expunged:—*Held:* by receiving the dividend he had not made his election to abide by his separate proof, but on refunding the dividend he might elect to come in under the joint fiat.—*Re* BAZLEY & CHAPMAN, *Ex p.* LAW (1839), Mont. & Ch. 111; *sub nom. Re* BAYLEY & CHAPMAN, *Ex p.* LAW, 3 Deac. 541, Ct. of R.

4078. —— —— ——.]—A joint creditor of a firm, who had proved his debt against the joint estate when in ignorance of the state of their accounts, they being the subject of a suit in equity, & having received dividends, was allowed to abandon his proof against the joint estate &, upon repaying the dividends, to prove against the separate estate.—*Re* WYAT & THOMPSON, *Ex p.* WATSON (1850), Fonbl. 178.

4079. —— —— —— **With interest.**]—A joint creditor sued out two separate commissions. Under one he proved against the joint estate, & received a dividend, at which time he was ignorant of his right to prove against the separate estate of the others:—*Held:* he had not conclusively elected to prove as a joint creditor, & on refunding the dividend with interest, he might prove as a separate creditor.—*Re* MACKENZIE, *Ex p.* BOLTON, *Ex p.* SWANZY (1816), Buck, 7, L. C.

Annotations:—**Refd.** *Re* Wiffin & King, *Ex p.* Cripps (1858), 30 L. T. O. S. 296. **Mentd.** *Re* Collie, *Ex p.* Adamson (1878), 26 W. R. 890, C. A.

4080. —— —— —— —— **Previous dividend not disturbed.**]—Where a creditor has merely proved & received dividend he may change his election, on refunding the dividend which he has received with interest at 4 per cent., though he cannot disturb any dividend already made.—*Re* COLLIE, *Ex p.* ADAMSON (1878), 8 Ch. D. 807; 47 L. J. Bcy. 103; 38 L. T. 917; 26 W. R. 890, C. A.

Annotations:—**Consd.** Couldery *v.* Bartrum (1881), 19 Ch. D. 394, C. A. **Refd.** Griffith *v.* Pound (1890), 45 Ch. D. 553, **Mentd.** Watson *v.* Holliday (1882), 20 Ch. D. 780; *Re* Parker, *Ex p.* Sheppard (1887), 19 Q. B. D. 84; *Re* Giles, *Ex p.* Stone (1889), 61 L. T. 82, D. C.; *Re* Newton, *Ex p.* National Provincial Bank of England (1896), 3 Mans. 200, D. C.; Whitechurch *v.* Cavanagh, [1902] A. C. 117, H. L.; *Re* Macfadyen, *Ex p.* Vizianagaram Mining Co., [1908] 2 K. B. 817, C. A.; Hillyer *v.* St. Bartholomew's Hospital, [1909] 2 K. B. 820, C. A.

SECT. 5.—POSITION OF SECURED CREDITORS.

See, generally, Part IX., *ante.*

4081. Abandonment of security—By separate creditors — Holding joint security.] — Separate creditors, who had taken a joint security, were permitted on giving it up to resort under a commission of bkpcy. to their original debts.—*Ex p.* LOBB (1802), 7 Ves. 592; 32 E. R. 238.

4082. Order for sale—Security deposited by bankrupt partner as security for firm debt—Other partner solvent.]—One of two partners deposited the deeds of his own estate, by way of equitable mtge., to secure a partnership debt, & afterwards became bkpt., the other partner being solvent:—*Held:* an order might be made for the sale of the equitable mtge.—*Re* IRELAND & HARRISON, *Ex p.* LLOYD (1838), 3 Deac. 305; 3 Mont. & A. 601, Ct. of R.

4083. —— **Security from partner—Bankruptcy of firm—Security deposited before firm formed.**]—A trader deposited policies of assurance with his bankers to secure the floating balance due from him, & signed a memorandum of the object of the deposit, of which notice was given to the insurance office. Afterwards he took a partner, & the policies remained & were treated as a security for the floating balance due from the firm, but of the change in the object of the security no memorandum was signed, nor was any notice given to the office. On the firm becoming bkpt.:—*Held:* the bankers were entitled to the usual order as in the case of an equitable mtge. without a written memorandum.—*Re* REAY, *Ex p.* BARNETT (1845), De G. 194, Ct. of R.

Annotations:—**Consd.** *Re* Buller, *Ex p.* Wornald (1860), 2 L. T. 544. **Refd.** *Re* Richards, Humber *v.* Richards (1890), 45 Ch. D. 589. **Mentd.** *Re* Goetz, Jonas, *Ex p.* Trustee (1898), 78 L. T. 399, C. A.

4084. —— **Abandonment.**]—A creditor, who has obtained the common order for sale of a security on the property of two of three partners, deposited by the three partners, with liberty to prove for the deficiency, cannot afterwards abandon that order, & claim to prove for his whole debt against the three partners retaining his security on the estate of the two, although the order has been acted on, & the creditor was not aware of his rights when it was obtained.—*Re* BUXTON, *Ex p.* DAVENPORT (1840), 1 Mont. D. & De G. 313; 10 L. J. Bcy. 1; 4 Jur. 1066, Ct. of R.

4085. Application of security—Whether joint creditors can insist on application in particular way.]—A creditor proved against the joint estate the amount of six several bills of exchange, all jointly accepted by two bkpts., for which he stated in his proof he held no security, except an assignment from one bkpt., to a trustee for the amount of a separate debt owing to such bkpt. After the proof was made, the trustee received the amount of that debt:—*Held:* the joint creditors had no right to insist on the appropriation of the money

Sect. 5.—Position of secured creditors.]

received by the trustee, towards the payment of any particular bills, for the purpose of reducing the proof against the joint estate.—*Re* WYATT & THOMPSON, *Ex p.* GROOM (1837), 2 Deac. 265; 3 Mont. & A. 157, Ct. of R.

4086. —— Debts due from two firms with common partner.]—One of two bkpts., M., being a partner in another firm of M. & S., gave a security to petitioners for any money that might become due, either from the house of bkpts., or from the firm of M. & S.:—*Held:* the proceeds of the security might be applied first in discharge of the debt due from the firm of M. & S. Form of order. —*Re* MEDLEY, *Ex p.* GLYN (1840), 1 Mont. D. & De G. 25, Ct. of R.

Annotation:—**Consd.** *Re* Fox & Jacobs, *Ex p.* Discount Banking Co. of England & Wales, [1894] 1 Q. B. 438.

4087. —— Debts due from firm & partner separately.]—A creditor of two partners was also a creditor of one of the partners separately, & the title-deeds of separate estate of that partner were deposited with him to secure both the joint & the separate debts. The two partners filed a joint liquidation petition, & the partner, whose separate estate was mortgaged, also filed a separate liquidation petition. The security having been realised:—*Held:* the creditor was entitled to apportion the produce of the realisation between his joint & separate debts in whatever way was most for his advantage, & to enable him to exercise that option, he was entitled to have a dividend on the joint estate declared before the declaration of a dividend on the separate estate.—*Re* FOSTER, *Ex p.* DICKIN (1875), L. R. 20 Eq. 767; 44 L. J. Bcy. 113; 33 L. T. 37; 24 W. R. 221.

4088. —— As to interest.]—Securities by way of equitable mtge. comprised joint property of bkpt. partners, separate property of one partner, & property of a stranger, & the mtgees. being joint & separate creditors elected to prove against the separate estates:—*Held:* an order made on their petition & directing an account of principal & interest due to them, without express limitation of the calculation of the interest to interest due at the date of the fiat, did not entitle them to a calculation of, or to retain out of the proceeds of the securities, interest subsequent to the date of the fiat.—*Re* FLOOD & LOTT, *Ex p.* LUBBOCK (1863), 4 De G. J. & Sm. 516; 2 New Rep. 207; 32 L. J. Bcy. 58; 8 L. T. 474; 9 Jur. N. S. 854; 46 E. R. 1019, L. C.

Annotation:—**Consd.** *Re* Savin (1872), 7 Ch. App. 760, L. JJ.

See 1914 Act, Sched. II., & 1915 Rules, r. 77.

4089. Security not held by creditor proving—Securities marshalled.]—A partnership firm wrongly pledged to their bankers, to secure a debt of the firm, delivery warrants of some brandy which had been left in their custody in the ordinary course of business by the owner. One of the partners in the firm had no knowledge of the fraud. The debt due by the firm to the bankers was also secured by a separate guarantee of the innocent partner. The firm filed a liquidation petition, & the bankers sold the brandy, & applied the proceeds of sale in part payment of their debt. The owner of the brandy knew nothing of the pledge until the stoppage of the firm. The separate estate of the innocent partner was sufficient to pay all his separate creditors in full, including the balance remaining due to the bankers, & to leave a surplus:—*Held:* the owner of the brandy was entitled to have the bankers' securities marshalled, &, to the extent of the value of the brandy, to have the benefit of the guarantee, & to prove against the separate estate of the innocent partner.—*Re* STRATTON, *Ex p.* SALTING (1883), 25 Ch. D. 148; 53 L. J. Ch. 415; 49 L. T. 694; 32 W. R. 450, C. A.

See, also, Part XX., Sect. 5, sub-sect. 3, D., *post.*

4090. Whether value of security must be deducted—Security of partner for debt of firm.]—Petitioners were holders of bills of exchange drawn by B., H. & Co., which firm consisted of L., A., B. & H., & accepted by L. & A. The acceptors having dishonoured the bills, petitioners resorted to the drawers. It being inconvenient for the drawers to pay, it was agreed between petitioners & B. & H., that they should assign to petitioners a plantation as security for the balance owing on the bills & interest, which was done. Afterwards a joint commission issued against L. & A. Petitioners were allowed to prove the amount of the bills & interest without deducting the value of the security.—*Re* LEIGH & ARMSTRONG, *Ex p.* PARR (1811), 1 Rose, 76; 18 Ves. 65; 34 E. R. 242, L. C.

Annotation:—**Refd.** *Re* Deane & Youle, *Ex p.* Goldsmid (1857), 1 De G. & J. 257, L. JJ.

4091. —— ——.]—A joint creditor having separate security from one of his co-debtors, was admitted to prove his debt against the joint estate, without surrender or sale of his security.—*Re* BELL, *Ex p.* PEACOCK (1825), 2 Gl. & J. 27, L. C.

Annotations:—**Apld.** *Re* Brettell, *Ex p.* Bowden (1832), 1 Deac. & Ch. 135, Ct. of R. **Consd.** *Re* Wyatt & Thompson, *Ex p.* Groom (1837), 2 Deac. 265, Ct. of R. **Expld.** *Re* Clarke & Parry, *Ex p.* Connell (1838), 3 Deac. 201, Ct. of R. **Distd.** *Re* Plummer & Wilson, *Ex p.* Shepherd (1841), 2 Mont. D. & De G. 204, L. C.; *Re* Jobson, *Ex p.* Thornton (1858), 3 De G. & J. 454, L. JJ. **Consd.** Rolfe & Bank of Australasia *v.* Flower, Salting (1866), L. R. 1 P. C. 27, P. C. **Refd.** *Re* Turner, *Ex p.* West Riding Union Banking Co. (1881), 19 Ch. D. 105, C. A.

4092. —— ——.]—A joint creditor having a security on the separate estate of a partner is entitled to prove against the joint estate without estimating or deducting its value.—ROLFE & BANK OF AUSTRALASIA *v.* FLOWER, SALTING & CO. (1865), L. R. 1 P. C. 27; 3 Moo. P. C. C. N. S. 365; 16 E. R. 139; *sub nom.* BANK OF AUSTRALASIA *v.* FLOWER, SALTING & CO., 35 L. J. P. C. 13; 12 Jur. N. S. 345; 14 W. R. 377, 467; *sub nom.* ROLFE *v.* FLOWER, BANK OF AUSTRALASIA *v.* FLOWER, 14 L. T. 144, P. C.

Annotations:—**Distd.** *Re* Commercial Bank Corpn. of India & the East, Jones's Claim (1868), 18 L. T. 668, C. A.; Sugg *v.* Hill (1893), 10 T. L. R. 126. **Refd.** *Re* Smith Knight, *Ex p.* Gibson (1869), 4 Ch. App. 662, L. JJ. **Mentd.** Barker *v.* Stickney, [1918] 2 K. B. 356; Bradford Old Bank *v.* Sutcliffe, [1918] 2 K. B. 833, C. A.

4093. —— —— Property forming security subsequently devised to bankrupt partners.]—Bkpt. & his partner, K., borrowed money on their joint promissory note, & K. deposited deeds of his separate property. K. died, devising his property to bkpt. subject to his debts:—*Held:* the creditor

PART XI. SECT. 5.

4090 i. *Whether value of security must be deducted—Security of partner for debt of firm—Proof against separate estate.*]—A partner who has individually joined as a maker in a promissory note of his firm for their accommodation is primarily liable, & in claiming against his insolvent estate in administration the holder need not value his security in respect of the firm's liability.—BELL *v.* OTTAWA TRUST & DEPOSIT CO. (1897), 28 O. R. 519.—**CAN.**

t. —— *Lien over partnership assets—Proof against separate estate.*]—Each of several exors., carrying on the business of their testator pursuant to the will has a right of indemnity against the assets of testator, including a lien over those assets, for liabilities properly incurred, & any security held by a creditor which interferes with that right is a security, the giving up of which will go to augment the estate of each exor., & the creditor must offer to give up or value that security when petitioning to sequestrate the estate of one of the exors.—SAVAGE *v.* UNION BANK OF AUSTRALIA, LTD., WHITELAW *v.* UNION BANK OF AUSTRALIA, LTD. (1906), 3 C. L. R. 1170.—**AUS.**

might prove the full amount of his debt without giving up his security.—*Re* BRETTELL, *Ex p.* BOWDEN (1832), 1 Deac. & Ch. 135 ; 1 L. J. Bcy. 37, Ct. of R.

Annotations :—**Consd.** *Re* Clarke & Parry, *Ex p.* Connell (1838), 3 Deac. 201, Ct. of R. **Refd.** *Re* Plummer (1841), 1 Ph. 56. **Mentd.** Rolfe & Bank of Australasia *v.* Flower, Salting (1866), L. R. 1 P. C. 27, P. C. ; *Re* Turner, *Ex p.* West Riding Union Banking Co. (1881), 19 Ch. D. 105, C. A.

4094. —— —— —— **Order on petition to expunge proof.**]—A., B. & C. carried on business in partnership, in premises belonging to A. A. executed a mtge. of the property to a banking co., with a power of sale, for securing £6,000, the amount of advances to the partnership by the bank. A. afterwards died, having devised the property to B. & C., who, becoming insolvent, made an assignment of all their estate & effects, in trust for their creditors, & the trustees, with the sanction of the bank, entered into a contract with a purchaser for the sale to him of the mortgaged property, the purchaser agreeing to pay to the banking co. the £6,000 by yearly instalments. A fiat afterwards issued against B. & C., under which the bank proved for the whole amount of their debt, including the £6,000. On a petition by the assignees to expunge the proof for that sum, the ct. allowed the proof to stand, but directed the dividends to be paid into ct., subject to further order.—*Re* STEEL, *Ex p.* SMYTH (1839), 3 Deac. 597, Ct. of R.

4095. —— —— **Deposit by firm of title-deeds of two partners.**]—Three partners, to secure a joint debt, deposited with their creditor the title-deeds of an estate belonging to two of the partners :—*Qu. :* whether the creditor could prove for the whole amount of his debt against the joint estate, without first realising his security.—*Re* BUXTON, *Ex p.* DAVENPORT (1840), 1 Mont. D. & De G. 313 ; 10 L. J. Bcy. 1 ; 4 Jur. 1066, Ct. of R.

4096. —— —— **Security given by one partner after bankruptcy of other partner.**]—F. & H. were jointly indebted to a bank. F. became bkpt., but the joint effects, not being more than equal to the payment of the partnership debts, were left in the possession of H., who afterwards made an arrangement with the bank for the payment of the debt due to the bank by instalments, &, as a further security, deposited with the solrs. of the bank the leases of two houses, which were his separate property for the purpose of being assigned to the bank. The bank considered H. as the bank's sole debtor. Afterwards H. addressed to the bank's solrs. the following letter :—" You will please deliver to the bank the deeds of the properties or leases in your possession belonging to me." The deeds were still held by the solr. on behalf of the bank as equitable mtgees. of the property. A separate fiat issued against H., under which the assignees possessed themselves of his separate estate & also of the joint estate of F. & H. which had been left in H.'s possession :—*Held :* the banking co. were entitled as equitable mtgees. to the proceeds of the leasehold premises, & the money to arise from the sale of the premises should be applied in the usual manner in satisfaction of what should be found due to the banking co., & they should be permitted to prove for the deficiency against the joint estate.—*Re* HEATLEY, *Ex p.* SMITH (1840), 1 Mont. D. & De G. 165, Ct. of R.

4097. —— —— **Deposit of bond.**]—One of three partners deposited with a joint creditor a bond belonging to himself, to secure the partnership debt. On the bkpcy. of the partners :—*Held :* the creditor could prove the amount of his debt against the joint estate, without giving up the bond.—*Re* RIDGE, *Ex p.* HALLIFAX (1842), 2 Mont. D. & De G. 544, Ct. of R.

4098. —— —— **Security clearly joint property of firm.**]—Creditors of a bkpt. firm holding securities, the separate estate of each partner, are entitled to prove against the joint estate under the bkpcy. for the full amount of their debt, without first realising or giving up their securities, but where such securities are clearly the joint property of the firm, the creditors must realise or give up the securities in the first instance.—*Re* STREATFIELD, LAWRENCE & Co., *Ex p.* ASSIGNEES (1860), 3 L. T. 600 ; *subsequent proceedings, sub nom. Re* STREATFEILD, LAURENCE & Co., *Ex p.* M'KENNA, *Ex p.* BANK OF ENGLAND (1861), 30 L. J. Bcy. 24, 25, L. JJ.

4099. —— —— **Property forming security becoming joint after debt incurred but without knowledge of creditor.**]—Shares in a bank, held by one partner & originally belonging to him, became, unknown to the bank, partnership property, & were such when the firm became bkpt. The firm were then largely indebted to the bank on their account, which debt accrued after the shares became partnership property. The bank had an undisputed charge on the shares under their articles of assocn., which gave a lien for all debts due from the holder alone or jointly with any other person, but they claimed to realise such lien as a separate security, & to prove for the whole debt against the joint estate without deducting the amount so realised :—*Held :* the ct. must look only at the fact whether the creditors held a security on bkpt.'s property, & could not consider whether the creditors had believed it to be such, & the amount of the security must be deducted from the proof.—*Re* COLLIE, *Ex p.* MANCHESTER & COUNTY BANK (1876), 3 Ch. D. 481 ; 45 L. J. Bcy. 149 ; 35 L. T. 23 ; 24 W. R. 1035, C. A.

Annotation :—**Folld.** *Re* Cooksey, *Ex p.* Portal (1900), 83 L. T. 435.

4100. —— —— **Security pledged for private & also for partnership debt.**]—Property belonging to a member of a firm was charged by him in favour of a bank for securing his own private debts to the bank, & also those of the firm. Each partner in the firm having gone into liquidation, the bank realised the security, deducted the private debt of the owner out of the proceeds of sale, & carried over the residue to a suspense account :—*Held :* the bank were not prevented from proving for their whole debt against the joint estate.—*Re* WALKER & Co., *Ex p.* WATSON (1880), 42 L. T. 516 ; 28 W. R. 632.

4101. —— —— **Security realised before bankruptcy—Proceeds held on deposit as security.**]—One of the partners in a firm mortgaged property belonging to himself alone to the bankers of the firm as a security for the firm's account. The mortgaged property was afterwards sold by the partner, the bank joining in the sale, & it was agreed between them that the purchase-money should be deposited with the bank in the name of the partner at 5 per cent. interest, as security to the bank for the balance for the time being owing to them by the firm, but that, subject to such security, the purchase-money, & the interest to accrue due thereon, should remain the separate property of the partner. The firm afterwards went into liquidation, owing a large balance to the bank :—*Held :* the mtge. given by the partner to the bank was a *bonâ fide* security upon his separate estate, & after the sale the purchase-money did not become a debt due from the bank to the firm, & the bank were entitled to prove in the liquidation of the firm for the whole amount

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of the balance due to them from the firm, without setting off the amount of the purchase-money in their hands.—*Re* HART, *Ex p.* CALDICOTT (1884), 25 Ch. D. 716; 53 L. J. Ch. 618; 50 L. T. 651; 32 W. R. 396, C. A.

Annotation:—**Refd.** Eberle's Hotels & Restaurant Co. *v.* Jonas (1887), 18 Q. B. D. 459, C. A.

4102. —— —— Shares forming security unable to be held jointly.]—A. & C., bkpts., kept a partnership account with a banking co., each being proprietors of shares, which stood in the books in their separate names, but which, in the deed of partnership between them, were declared to be joint property. By the deed of the co. it was provided that no shares should be held jointly, or be divided into fractional parts:—*Held:* the co. could not prove their joint debt against the firm, without first realising the shares which they held as a security, & deducting the amount from the proof.—*Re* CLARKE, *Ex p.* CONNELL (1838), 3 Deac. 201; 3 Mont. & A. 581; 7 L. J. Bcy. 44, Ct. of R.

Annotations:—**Consd.** *Re* Plummer, *Ex p.* Shepherd, *Re* Plummer, *Ex p.* Joad (1840), 9 L. J. Bcy. 31, Ct. of R.; *Re* Collie, *Ex p.* Manchester & County Bank (1876), 3 Ch. D. 481, C. A.

4103. —— Warrant of attorney taken for joint debt—Separate execution thereon—Proof of separate debt without giving up execution.]—On a separate commission against one of a firm, a joint & separate creditor, who in respect of his joint debt had taken a warrant of attorney, & sued out a separate execution against bkpt.:—*Held:* entitled to prove his separate debt, without giving up his execution.—*Ex p.* STANBOROUGH (1820), 5 Madd. 89; 56 E. R. 829.

4104. —— Security of partner for debt of other partner.]—An equitable mtgee. of one partner, for a debt due from the other, may prove his whole debt against the separate estate of that other partner & retain his security against the first.—*Re* PARKIN, *Ex p.* RODGERS (1832), 1 Deac. & Ch. 38, Ct. of R.

4105. —— Security by firm—Proof against separate estate.]—A partnership firm mortgaged part of the joint estate to secure a joint debt, & by the mtge. deed covenanted jointly & severally for payment of the debt:—*Held:* on their bkpcy., the mtgee. might prove the whole debt against each separate estate, without giving up his security.—*Re* PLUMMER & WILSON, *Ex p.* SHEPHERD (1841), 1 Ph. 56; 2 Mont. D. & De G. 204; 11 L. J. Ch. 25; 5 Jur. 1147; 41 E. R. 552, L. C.

Annotations:—**Consd.** Midland Banking Co. *v.* Chambers (1868), L. R. 7 Eq. 179; *Re* Turner, *Ex p.* West Riding Union Banking Co. (1881), 19 Ch. D. 105, C. A.; *Re* Hart, *Ex p.* Caldicott (1884), 25 Ch. D. 716. **Refd.** Bank of Australasia *v.* Flower, Salting (1866), 35 L. J. P. C. 13, P. C. **Mentd.** *Re* Jobson, *Ex p.* Thornton (1858), 3 De G. & J. 454, L. JJ.

4106. ———— ————.]—Petitioners, being equitable mtgees. of certain property of bkpts., obtained the usual order for sale of the property, with liberty to bid, & to prove for any deficiency. They also held the joint & several bonds of bkpts. for the payment of the mtge. money. The estate was sold to one of petitioners, for a sum amounting nearly to the whole debt:—*Held:* petitioners could not prove against the separate estates on the bonds for the full amount of the debt, but only for the deficiency unsatisfied by the proceeds of the sale.—*Re* GYE, *Ex p.* REYNAL (1842), 2 Mont. D. & De G. 637, Ct. of R.

4107. —— —— ——.]—A firm in Charleston applied to a firm in Liverpool to raise the necessary funds for the purchase of cotton in America for sale in England, at the risk of certain speculators for whom they acted, & the Liverpool firm applied to an English bank for an advance for that purpose. An arrangement was made, under which the Charleston firm drew upon an American branch of the bank for the amount required, purchased the cotton, consigned it to the Liverpool firm, drew bills upon that firm, & indorsed them to the bank. At the same time the cotton was consigned to the Liverpool firm, who accepted the bills drawn upon them by the Charleston firm, & the bills of lading were indorsed by the Charleston firm to the bank as security for their advance. Afterwards the Liverpool & Charleston firms became insolvent. The value of the cotton was insufficient to cover the acceptances of the Liverpool firm:—*Held:* the transaction was a joint adventure of the Charleston & Liverpool firms, & they were jointly interested in the cotton, & the bank could prove against the estate of the Liverpool firm for the sum advanced without giving up their security.—*Re* FRASER, TRENHOLM & Co., *Ex p.* ENGLISH & AMERICAN BANK (1868), 4 Ch. App. 49; *sub nom. Re* PRIOLEAU, *Ex p.* ENGLISH & AMERICAN BANK, 19 L. T. 302, L. JJ.

Annotation:—**Distd.** *Re* Turner, *Ex p.* West Riding Union Banking Co. (1881), 19 Ch. D. 105, C. A.

4108. —— Security by firm for debt of continuing partner—Continuing partner owning half security.]—In 1853 B. & T. entered into partnership as woollen manufacturers. A mill was erected out of the partnership funds upon land leased for nine hundred & ninety-nine years to B. & T., their exors., administrators, & assigns. In 1875 the partnership was dissolved by agreement, B. retiring from the business & leasing his moiety of the mill to T., who continued the business in his own name alone. At the same time B. joined T. in depositing the lease of the mill to secure T.'s banking account in continuing the business to the amount of £15,000. In 1880 T. went into liquidation, & the bank claimed to prove for £29,000, the amount to which T.'s account was overdrawn, without valuing the security created by the deposit of the lease by B. & T., on the ground that it was a joint security:—*Held:* the bank were not entitled to prove without first deducting the value of T.'s half of the security.—*Re* TURNER, *Ex p.* WEST RIDING UNION BANKING Co. (1881), 19 Ch. D. 105; 45 L. T. 546; 30 W. R. 239, C. A.

4105 i. —— *Security of firm for debt of partner—Proof against separate estate.*]—Where a creditor holds security on the partnership estate for the individual liability of an insolvent member of the firm, he is entitled to prove against the separate estate without putting a value on such security.—*Re* JONES, *Ex p.* CONSOLIDATED BANK (1878), 2 A. R. 626.—**CAN.**

4105 ii. ———— ————.]—If, on a petition for the sequestration of the estate of one partner, the act of insolvency alleged is the non-satisfaction by that partner of a judgment obtained against the firm, any security from the firm to debtor need not be set out or valued.—*Re* STEVENSON (1893), 19 V. L. R. 660.—**AUS.**

w. —— *Joint & several mortgage by tenants in common—Proof against estate of one.*]—A debtor, possessed as tenant in common of an undivided share in a piece of land, joined with his co-tenants in mortgaging the land. The mtge. contained a joint & several covenant. Debtor afterwards became bkpt. On summons by the mtgee. to be admitted to prove on the estate for the whole of the private debt:—*Held:* before being admitted to prove on the estate, the mtgee. must value bkpt.'s undivided share in the land.—*Re* JACOBS (1890), 9 N. Z. L. R. 293.—**N.Z.**

a. *Whether security must be surrendered—Security of partner for debt of firm.*]—In insolvency a joint creditor of a firm who obtains a security upon the property of a member of it may have his payment ratably out of the estate of the firm without being required to surrender his security upon the separate estate of the member of it.—ROBINSON BROOKING & Co. *v.* MCBRIDE & Co. (1850), 3 Nfld. L. R. 160.—**NFLD.**

SECT. 6.—RIGHTS OF PARTNERS.

SUB-SECT. 1.—OF SOLVENT PARTNER.

4109. Right to sue—Without joining assignees—Payment out of separate property to defendants' use—Contract made before bankruptcy.]—The payment of money to defts.' use by a solvent partner, out of his separate property, after the bkpcy. of his partner, in pursuance of a contract made before the bkpcy., may be sued for in the name of the solvent partner only, without joining the assignees of bkpt. partner.

Where pltf. & bkpt., before the bkpcy., being insurance brokers, effected an insurance for defts., & the receipt of the premium was acknowledged in the policy at the time of effecting such insurance, but the premium was not in fact paid until after the partner's bkpcy. by pltf., out of his own separate property:—*Held:* the principal insured was liable to the solvent partner only.—THACKER *v.* SHEPHERD (1773), 2 Chit. 652.

Annotation:—**Consd.** Aspinall *v.* L. & N. W. Ry. Co. (1853), 11 Hare, 325.

4110. Right to sell partnership effects—Whether sale good against assignees under subsequent joint commission.]—If one of two partners become bkpt., the solvent partner may, if for a valuable consideration & without fraud, dispose of the partnership effects; & if he afterwards fail, the assignees, under a joint commission against both, cannot maintain trover against the *bonâ fide* vendee of such partnership effects.—FOX *v.* HANBURY (1776), 2 Cowp. 445; 98 E. R. 1179.

Annotations:—**Apld.** Salomons *v.* Nissen (1788), 2 Term Rep. 674. **Distd.** Meyer *v.* Sharpe (1813), 5 Taunt. 74. **Consd.** Harvey *v.* Crickett (1816), 5 M. & S. 336; Brickwood *v.* Miller (1817), 3 Mer. 279; *Re* Houghton & Watts, *Ex p.* Robinson (1833), Coop. *temp.* Brough. 162; Morgan *v.* Marquis (1853), 9 Exch. 145; Fraser *v.* Kershaw (1856), 2 K. & J. 496. **Refd.** Taylor *v.* Fields (1799), 4 Ves. 396. **Mentd.** Crawshay *v.* Collins (1808), 15 Ves. 218; Dutton *v.* Morrison (1810), 17 Ves. 193; Dickson *v.* Cass (1830), 1 B. & Ad. 343.

4111. —— —— Sale by sheriff under execution against then solvent partner.]—One of two partners became bkpt. Part of the partnership property was subsequently seized by the sheriff, under a *fi. fa.* obtained against the solvent partner, & sold. The vendee subsequently offered the goods for sale as his property. A joint adjudication was afterwards made against both partners, & the assignee forcibly retained possession of the goods:—*Held:* the power of the solvent partner, upon the bkpcy. of his copartner, to sell the partnership property was given him in his personal capacity, & could not be transferred either by assignment of "all his share & interest" in the partnership, or by exposing himself, although *bonâ fide*, to a judgment under which all such share & interest was taken in execution, & the assignee was entitled to an injunction restraining the sale, notwithstanding his misconduct in violently putting deft. out of possession.—FRASER *v.* KERSHAW (1856), 2 K. & J. 496; 25 L. J. Ch. 445; 2 Jur. N. S. 880; 4 W. R. 431; 69 E. R. 878.

4112. Right to deliver partnership effects for antecedent debt—Creditor tenant in common with assignees.]—After an act of bkpcy. committed by one partner, the other delivered goods of their joint property to a creditor for a joint debt & died. Afterwards a commission issued against the surviving partner:—*Held:* the creditor, by virtue of such delivery by the solvent partner, became tenant in common of the goods with the assignees of bkpt. by relation from the act of bkpcy. which was in the lifetime of the solvent partner, & the assignees could not maintain trover against such creditor.

If [the solvent partner] delivered the property over to deft. *bonâ fide* for a debt, which must be taken to be the case here, the latter stands in the same situation as [the former] himself would have done (LORD KENYON, C.J.).—SMITH *v.* ORIELL (1801), 1 East, 368; 102 E. R. 142.

Annotations:—**Consd.** Harvey *v.* Crickett (1816), 5 M. & S. 336. **Refd.** Buckley *v.* Barber (1851), 6 Exch. 164; Morgan *v.* Marquis (1853), 9 Exch. 145.

4113. Right to collect partnership assets—By taking debtor's bill—Payment of partnership debt by indorsing bill to creditor—Good against assignees on subsequent bankruptcy of then solvent partner.]—One of two partners, who were country bankers, became bkpt., & defts., being holders of their notes, obtained payment of part of them from the London banker, at whose house they were payable, out of the funds in their hands belonging to the country bank. The solvent partner, knowing of the bkpcy., procured a debtor to the firm to give his bill in part satisfaction of his debt, & indorsed & delivered same to defts., in payment of the residue of the notes in their hands, & afterwards became bkpt.:—*Held:* the assignees could not recover from defts. the money so paid to them by the London banker, nor the proceeds of the bill.

For future purposes, the bkpcy. of one partner may operate as a dissolution, so as to prevent the solvent partner from dealing with the partnership property as if the partnership continued, but most certainly he has a lien on the joint funds in his hands, in respect of all claims which were consummate at the time of the bkpcy. (LORD ELLENBOROUGH, C. J.).—HARVEY *v.* CRICKETT (1816), 5 M. & S. 336; 105 E. R. 1074.

Annotations:—**Consd.** *Re* Houghton, *Ex p.* Robinson (1833), 1 Mont. & A. 18, L. C.; Woodbridge *v.* Swann (1833), 4 B. & Ad. 633; Buckley *v.* Barber (1851), 6 Exch. 164. **Refd.** Morgan *v.* Marquis (1853), 9 Exch. 145.

See 1914 Act, s. 45.

4114. —— Right to give discharge—Use of trustee's name.]—After the bkpcy. of a partner & the appointment of a trustee of his property, his solvent partner has a right to receive, & can give a good discharge for, the partnership assets, & is entitled, for the purpose of collecting or recovering the assets, to use the name of the trustee, upon giving him an indemnity.—*Re* OWEN, *Ex p.* OWEN (1884), 13 Q. B. D. 113; 53 L. J. Ch. 863; 50 L. T. 514; 32 W. R. 811; 1 Morr. 93, C. A.

Annotation:—**Expld.** *Re* Maund, *Ex p.* Maund, [1895] 1 Q. B. 194.

4115. Right to continue business—Making payments to meet partnership bills.]—After the bkpcy. of one of two partners, the solvent partner, thinking the firm capable of paying its debts, continued the business, & paid partnership money into a banker's, to be applied in discharge of running bills of the firm, payable at the bank, & the money was so

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b. *Joint & several security by original firm—Subject of security not transferred to new firm—Rights of secured creditor.*]—A creditor lent money to a firm on the security of certain heritable subjects belonging to it—the obligation for repayment being granted by the firm & by its two partners. Three years later the two partners took in a new partner, & a new contract of copartnery was executed for carrying on the business in the same firm name. Under the contract the new firm had no concern with the debts due to or by the old firm, & the right to the security subjects was not transferred to the new firm, which paid a rent to the old firm for the use of the premises occupied by them; the creditor in the bond knew nothing of the change of partnership. On the bkpcy. of the new firm:—*Held:* the heritable creditor was not entitled to rank in the sequestration.—STEPHEN'S TRUSTEE *v.* JENKINS (MACDOUGALL & CO.'S TRUSTEE) (1889), 16 R. (Ct. of Sess.) 779.—**SCOT.**

PART XI. SECT. 6, SUB-SECT. 1.

c. *Right of dormant partner—Over partnership assets.*]—A dormant partner has no special lien on partnership stock unsold but must come in ratably with other creditors.—*Re* CURRY, *Ex p.* LEVER (1850), 15 L. T. O. S. 476.—**IR.**

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applied :—*Held :* the payment, having been made *bonâ fide*, & without any contemplation of bkpcy. by the solvent partner, was valid at law.—WOODBRIDGE *v.* SWANN (1833), 4 B. & Ad. 633 ; 1 Nev. & M. K. B. 724 ; 2 L. J. K. B. 132 ; 110 E. R. 594.

Annotations :—**Refd.** Buckley *v.* Barber (1851), 6 Exch. 164 ; Morgan *v.* Marquis (1853), 9 Exch. 145.

4116. Right to be appointed receiver & manager —On giving security—Duty to furnish trustees with accounts.]—Articles of partnership provided that the partnership should continue for fourteen years, & if any partner should become bkpt., he should cease to be a partner, & his share in the capital should remain as a loan to the continuing partners during the residue of the term, if they should carry on the business, at 5 per cent., & the payment of the loan should be secured by the joint & several bond of the continuing partners. The partnership consisted of a father & his three sons, of whom deft. was the youngest. The whole of the capital was provided by the father. The father & the two elder sons became bkpt., & their trustees claimed a declaration that the articles under which deft. claimed to retain as a loan the shares of bkpts. in the capital of the partnership were void as against the creditors of bkpts., & moved for the appointment of a receiver & manager of the partnership business. Deft. claimed the right, as solvent partner, to be appointed receiver & manager :—*Held :* deft. was entitled to be appointed receiver & manager, but must give security, pass his accounts, furnish pltfs. with proper accounts, allow them all reasonable access to the books, & pay the balance in his hands, as & when they reached an amount to be agreed upon, into ct. or into a banking account of pltfs. & himself.—COLLINS *v.* BARKER, [1893] 1 Ch. 578 ; 62 L. J. Ch. 316 ; 68 L. T. 572 ; 41 W. R. 442 ; 9 T. L. R. 167 : 37 Sol. Jo. 193 ; 3 R. 237.

SUB-SECT. 2.—OF RETIRING PARTNER OR HIS REPRESENTATIVES TO PARTNERSHIP PROPERTY EXISTING AT DISSOLUTION ON SUBSEQUENT BANKRUPTCY OF CONTINUING FIRM.

4117. Lien on assets at dissolution.]—Representatives of a partner are entitled to set off debts, & have all allowances before the separate creditors of the other can take his share, & they have a lien for such demands.—WEST *v.* SKIP (1749), 1 Ves. Sen. 239 ; 27 E. R. 1006, L. C. ; *subsequent proceedings* (1750), 1 Ves. Sen. 456.

Annotations :—**Refd.** Fox *v.* Hanbury (1776), 2 Cowp. 445 ; Smith *v.* De Silva (1776), 2 Cowp. 469 ; Taylor *v.* Fields (1799), 4 Ves. 396 ; Aspinall *v.* L. & N. W. Ry. Co. (1853), 11 Hare, 325 ; Ekins *v.* Brown (1854), 1 Ecc. & Ad. 400 ; **Mentd.** *Ex p.* Ruffin (1801), 6 Ves. 119, L. C. ; Russel *v.* Buchanan (1838), 9 Sim. 167 ; Imray *v.* Magnay (1843), 11 M. & W. 267 ; Bartlett *v.* Bartlett (1857), 3 Sm. & G. 533 ; *Re* Rawbone's Trust (1857), 3 K. & J. 476.

4118. ——.]—L. & P. carrying on business in partnership agreed to dissolve partnership, & on the dissolution P. conveyed to L. his interest in the premises on which the business was carried on, but the consideration was never paid, & L. subsequently deposited the title deeds of the property with P. to secure the debt. At the time of the dissolution the partnership was insolvent. L. became bkpt., & the assignees of his separate estate claiming the property, P. claimed to be entitled to a vendor's lien for unpaid purchase-money :—*Held :* (1) one partner might agree with a retiring partner to give him a sum for the concern, though they knew the partnership to be insolvent, provided no fraud was intended ; (2) the property was the separate property of L., subject to the equity always attaching upon property bought, to answer for the purchase-money, if it was not paid.—*Re* LIGHTOLLER, *Ex p.* PEAKE (1816), 1 Madd. 346 ; 2 Rose, 455 ; 56 E. R. 128.

4119. ——.]—Upon the death of one of three partners, his exors. carried on the business with the two surviving ones for a twelve-month longer, & then dissolved the partnership, upon which occasion the two continuing partners gave the exors. a bond to secure the balance due to them ; & more than six years afterwards the two became bkbt. :—*Held :* the exors. had a right to prove the amount of the bond against the joint estate of the two continuing partners.—*Re* BOOTHBY, *Ex p.* HALL (1838), 3 Deac. 125, Ct. of R.

4120. ——.]—A. & B. being partners, A. retired, & assigned all the partnership realty & personalty to B., who was to pay the partnership debts, especially a trust debt of £2,000. Afterwards A. assigned to B. other real estates & mtges., his separate property, to insure payment of the £2,000. A. died, & B. filed a bill against A.'s representatives for an account, under which it was arranged that the sum due to B. should be taken at £3,000 & a certain conveyance executed. The £3,000 was paid, & the conveyance executed. B. became bkpt., & the parties entitled to the £2,000 filed a bill against the representatives of A. for the £2,000. The representatives having claimed a lien on the partnership assets & the separate property for £2,000 :—*Held :* no such lien existed.—*Re* JAMES, *Ex p.* RUSSELL (1837), 3 Mont. & A. 192, Ct. of R.

4121. ——.]—By a partnership deed a partner entitled to one-fourth of the capital & profits engaged to furnish more than his proportion of the capital, if required, it being agreed that the excess should at his death be secured to his representatives by a mtge. on the partnership property, he having power to appoint by will one or more of his sons to succeed to his fourth part. By his will he appointed such of his sons to succeed him as should be selected by his widow & one of his partners, whom he appointed his extrix. & exor., but directed that, during the minority of the sons, & after providing for their maintenance, the surplus profits of his share should fall into his residuary estate. At his death, the sons being minors, the business was carried on as before, testator's representatives taking his place, but not taking or calling for any security for the debt due to his estate in respect of the excess of capital advanced by him. On the widow dying & the surviving partners becoming bkpt. :—*Held :* there could be no right of proof on behalf of testator's estate against the joint estate of the surviving partners, in respect of such debt.—*Re* DERHAM, *Ex p.* THOMPSON (1842), 2 Mont. D. & De G. 761, Ct. of R. ; *subsequent proceedings* (1844), 8 Jur. 633, L. C.

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d. *Claim to shares in ships belonging to partnership—Shares registered in name of bankrupt partner only.*]—Three partners, who carried on a joint trade of shipping goods, were registered as part-owners of the vessels belonging to the concern, each in the proportion of a third share of each vessel. One of the partners having become bkpt. & then sequestrated, in a question between his trustee & the other partners :—*Held :* as the vessels had not been registered in the name of the co. as partnership property, & as the shares of bkpt. stood in the register in his name individually as part-owner, the shares passed absolutely to his trustee, & his co-partners were not entitled to claim them as co. property, to be dealt with according to the provisions of a contract which had been entered into between the partners.—MCARTHURS *v.* MCBRAIR & JOHNSTONE'S TRUSTEE (1844), 6 Dunl. (Ct. of Sess.), 1174.—**SCOT.**

4122. *S. P.* FEARENSIDE *v.* DERHAM, THOMPSON *v.* DERHAM (1844), 13 L. J. Ch. 354; 3 L. T. O. S. 97; *sub nom. Re* DERHAM, *Ex p.* THOMPSON, 8 Jur. 633; *subsequent proceedings*, 3 L. T. O. S. 137, L. C.

4123. ——.]—A trader, by his will, appointed his partner & other parties exors., & authorised his partner to purchase his share of the trade, premises, & stock, & if he declined to do so, the trade was to be carried on for the benefit of testator's wife & family. A valuation was made, & the surviving partner took possession of the whole partnership property in circumstances which induced the ct. to set aside the sale as invalid. The surviving partner, & subsequently his son & legatee, carried on the business for several years, & the son ultimately became bkpt. The partnership property was then sold, & the proceeds paid into ct.:—*Held:* the representatives of the deceased partner were entitled to a lien on one moiety of the fund in it for sums due to them from the estate of the surviving partner, & their claim ought to be satisfied in preference to the debts of the creditors of bkpt., the case not being affected by the question, whether any of the partnership stock was or was not in the order or disposition of bkpt.—STOCKEN *v.* DAWSON (1848), 17 L. J. Ch. 282, L. C.

4124. ——.]—One of two partners died, a considerable sum being due from the partners to his estate. The surviving partner continued the trade, with the assent of the exors., & became bkpt.:—*Held:* the exor. had no lien on the stock-in-trade substituted for the stock which had been sold.—PAYNE *v.* HORNBY (1858), 25 Beav. 280; 53 E. R. 643.

4125. Lien on debt due to firm at date of dissolution—Right of re-entry reserved at dissolution.]—A., B. & C. being in partnership, A. retired, a balance being due to him, which B. & C. covenanted to pay by instalments, giving a power of re-entry to A., if any instalment were unpaid, & B. & C. were also to reassign the premises to A. on trusts for sale. B. retired, & C. alone continued the business. Default was made in payment of an instalment, C. became bkpt., & A. re-entered:—*Held:* a debt originally due to A., B. & C. was not in the reputed ownership of C., & A. had a lien thereon.—*Re* STOKES, *Ex p.* PEMBERTON, *Re* STOKES, *Ex p.* HANCOX (1836), 1 Deac. 421; 2 Mont. & A. 548, Ct. of R.

4126. Whether entitled to have specific assets applied to creditors of old firm.]—A partner, retired upon a bond for the balance, due to him, & a covenant of indemnity, with a surety, being upon the bkpcy. of the remaining partners arrested by the joint creditors, his petition for the application of the specific stock & debts of the old partnership to the creditors of that partnership in preference was dismissed, with liberty to file a bill.—*Ex p.* FELL (1805), 10 Ves. 347; 32 E. R. 879, L. C.

Annotations:—**Consd.** *Re* Christopher, *Ex p.* Harris (1816), 1 Madd. 583; *Re* Lightoller, *Ex p.* Peake (1816), 1 Madd. 346. **Apld.** *Re* Henderson & Morley, *Ex p.* Freeman (1819), Buck, 471; *Re* Hayward, *Ex p.* Burdekin (1842), 2 Mont. D. & De G. 704, Ct. of R.; Thompson *v.* Derham, Thompson *v.* Goodman (1842), 1 Hare, 358.

4127. —— Whether equitable lien on partnership estate.]—On the dissolution of a partnership, the assets were assigned to the continuing partner, on his indemnity against the firm's debts. The continuing partner became bkpt.:—*Held:* the retired partner had no equitable lien on the partnership estate he had left behind, to have it applied in satisfaction of the outstanding debts of the firm.—*Re* HAYWARD, *Ex p.* BURDEKIN (1842), 2 Mont. D. & De G. 704; 6 Jur. 977, Ct. of R.

4128. —— Partnership assets not vested in continuing partner.]—D. & P. carried on business under articles, which provided for the taking of an account & the payment of the amount due to the outgoing partner as a condition of the continuing partner being entitled to "the whole of the partnership estate, & effects, including good will." The partnership was dissolved by the death of P., & at that time the partnership was insolvent. D., the surviving partner, continued to carry on the business, but no account was taken, nor was any money paid. Shortly afterwards D. became bkpt., P.'s exors. having paid, or become liable for the debts of the partnership:—*Held:* they were entitled to be indemnified for the partnership debts by the appropriation for that purpose of the partnership assets.—*Re* DANIEL, *Ex p.* POWELL (1896), 75 L. T. 143; 3 Mans. 312, D. C.

SUB-SECT. 3.—OF BANKRUPT PARTNER.

4129. Power to bind firm—Deposit of goods for sale.]—One of two partners went away on Mar. 27, intending to abscond; on Mar. 30 deft. received from him a letter dated Mar. 28 announcing the deposit of some cochineal at a warehouse for his use; deft. thereupon sold the cochineal & applied the proceeds in paying off a debt due by the firm to him. Pltfs., assignees in a joint commission against both partners, sought to recover the value of the goods:—*Held:* the partner's power to bind the firm by his contract was gone at the time he wrote the letter, & the whole transaction was void & did not affect the moiety belonging to the co-partners.—HAGUE *v.* ROLLESTON (1768), 4 Burr. 2174; 98 E. R. 134.

Annotations:—**Folld.** Harman *v.* Fishar (1774), 1 Cowp. 117. **Consd.** Thomason *v.* Frere (1809), 10 East, 418. **Refd.** Alderson *v.* Temple (1768), 4 Burr. 2235; Fox *v.* Hanbury (1776), 2 Cowp. 445; Jones *v.* Yates & Young (1829), 4 Man. & Ry. K. B. 613; Dickson *v.* Cass (1830), 1 B. & Ad. 343; Goldsmid *v.* Raphael (1836), 5 L. J. C. P. 329.

4130. —— Joint assignment—Void as to moiety only.]—Where two partners join in an assignment of any property as a security for a debt, one of whom has at the time committed an act of bkpcy., it is void as to a moiety only.—WHITWELL *v.* THOMPSON (1793), 1 Esp. 68.

Annotations:—**Mentd.** Lindon *v.* Sharp (1843), 6 Man. & G. 895; Graham *v.* Chapman (1852), 12 C. B. 85.

4131. —— Acceptance of bill in firm name.]—One of two partners in trade, after an act of bkpcy., accepted a bill of exchange in the name of the firm, without the privity of his copartner:—*Held:* in the hands of an innocent indorsee it was an available security against the firm.—LACY *v.* WOOLCOTT (1823), 2 Dow. & Ry. K. B. 458; 1 L. J. O. S. K. B. 143.

Annotations:—**Consd.** *Re* Houghton & Watts, *Ex p.* Robinson (1833), 3 Deac. & Ch. 376, L. C. **Refd.** Craven *v.* Edmondson (1830), 6 Bing. 734.

4132. —— Payment to creditor with notice of act of bankruptcy.]—*Held:* a payment by a partner, who had committed an act of bkpcy., of a partnership debt due before the bkpcy., to a creditor who had notice of the act of bkpcy., was not protected by 6 Geo. 4, c. 16, s. 82, & as to the moiety of the solvent partner the payment was without authority, as the bkpcy. destroyed the implied agency arising from the partnership.—CRAVEN *v.* EDMONDSON (1830), 6 Bing. 734; 4 Moo. & P. 622; 8 L. J. O. S. C. P. 298; 130 E. R. 1463.

Annotations:—**Consd.** Dickson *v.* Cass (1830), 1 B. & Ad. 343. **Mentd.** *Re* Houghton & Watts, *Ex p.* Robinson (1833), 3 Deac. & Ch. 376, L. C.

Sect. 6.—*Rights of partners: Sub-sects.* 3 & 4.]

4133. —— Bills belonging to firm indorsed for private debt of bankrupt—Recovery of proceeds by solvent partner & assignee.]—B. & S. traded in partnership, & were possessed of bills of exchange, which S., in fraud of the partnership, indorsed & delivered to deft. in satisfaction of a private debt of his own, deft., being cognizant of the fraud. S. became bkpt. Deft. having realised the bills, the assignees of S., jointly with B., without having previously done anything to disaffirm the transaction, brought an action against deft. for the wrongful conversion, & for money received to their use:—*Held:* they were entitled to recover under the counts for money received to their use.—HEILBUT *v.* NEVILL (1870), L. R. 5 C. P. 478; 39 L. J. C. P. 245; 22 L. T. 662; 18 W. R. 898, Ex. Ch.

Annotation:—Distd. Bennett *v.* Gamgee (1876), 2 Ex. D. 11.

SUB-SECT. 4.—OF TRUSTEE OF BANKRUPT PARTNER.

4134. Tenant in common with solvent partners.]—After an act of bkpcy. committed by one of two partners, joint effects were sent away, which came to deft.'s hands. Then the solvent partner died, leaving deft. his exor., & afterwards a commission of bkpcy. was taken out against the surviving partner, & his estate assigned to pltfs.:—*Held:* they were tenants in common with the solvent partner, & after his decease with his representatives by relation of law from the act of bkpcy., & could not maintain trover against deft. claiming under such solvent partner.—SMITH *v.* STOKES (1801), 1 East, 363; 102 E. R. 141.

Annotation:—Refd. Morgan *v.* Marquis (1853), 9 Exch. 145.

4135. ——.]—The assignee of bkpt. partner is a tenant in common of the partnership goods with the solvent partner, & cannot maintain an action of trover, for their conversion, against an auctioneer for selling such goods by direction of the solvent partner.—LEWIS *v.* WHITE (1863), 2 New Rep. 81; 8 L. T. 320.

4136. Tenant in common with assignees under joint adjudication in Ireland.]—Two partners carried on business in England & Ireland. One executed an assignment in England for the benefit of his creditors, & was afterwards adjudicated a bkpt. in England. Some of the joint estate of the partners came into the hands of the trustees of the deed, & the proceeds of sale were, under the order of the ct., deposited in the bank in the joint names of the trustees of the deed & the trustees in bkpcy. Before that was done, a joint adjudication of bkpcy. had been made against the two partners in Ireland. The Irish assignees of the joint estate having applied to have the proceeds of sale paid over to them:—*Held:* (1) the trustees under the separate adjudication in England, & the assignees under the joint adjudication in Ireland, were tenants in common of the joint assets, & the latter had no better title to the proceeds of sale than the former; (2) the application must be refused also on the ground of convenience, as the greater number of the joint creditors lived in England & wished the fund in question to remain in England.—*Re* O'REARDON, *Ex p.* JAMES (1873), 9 Ch. App. 74; 43 L. J. Bcy. 13; 29 L. T. 761; 22 W. R. 196, L. C. & L. J.

See, now, 1914 Act, s. 12.

4137. Not partner of solvent partner.]—Assignees of bkpt. partner do not become partners of the solvent partner.—ALLEN *v.* KILBRE (1819), 4 Madd. 464; 56 E. R. 776.

4138. Interest of partner vests in trustee.]—When one partner becomes a bkpt., his interest in the partnership property is vested in his assignees, &, perhaps with equities in them, vastly beyond what tenants in common have, when no bkpcy. has occurred (LORD ELDON, C.).—BARKER *v.* GOODAIR (1805), 11 Ves. 78; 32 E. R. 1017.

Annotations:—Refd. Dutton *v.* Morrison (1810), 17 Ves. 193, L. C. Mentd. Brickwood *v.* Miller (1817), 3 Mer. 279; Pennell *v.* Roy (1853), 3 De G. M. & G. 126, L. JJ.; Dibb *v.* Brooke, [1894] 2 Q. B. 338.

4139. ——.]—By the bkpcy. of one partner his interest is devested & vests in his assignees by relation to the act of bkpcy.—DUTTON *v.* MORRISON (1810), 17 Ves. 193; 1 Rose, 213; 34 E. R. 75, L. C.

Annotations:—Refd. Brickwood *v.* Miller (1817), 3 Mer. 279; *Re* Kelson, *Ex p.* Egyptian Commercial & Trading Co. (1868), 4 Ch. App. 125, L. C. Mentd. *Re* Houghton & Watts, *Ex p.* Robinson (1833), Coop. *temp.* Brough. 162; Woodbridge *v.* Swann (1833), 4 B. & Ad. 633; Bowker *v.* Burdekin (1843), 11 M. & W. 128; Lindon *v.* Sharp (1843), 6 Man. & G. 895; Morgan *v.* Marquis (1853), 9 Exch. 145; *Re* A Disputed Adjudication (1861), 3 L. T. 634; Dibbs *v.* Brooke, [1894] 2 Q. B. 338.

4140. ——.]—The moiety of the partnership property belonging to bkpt. partner is by the act of bkpcy. vested in his assignees.—CRAVEN *v.* EDMONDSON (1830), 6 Bing. 734; 4 Moo. & P. 622; 8 L. J. O. S. C. P. 298; 130 E. R. 1463.

Annotations:—Mentd. Dickson *v.* Cass (1830), 1 B. & Ad. 343; *Re* Houghton & Watts, *Ex p.* Robinson (1833), 3 Deac. & Ch. 376, L. C.

4141. Power to sell property left in hands of bankrupt—Duty to account.]—If property is left in the hands of bkpt. partner at the time of the bkpcy., the assignees are entitled to take possession of the whole & sell it, but must account for a moiety to the solvent partner.—SMITH *v.* STOKES (1801), 1 East, 363; 102 E. R. 141.

Annotation:—Mentd. Morgan *v.* Marquis (1853), 9 Exch. 145.

4142. —— Right to exclude solvent partner—Injunction restraining sale.]—On a separate commission against one partner, the assignees took possession of the partnership property, & were about to sell it. An injunction was granted to restrain the sale.

The assignees are entitled to the interest of bkpt. in the joint estate, but they have no right to exclude the solvent partner from the possession (LEACH, V.-C.)—ALLEN *v.* KILBRE (1819), 4 Madd. 464; 56 E. R. 776.

4143. Right to participate in subsequent profits.]—A partnership being dissolved by the bkpcy. of one partner, the assignees are entitled, beyond an account & distribution of the stock, etc., to a participation of subsequent profits, made by the other partners, carrying on the trade with the capital, as constituted at the time of the bkpcy. *Qu.:* as far as the profits may have been produced by a joint application of that & other funds.—CRAWSHAY *v.* COLLINS (1808), 15 Ves. 218; 33 E. R. 736.

Annotations:—Consd. Featherstonhaugh *v.* Fenwick (1810), 17 Ves. 298; Brown *v.* De Tastet (1821), Jac. 284. Expld. & Distd. Cook *v.* Collingridge (1823), Jac. 607. Expld. Portlock *v.* Gardner (1842), 11 L. J. Ch. 313. Consd. Willett *v.* Blanford (1842), 1 Hare, 253. Apprvd. Blyth *v.* Blyth (1861), 4 L. T. 536, L. C. Refd. Heathcote *v.* Hulme (1819), 1 Jac. & W. 122; Lewis *v.* Langdon (1835), 7 Sim. 421; Wedderburn *v.* Wedderburn (1838), 4 My. & Cr. 41; Simpson *v.* Chapman (1853), 4 De G. M. & G. 154, L. JJ.; Darby *v.* Darby (1856), 3 Drew. 495; Vyse *v.* Foster (1872), 8 Ch. App. 309, L. JJ.; Mentd. Buckley *v.* Barber (1851), 20 L. J. Ex. 114; Davies *v.* Hodgson (1858), 25 Beav. 177; Stevenson *v.* Akt. für Cartonnagen-Industrie, [1918] A. C. 239, H. L.

4144. —— Bankrupt indebted to firm.]—One of three partners in a ship & cargo, the cost & outfit of which was £4,568, paid only £410 in part of his third share, & gave his notes for the remainder, but, before they became due, was declared a bkpt.:

—*Held:* the other partners could not, by voluntarily discharging the notes, stand in his place for any share of the profits, but the assignees were entitled to a full third both of the profits of the adventure, & of the value of the ship.—SMITH *v.* DE SILVA (1776), 2 Cowp. 469; 98 E. R. 1191.

Annotation:—**Consd.** Holderness *v.* Shackels (1828), 8 B. & C. 612.

4145. —— —— Contribution of further capital by solvent partner.]—A. being entitled, under a parol partnership agreement with B. & C., to three-eighths of the capital & profits of the business, became bkpt., being at the time indebted to the partnership in respect of bills in which the partnership name had been used for his personal accommodation. The assignees claimed a share of profits made subsequently to the bkpcy., while the continuing partners insisted that bkpt.'s interest in the profits ceased at that time. In consequence of such difference, no settlement of accounts between his estate & the partnership took place, & the assignees filed their bill, but B. & C., & afterwards C. alone, pending the litigation with the assignees, carried on the business for many years with the stock & capital which existed at the time of the bkpcy. & stock & capital substituted in the usual course of trade for such former stock & capital, aided by the expenditure of considerable sums by C.:—*Held:* the assignees of A. were entitled to three-eighths of the profits which had been made or should be made until the concern was finally wound up, & to three-eighths of the money to be produced by the sale of what remained in specie of the capital & stock, & A.'s proportion of the profits was not to be lessened, nor the proportion of C. to be increased, in respect of the debt which A. owed to the partnership, or of the money which C. brought into the business, beyond his share of the original capital.—CRAWSHAY *v.* COLLINS (1826), 2 Russ. 325; 38 E. R. 358, L. C.

Annotations:—**Refd.** Richardson *v.* Bank of England (1838), 4 My. & Cr. 165, L. C.; Portlock *v.* Gardner (1842), 1 Hare, 594; McDonald *v.* Richardson, Richardson *v.* Marten (1864), 10 L. T. 166; Vyse *v.* Foster (1872), 21 W. R. 207, L. J. **Mentd.** Wedderburn *v.* Wedderburn (1856), 22 Beav. 84; *Re* Aldridge, Aldridge *v.* Aldridge, [1894] 2 Ch. 97.

4146. —— Bankrupt continuing to act as partner—Personal skill.]—Bkpt., at the commencement of his bkpcy., was practising as a dental surgeon in partnership with B. He had previously mortgaged his share of the profits of the partnership, & the mtgee. had obtained the appointment of a receiver under his mtge. deed. After the commencement of his bkpcy., bkpt. continued to carry on the practice with B. upon the terms of the partnership deed so far as they were applicable, & his share of the profits was paid to the receiver, but was claimed by the trustee in bkpcy.:—*Held:* although the profits of the practice arose in great part from the exercise by bkpt. of his personal skill, yet, as from the commencement of the bkpcy., the trustee was entitled to his share of the profits.—*Re* ROGERS, *Ex p.* COLLINS, [1894] 1 Q. B. 425; 63 L. J. Q. B. 178; 70 L. T. 107; 10 T. L. R. 24; 1 Mans. 387; 10 R. 469.

Annotations:—**Refd.** *Re* Roberts, [1900] 1 Q. B. 122, C. A. **Mentd.** Mercer *v.* Vans Colina (1897), [1900] 1 Q. B. 130, n.

4147. Right to books & papers of firm—Whether solvent partner can be excluded—Refusal of assignees to deliver firm's papers to solvent partner.]—One of two solrs., who were partners, became bkpt., & the assignees excluded the other from interfering with the affairs of the partnership. The ct. refused to order the assignees to deliver to him the papers belonging to the clients of the firm.—DAVIDSON *v.* NAPIER (1827), 1 Sim. 297; 57 E. R. 588.

4148. —— Jurisdiction of court to take books out of solvent partner's hands.]—One of two partners became bkpt., the other remaining solvent:—*Held:* the ct. had no power to take the books out of the hands of the solvent partner.—*Re* COVERDALE, *Ex p.* FINCH (1832), 1 Deac. & Ch. 274, Ct. of R.

4149. —— Partnership dissolved before bankruptcy of retiring partner—Solvent partner purchasing bankrupt's interest.]—A *bonâ fide* purchaser for value of the book debts, books, & all the interest in the partnership of his partner prior to a dissolution, will not be compelled, upon the subsequent bkpcy. of such late partner, to hand over to the trustee the books of account which passed by the assignment & thereupon ceased to be property of bkpt. within 1869 Act, s. 22, & 1870 Rules, r. 110.—*Re* WEST, *Ex p.* GOOD (1882), 21 Ch. D. 868; 51 L. J. Ch. 831; 46 L. T. 823.

4150. —— Reasonable access—Solvent partner allowed to deal solely with partnership property.]—In a case where the ct. thought it proper to allow the solvent partner to deal solely with the partnership property, he was ordered to allow the assignees of his bkpt. partner at all reasonable & convenient times to inspect the books of the partnership, & to furnish them with a full & true statement of all the effects & debts of the partnership.—*Re* UPPERTON, *Ex p.* STOVELD (1823), 1 Gl. & J. 303.

4151. —— —— Solvent partner appointed receiver & manager.]—A solvent partner, on being appointed receiver & manager of a business, the other two partners in which were bkpt., was ordered to allow the trustees of bkpts. reasonable access to the books.—COLLINS *v.* BARKER, [1893] 1 Ch. 578; 62 L. J. Ch. 316; 68 L. T. 572; 41 W. R. 442; 9 T. L. R. 167; 37 Sol. Jo. 193; 3 R. 237.

4152. Right to share of partnership effects—Sums due by bankrupt to firm not paid.]—If one of several partners becomes bkpt., his assignees are not entitled to any share of the partnership effects, until they have satisfied all that is due from him to the firm.—HOLDERNESS *v.* SHACKELS (1828), 8 B. & C. 612; Dan. & Ll. 203; 3 Man. & Ry. K. B. 25; 7 L. J. O. S. K. B. 80; 108 E. R. 1170.

Annotation:—**Mentd.** Green *v.* Briggs (1848), 6 Hare, 395.

4153. Both partners bankrupt—Rights of action against partner of one bankrupt in another firm.]—A., the partner of B., was also in partnership with C. A. being indebted to the firm of A. & B. indorsed to A. & B. a bill belonging to the firm of A. & C., & immediately afterwards indorsed it in the names of A. & B. to D., a creditor of A. & B., who received the amount at maturity. A. & C. afterwards became bkpts.:—*Held:* their assignees could not maintain trover against B., nor could such assignees maintain an action against B. for money taken by A. from the funds of A. & C. & applied to the use of A. & B.—JONES *v.* YATES (1829), 9 B. & C. 532; 4 Man. & Ry. K. B. 613; 7 L. J. O. S. K. B. 217; 109 E. R. 198.

Annotations:—**Apld.** Gibson *v.* Winter (1833), 5 B. & Ad. 96. **Distd.** Gordon *v.* Ellis (1844), 2 Dow. & L. 308. **Expld.** Begbie *v.* Phosphate Sewage Co. (1875), L. R. 10 Q. B. 491. **Refd.** Cooper *v.* Law (1859), 6 C. B. N. S. 502; Heilbut *v.* Nevill (1870), L. R. 5 C. P. 478, Ex. Ch. **Mentd.** Wallace *v.* Kelsall (1840), 8 Dowl. 841; Jones *v.* Smith (1848), 1 Exch. 831; Bowes *v.* Foster (1858), 6 W. R. 257; Smith *v.* Johnson (1858), 3 H. & N. 222; Kendal *v.* Wood (1871), L. R. 6 Exch. 243, Ex. Ch.; Scott *v.* Brown, Doering, McNab, Slaughter & May *v.* Brown Doering, McNab, [1892] 2 Q. B. 724, C. A.

4154. —— Joint commission following separate commission—Sale by sheriff before joint commission issued.]—A declaration in trover by assignees of bkpt. stated that M. & H., bkpts., before their bkpty., were lawfully possessed of certain goods,

Sect. 6.—Rights of partners: Sub-sects. 4, 5 & 6, A.]

that before the bkpcy. they came to the possession of defts., & that defts. knowing the goods to belong to pltfs. as assignees, after the bkpcy. converted them. A separate commission issued against M. alone on Nov. 7; on the 8th, the goods were sold by deft., as sheriff; on the 9th, a joint commission issued against M. & H., under which pltfs. were appointed assignees, & pltfs. afterwards, & after the goods were delivered to the purchasers, demanded them of defts. who refused them :—*Held:* (1) the sale, & not the demand & refusal constituted the conversion; (2) the allegations of the declaration, that pltfs. were possessors of the goods as assignees of both bkpts., & that defts. converted the goods after the bkpcy., were not supported by the evidence.

The effect of the last commission undoubtedly was to make them assignees of the separate as well as the joint property, but at the time of the conversion they were assignees of the property of one bkpt. only (PARKE, B.).—EDWARDS *v.* HOOPER (1843), 11 M. & W. 363; 12 L. J. Ex. 304; 7 Jur. 378; 152 E. R. 844.

SUB-SECT. 5.—IN SURPLUS OF JOINT ESTATE AND SEPARATE ESTATES OF COPARTNERS.

4155. Lien on copartner's share of surplus of joint estate—In respect of partnership bill of exchange given for private debt.]—Under a joint commission of bkpcy. the separate estate of one partner has a lien on the other's share of a surplus of the joint estate in respect of a debt, proved under bills of exchange, drawn in the name of the firm for a separate debt, & may come in with the other separate creditors for the deficiency.—*Ex p.* KING (1810), 17 Ves. 115; 1 Rose, 212; 34 E. R. 45, L. C.

Annotation :—**Folld.** *Re* Taylor, *Ex p.* Terrell (1819), Buck, 345.

4156. Right to account of surplus of separate estate—Application by petition—Jurisdiction of court to grant order.]—Under a separate commission against one of two partners, bkpt. having paid 20*s.* in the pound to all his creditors, obtained an order for the payment of the surplus to him, & same was paid to him :—*Held:* his partner was entitled to apply by petition in the bkpcy., for an account of such surplus, & for payment of his proportion of it, & the ct. had jurisdiction to make the order required.—*Re* HOLLAND, *Ex p.* LANFEAR (1813), 1 Rose, 442, L. C.

4157. Right to account of surplus of proceeds of attachment of joint estate abroad—Bankruptcy of one partner in England.]—P., a partner in two houses of trade originating in the West Indies where his partners continued to carry on the business, but being himself resident in London, receiving & disposing of the consignments from, & shipping cargoes to, his partners abroad, became bkpt. On bill by his assignees against a creditor of the two firms, having attached in the West Indies property belonging to both, for an account for what he had received by means of his attachments :—*Held:* deft. was entitled to retain what he had received, to the extent of satisfying his joint debts, & to account only for the overplus.—BRICKWOOD *v* MILLER (1817), 3 Mer. 279; 36 E. R. 108

Annotation :—**Refd.** *Re* Houghton & Watts, *Ex p.* Robinson (1833), 3 Deac. & Ch. 376, L. C.

4158. To reimbursement—In respect of proof by joint creditors.]—Where joint creditors under an order to prove against separate estates, prove against one or more of them, exclusively of the rest, the estate so burthened is entitled to reimbursement from the others.—*Re* DAWES, *Ex p.* WILLOCK (1816), 2 Rose, 392, L. C.

4159. —— Out of surplus of joint estate—Proof against separate estate for deficiency—Some partners solvent.]—The usual order having been obtained to take the accounts of the joint & separate estate under a separate commission, the joint estate paid 17*s.*, & was sufficient to pay the remaining 3*s.* in the pound, leaving a surplus in the hands of the assignees. Upon taking the partnership accounts, a balance appeared in favour of the solvent partners. The separate estate had paid 3*s.* in the pound :—*Held:* the surplus of the joint estate was to be paid to the solvent partners, & if it proved insufficient, they were to be at liberty to prove against the separate estate for the difference.—*Re* TAYLOR, *Ex p.* TERRELL (1819), Buck, 345.

4160. —— Out of surplus of separate estate—For deficiency of joint estate made good by one partner.]—If a commission issue against three, & the joint estate is insufficient, & one partner pay the deficiency from his private estate, & there is a surplus on the separate estates of each of the others, the partner who paid the deficiency is entitled to such surplus before interest is paid to the separate creditors.—*Re* RIX, GORHAM, & INKERSOLE, *Ex p.* RIX (1831), Mont. 237.

4161. —— Realisation of one partner's security paying off more than due proportion of debt.]—A., B. & C., being in partnership, borrowed £10,000 of their bankers. To secure repayment with interest, B. executed a mtge. of a freehold estate, & C. a mtge. of a copyhold estate. B.'s estate was sold, & paid off £8,690 of the mtge. debt, & C.'s estate only paid the residue of the debt & interest amounting to £1,628 :—*Held:* A.'s estate being wholly insolvent, the estate of B. was entitled to be recouped from the estate of C., the amount of the difference between the £1,628 & the half of the mtge. money & interest.—*Re* BISHTON, *Ex p.* PLOWDEN (1837), 2 Deac. 456; 3 Mont. & A. 402, Ct. of R.

SUB-SECT. 6.—PROOF.

A. By Partner against Firm.

4162. General rule—Whether right of proof—Joint creditors unpaid.]—A., B. & C. were in partnership, & A. & B. were also concerned as partners in a distinct house. Commissions issued against both firms :—*Held:* the estate of the two could not claim anything against the estate of

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PART XI. SECT. 6, SUB-SECT. 5.

e. *Right to repayment of advances to firm—& share of profits underdrawn—Out of surplus joint estate.*]—On the insolvency of C. & another the requisite proportion of creditors granted C. his discharge, & sold them the insolvent estate at a price, for which he gave his promissory notes payable at intervals. Shortly afterwards he entered into partnership with M., & a memorandum was executed by them, by which they agreed that such estate should form their stock-in-trade, & become their property equally, & they equally assumed the liability for the amount of the composition notes. While the greater part of those notes was still unpaid they made an assignment in insolvency. From their assets sufficient was realised to pay their partnership creditors in full, & leave a surplus. During the partnership of C. & M., M. had advanced $500 to the firm, & C. had drawn out of the business $88.26 in excess of his share. The creditors of C. claimed that the whole of the surplus should be applied toward the payment of the composition notes :—*Held:* M. was first entitled to be paid the $588.26 with interest upon the $500, as that was a loan to the firm, but no interest upon the overdraft, & C., & through him his creditors, had a right to insist upon the composition notes being paid before any of the residue of the surplus was divided between C. & M.—*Re* CLEVERDON (1879), 4 A. R. 185.—**CAN.**

the three, until the joint creditors of the three were fully satisfied.—*Ex p.* HARGREAVES (1788), 1 Cox, Eq. Cas. 440; 29 E. R. 1239, L. C.

Annotation:—**Folld.** Narraway *v.* Beattie, Cama's Estate (1872), 26 L. T. 310.

4163. —— —— ——.]—A debt due by one partner in a firm to his copartners cannot be proved against the joint estate until all the joint debts have been paid in full.—SCOTT *v.* IZON (1865), 34 Beav. 434; 55 E. R. 703.

4164. —— —— **Debt incurred by fraud.]**—Under a joint commission of bkpcy. there is no proof for the separate estate against the joint estate, unless the debt arose by fraud, as distinguished from contract.—*Re* RAMSEY & ALDRICH, *Ex p.* HARRIS (1813), 1 Rose, 437; 2 Ves. & B. 210; 35 E. R. 298, L. C.

Annotations:—**Folld.** Lacey *v.* Hill, Leney *v.* Hill (1876), 4 Ch. D. 537, C. A. **Distd.** Read *v.* Bailey (1877), 3 App. Cas. 94, H. L.

4165. —— —— —— **Conversion of separate estate to use of partnership.**]—To the rule that a partner shall not prove in competition with the creditors of the firm who are in fact his own creditors, there are two exceptions, one of which is where a partner becomes a creditor in respect of the fraudulent conversion of his separate estate to the use of the partnership (LORD ELDON, C.). —*Re* GOODCHILDS & Co., *Ex p.* SILLITOE, *Ex p.* HUNTER (1824), 1 Gl. & J. 374; 2 L. J. O. S. Ch. 137, L. C.

Annotations:—**Apld.** Read *v.* Bailey (1877), 3 App. Cas. 94, H. L. **Mentd.** *Re* Wentworth, *Ex p.* Castell (1826), 2 Gl. & J. 124; *Re* Petherbridge, *Ex p.* Cook (1831), Mont. 228, L. C.; *Re* Barrow & Geddes, *Ex p.* Moult (1832), Mont. 321, Ct. of R.; *Re* Oliver, *Ex p.* Williams (1843), 3 Mont. D. & De G. 433, Ct. of R.; *Re* Deane & Youle, *Ex p.* Goldsmid & King (1857), 1 De G. & J. 257, L. JJ.; *Re* Braginton, *Ex p.* Maude (1867), 2 Ch. App. 550, L. JJ.; Narraway *v.* Beattie, Cama's Estate (1872), 26 L. T. 310; Nanson *v.* Gordon (1876), 1 App. Cas. 195, H. L.; *Re* Wilcoxon, *Ex p.* Andrews (1884), 25 Ch. D. 505, C. A.; *Re* Hind, *Ex p.* Hind (1890), 62 L. T. 327, D. C.; *Re* Ridgway, *Ex p.* Clarke, *Re* Ridgway, *Ex p.* Kaye (1892), 9 Morr. 269; *Re* Joseph & Bergel's Deed of Assignment, Pears *v.* Bergel (1908), 100 L. T. 74.

4166. —— —— **Dormant partner.**]—Under an agreement, which recited that M. & S. had agreed to become partners with each other & with D., & that D. had agreed to lend them £10,000 for the purpose of investing same in the business, it was agreed that the capital should consist of the £10,000, & any further advances by either party, such sum of £10,000 & further advances to bear interest at 5 per cent., that the £10,000 were advanced by D. by way of loan under Partnership Amendment Act, 1865 (c. 86), that yearly accounts should be remitted to D., & the yearly profit or loss divided between D., M. & S. in certain proportions, that on the death of any partner, or in case his original capital should be reduced by losses to one-half, D. should have the option of dissolving the partnership, & that on D.'s death his exors. should not withdraw his capital until the partnership was dissolved. Upon the liquidation of the firm, D. sought to prove for further advances made by him in addition to the £10,000:—*Held:* he could not prove in competition with the creditors of the firm, for the agreement constituted him a dormant partner.—*Re* MEGEVAND, *Ex p.* DELHASSE (1878), 7 Ch. D. 511; 47 L. J. Bcy. 65; 38 L. T. 106; 26 W. R. 338, C. A.

Annotations:—**Distd.** Badeley *v.* Consolidated Bank (1888), 38 Ch. D. 238, C. A. **Consd.** King *v.* Whichelow (1895), 64 L. J. Q. B. 801, C. A. **Mentd.** Badeley *v.* Consolidated Bank (1886), 34 Ch. D. 536; Frowde *v.* Williams (1886), 56 L. J. Q. B. 62; D. C.; Akt. Iggesunds Bruk *v.* Von Dadelszen (1887), 3 T. L. R. 517, C. A.; Adam *v.* Newbigging (1888), 13 App. Cas. 308, H. L.

4167. —— —— **No separate creditors proving—In respect of debt for which partner jointly liable.]**—Where a former partner, or his personal representative, seeks to prove against the partnership estate, he will not be prevented from proving in competition with the creditors of the firm, unless there are creditors proving in respect of a debt for which the former partner is liable jointly with the members of the firm. The possibility that such debts may be proved in the bkpcy., is not sufficient to prevent him from proving.—*Re* WILCOXON, *Ex p.* ANDREWS (1884), 25 Ch. D. 505; 53 L. J. Ch. 411; 50 L. T. 679; 32 W. R. 650, C. A.

Annotation:—**Apld.** *Re* Joseph & Bergel's Deed of Assignment, Pears *v.* Bergel (1908), 100 L. T. 74.

4168. —— —— **Debts for which partner jointly liable statute-barred against him.]**—A., B. & C. carried on business in copartnership. In 1875, A. retired from the firm, his share being purchased by B. & C., the continuing partners. On his retirement, A. at the request of the continuing partners, paid certain mtge. debts of the business, & took transfers to himself of the mtge. debts with the securities for same. He also at their request lent them money on mtge. of other portions of the partnership property. He died in 1876. B. & C. continued the business until 1883, when they became bkpt. At that time there were cash creditors of the old firm still unpaid, who carried in proofs against the joint estate of B. & C. The exors. of A. also carried in a proof against the separate estates of B. & C. for (1) the balance of the purchase-money of A.'s share, (2) the mtge. debts paid off by A. on transfer to himself, (3) the money lent by A.

PART XI. SECT. 6, SUB-SECT. 6.—A.

f. *General rule—Whether right of proof—Retiring partner—No stipulation as to his credit in the books of the firm.*]—The creditors of a partnership consisting of three partners, gave them an extension on condition that one of the partners should retire. When the dissolution took place nothing was said in reference to a sum of $1,198 standing in the books of the partnership to the credit of the retiring partner:—*Held:* this claim was not provable against the estate of the continuing partners on their insolvency.—*Re* WHITE & GIBBON (1879), 4 A. R. 416. —**CAN.**

g. —— —— —— *On note given by firm for capital withdrawn—Loss of right.*]—J. G., in partnership with three others, retired, & the others continued the business as G. & Sons. On retiring he was to receive $2,000, for $1,750 of which he took the note of the new firm. Shortly afterwards all four were put into insolvency on debts of the old firm. J. G., although one of the insolvents, proved as a creditor on the note, & acted as a creditor in all the proceedings. A compromise secured by the joint & several notes of the insolvents, & of M. & C. was accepted & a deed of composition was made & confirmed. Subsequently insolvents joined in a request to the assignee to convey the estate to C. "to hold same in trust, to convert same into money to meet the claims of our creditors on promissory notes signed by C. as our surety." In an action on one of the composition notes, made for part of the dividend on the claims of J. G. for $1,750, signed by the other three insolvents M. & C., payable to the order of J. G., & by him indorsed to pltfs. after maturity:—*Held:* although he might have had a right to rank in respect of the $1,750 against the separate estates of his co-insolvents, he had relinquished such right by consenting to the transfer of the assets to C.—STEPHEN *v.* GAVAZA (1883), 4 R. & G. 514.—**CAN.**

h. —— —— *Salaried partner.*]—On the sequestration of a partnership estate a salaried partner cannot claim payment of his salary out of the assets in competition with other creditors. —WALKER *v.* RECEIVERS GRAND JUNCTION RYS. (1905), 22 S. C. 86.—**S. AF.**

k. —— —— *Anonymous partner.*]—An anonymous partner is not entitled on the insolvency of the firm to claim for debts due to him by the partnership in competition with the ordinary creditors of the firm.—DAVISON'S ESTATE *v.* AURET (1905), 22 S. C. 11, 274; 15 C. T. R. 21, 392.—**S. AF.**

l. —— —— —— *Whether preferred to separate creditors of ostensible partner.*]—*Semble:* an anonymous partner is entitled to prove upon the business in preference to the private creditors of the ostensible partner.—DAVISON'S ESTATE *v.* AURET (1905), 22 S. C. 11, 274; 15 C. T. R. 21, 392. —**S. AF.**

Sect. 6.—Rights of partners: Sub-sect. 6, A.]

on mtge. after his retirement. The proof was rejected by the trustee, on the ground that to admit it would infringe against the rule forbidding a partner to prove in competition with his own creditors:—*Held:* as the debts proved by the cash creditors were, as against A.'s estate, statute-barred, the rule did not apply, & the proof must be admitted.—*Re* HEPBURN, *Ex p.* SMITH (1884), 14 Q. B. D. 394; 54 L. J. Q. B. 422.

Annotation:—**Mentd.** *Re* Stephens, Warburton *v.* Stephens (1889), 43 Ch. D. 39.

4169. —— Of general application.]—The rule, which prevents a partner from proving in bkpcy. against the joint estate of the partnership for a private debt while there are joint debts unpaid, is a rule of general application, & such application is not to be narrowed by considerations as to what would be its precise effect in individual instances.—NANSON *v.* GORDON (1876), 1 App. Cas. 195; 45 L. J. Bcy. 89; 34 L. T. 401; 24 W. R. 740, H. L.; *affg.* S. C. *sub nom.*; *Re* DIXON, *Ex p.* GORDON (1874), 10 Ch. App. 160, L. JJ.

Annotations:—**Apld.** *Re* Blythe, *Ex p.* Blythe (1881), 16 Ch. D. 620. **Refd.** *Re* Wilcoxon, *Ex p.* Andrews (1884), 25 Ch. D. 505, C. A.; *Re* Hind, *Ex p.* Hind (1890), 62 L. T. 327, D. C.

4170. Partner carrying on business entirely distinct.]—Where several persons are partners in trade, & some of them carry on a distinct trade, & in such character deal with & become creditors of the other firm, & a joint commission issues, proof may be made for such debt, as if they had dealt with strangers.

A. & B. carried on trade as wool-staplers, as copartners in Southwark, under the firm of A. & B., & they also carried on trade as wool-staplers at Leeds, under the firm of C. & Co. C. was a servant to A. & B., & received from them an annual salary, & was not interested in the profit or loss of either of the concerns, which were kept totally distinct from each other. The creditors of the estate of A. & B. having applied to have a proof of a debt established by that firm against the estate of C. & Co.:—*Held:* the comrs. should take an account of the dealings & transactions between the two estates, & ascertain the balance due from the estate of C. & Co. to the estate of A. & B., & declare the balance which they should so find to be due, & such declaration should be considered as a proof of the debt or balance, & the assignees should transfer from the estate of C. & Co. to the estate of A. & B. a ratable dividend in proportion with the other creditors.—*Ex p.* JOHNS (1802), 1 Cooke's Bankrupt Laws, 8th ed., p. 534, L. C.

Annotation:—**Folld.** *Ex p.* St. Barbe (1805), 11 Ves. 413, L. C.

4171. —— Business merely branch business.]—Where partners are engaged individually in other concerns, if they are distinct, proof may be made in bkpcy. of debts as between the different estates, but not, if they are merely branches of the joint concern.—*Ex p.* ST. BARBE (1805), 11 Ves. 413; 32 E. R. 1147, L. C.

Annotations:—**Apld.** *Re* Oliver, *Ex p.* Williams (1843), 3 Mont. D. & De G. 433, Ct. of R. **Dbtd.** Narraway *v.* Beattie, Cama's Estate (1872), 26 L. T. 310.

4172. —— In respect of credit procured.]—Seven partners carried on a bank, two of whom carried on a separate trade as ironmongers. A debt arose from the aggregate firm to the separate trade, in respect of money procured for the benefit of the aggregate firm, on the credit of the indorsement of the separate firm:—*Held:* no proof could be made by the separate firm against the aggregate firm, as the debt did not arise from dealings in articles which were the subject of the separate trade.—*Re* GOODCHILDS & Co., *Ex p.* SILLITOE, *Ex p.* HUNTER (1824), 1 Gl. & J. 374; 2 L. J. O. S. Ch. 137, L. C.

Annotations:—**Consd.** *Re* Wentworth, *Ex p.* Castell (1826) 2 Gl. & J. 124. **Folld.** *Re* Petherbridge, *Ex p.* Cook (1831), Mont. 228, L. C. **Consd.** *Re* Barrow & Geddes, *Ex p.* Moult (1832), Mont. 321, Ct. of R. **Apld.** *Re* Oliver, *Ex p.* Williams (1843), 3 Mont. D. & De G. 433, Ct. of R. **Folld.** *Re* Braginton, *Ex p.* Maude (1867), 2 Ch. App. 550, L. JJ. **Dbtd.** Narraway *v.* Beattie, Cama's Estate (1872), 26 L. T. 310. **Apld.** *Re* Dixon, *Ex p.* Gordon (1874), 10 Ch. App. 160, L. JJ. **Consd.** Nanson *v.* Gordon (1876), 1 App. Cas. 195, H. L.; *Re* Hind, *Ex p.* Hind (1890), 62 L. T. 327, D. C.; *Re* Ridgway, *Ex p.* Clarke, *Re* Ridgway, *Ex p.* Kaye (1892), 9 Morr. 269; *Re* Joseph & Bergel's Deed of Assignment, Pears *v.* Bergel (1908), 100 L. T. 74. **Mentd.** *Re* Deane & Youle, *Ex p.* Goldsmid & King (1857), 1 De G. & J. 257, L. JJ.; Read *v.* Bailey (1877), 3 App. Cas. 94, H. L.; *Re* Wilcoxon, *Ex p.* Andrews (1884), 25 Ch. D. 505, C. A,

4173. —— For cash advances—Made by banking firm as bankers.]—A., B. & C. were copartners as bankers, & B. & C. were partners as distillers. The bankers having advanced money to the distillers, & a commission having issued against the three:—*Held:* a proof might be made by the estate of the three copartners against the estate of the two in respect of the debt due from the two to the three.—*Re* BRENCHLEY, *Ex p.* BRENCHLEY (1826), cited 2 Gl. & J. at p. 127; 5 L. J. O. S. Ch. 73.

4174. —— —— ——.]—Five persons were copartners in one bank, & four of them were copartners in another bank, & in consequence of their banking transactions, the smaller firm became indebted to the larger. A commission issued against the five copartners:—*Held:* the larger firm was entitled to prove against the less the debt due to it from the latter.—*Re* WENTWORTH, CHALONER & RISHWORTH, *Ex p.* CASTELL (1826), 2 Gl. & J. 124; 5 L. J. O. S. Ch. 71.

4175. *S. P. Re* EATON, *Ex p.* STROUD (1826), cited 2 Gl. & J. at p. 127; 5 L. J. O. S. Ch. 71.

4176. —— —— Made by banking firm but not as bankers.]—Two members of an iron co. carried on a distinct trade as bankers, but they were not the bankers of the co. They made advances at interest to the co. when it was pressed by creditors, without asking for any security:—*Held:* the inference was that the advances would not have been made, had not the bankers been partners in the co., & were not made by them in their character of bankers, & were not dealings between trade & trade giving a right of proof against the estate of the co., the use of the facilities afforded by a trade not being necessarily a use of them in the

m. —— —— *Partnership limited to one transaction—Proof for subsequent advances.*]—B. & J. entered into an agreement under Act No. 179 for the loan by J. to B. of £500. The deed contained many of the ordinary clauses of a partnership deed & gave J. many of the powers of a partner, & J. took stipulations from B. ordinarily made between partners, but J. avoided holding himself out as an apparent partner. J. after advancing the £500, made further advances exceeding £50, but without any provision that he was to get any increased share of profits in reference to those further advances. On petition by J. for the compulsory sequestration of B.'s estate:—*Held:* (1) the transaction was one in which the original £500 & the subsequent advances were completely severed; (2) as to the subsequent advances J. stood in the position of any other creditor, & order for sequestration made absolute.—*Re* BUTCHART, *Ex p.* JONES (1865), 2 W. W. & A'B. 8.—**AUS.**

4170 i. *Partner carrying on business entirely distinct.*]—*Semble:* when a trade distinct from that carried on by the partnership is carried on by some of the partners in partnership as a business altogether separate from that of the major firm the minor firm can prove against the insolvent estate of the major firm for a debt arising in the ordinary way of business in respect of the distinct trades by the major to the minor firm in competition with its separate creditors.—SILBERT (PHILIP) & Co. *v.* EVANS (HERBERT) & Co., [1912] T. P. D. 425.—**S. AF.**

trade itself.—*Re* OLIVER, *Ex p.* WILLIAMS (1843), 3 Mont. D. & De G. 433, Ct. of R.

Annotations:—**Consd.** Narraway *v.* Beattie, Cama's Estate (1872), 26 L. T. 310. **Distd.** *Re* Ridgway, *Ex p.* Clarke, *Re* Ridgway, *Ex p.* Kaye (1892), 9 Morr. 269, C. A.

4177. —— —— For goods supplied.]—Where one member of a firm, who carries on business on his separate account, supplies goods to the firm, & a commission issues against the firm, the debt is provable, but not so for money advanced.—*Re* PETHERBRIDGE, *Ex p.* COOK (1831), Mont. 228, L. C.

Annotations:—**Consd.** *Re* Boothby, *Ex p.* Hall (1838), 3 Deac. 125, Ct. of R.; Narraway *v.* Beattie, Cama's Estate (1872), 26 L. T. 310.

4178. —— —— ——.]—A partner in a bkpt. firm, who also carried on a distinct trade on his own account, claimed to prove against the estate of the firm in respect of cash advances:—*Held:* the exception to the rule, that a partner could not prove in competition with his firm's creditors, which allowed proof in respect of a debt in a distinct trade carried on by one or more partners of the bkpt. firm, was confined to cases where the debt arose in respect of goods supplied, & had no application to a debt for cash advanced.—NARRAWAY *v.* BEATTIE, CAMA'S ESTATE (1872), 26 L. T. 310; *affd.* on other points, 26 L. T. 492, L. JJ.

4179. —— Debt converted into personal debt from partner.]—A partner cannot prove in competition with his own creditors, even where one or more members of the firm have carried on a separate trade, & the debt has arisen in the ordinary way of business, if it has been *bonâ fide* converted before bkpcy. into a debt from the partner personally.—*Re* RIDGWAY, *Ex p.* KAYE (1892), 8 T. L. R. 751; 9 MORR. 269, C. A.

See, further, PARTNERSHIP.

4180. Partner after separate discharge paying joint debts to indigent creditors—Under belief that joint estate solvent.]—Bkpt., a banker, after obtaining his certificate, paid the indigent holders of outstanding notes of his firm their full value, in order to assist them, & under the belief that the joint estate would pay 20*s.* in the pound:—*Held:* he could prove the amount against the joint estate, & having regard to the fact that he was a partner, & unlikely to pay the holders unless they had a valid claim, no inquiry should be directed as to whether the notes were at the time of the bkpcy. provable against the estate.—*Re* ATKINS, *Ex p.* ATKINS (1820), Buck, 479.

4181. For annual payments not in nature of rent.]—W. & B. entered into partnership in 1861, as millers, etc., W. being at the time the freeholder of a steam mill & four acres of land in C., subject to a mtge. One of the provisions of the partnership articles was that the business should be carried on upon the mill & premises. The articles also provided that the stock & effects of W. should be taken at a valuation by the partnership, & that the annual sum of £210 should be allowed & paid out of the partnership property to W., his heirs & assigns, in equal half-yearly payments. No formal demise of the mill & land was made to the partnership. In 1870 the partners were adjudicated bkpts., & W. instituted proceedings for liquidation in respect of his separate estate. The trustee of W.'s separate estate claimed £700 as arrears of rent under the partnership articles against the joint estate. The mtgees. also served notices upon the trustee of the joint estate, requiring him to pay to them all rent due & thereafter to become due:—*Held:* no rent, properly so called, was due under the agreement, the relation of landlord & tenant not having been created.—*Re* WYCHE & BRYAN, *Ex p.* APPLEBY & WYCHE (1872), 20 W. R. 411.

4182. For share of capital—Repayable on dissolution.]—Under articles of partnership it was provided that if C., the head of the firm, should retire or die, so much of his share in the capital as should not exceed £100,000 should be continued in, & be considered as part of the partnership effects, & the other partners were to repay the amount to him or his estate by fixed instalments. C. died in 1857, & the accounts having been investigated, the exors. in 1858 assigned all the stock-in-trade, etc., to the surviving partners, who executed a bond to them for the amounts found due to their estate, & to indemnify them against all liabilities. In Aug., 1861, the firm became bkpt., & a sum much exceeding £100,000 was found to be due to C.'s estate, & a proof tendered for the whole amount. As to the right of proof for the excess there was no dispute, but the trade creditors insisted that the exors. could not prove for the £100,000 in competition with the trade creditors:—*Held:* the bond & the assignment by the exors. in consideration of the settlement had removed any ambiguity which might have existed upon the articles as to the principle upon which C.'s capital was to remain in the business, & had displaced all notion of partnership between the exors. & bkpts., all notion of competition in the proof, of participation of the exors. in the profits of the trade, & of title to the capital of the business, & the proof for the whole amount must be admitted.—*Re* BEATER, DENNANT & RUSS, *Ex p.* EDMONDS (1862), 4 De G. F. & J. 488; 31 L. J. Bcy. 15; 8 Jur. N. S. 629; 45 E. R. 1273; *sub nom. Re* COSTER, BEATER & Co., *Ex p.* COSTER'S EXECUTORS, 6 L. T. 199, L. JJ.

Annotations:—**Consd.** *Re* Dixon, *Ex p.* Gordon (1874), 10 Ch. App. 161, n. **Mentd.** *Re* Johnson, Shearman *v.* Robinson (1880), 15 Ch. D. 548; Strickland *v.* Symons (1883), 22 Ch. D. 666.

4183. —— ——.]—Five persons carried on a partnership business under articles, whereby it was agreed that, upon the retirement or death of any partner, his share should be taken at a valuation by the surviving partners, who should pay for it by instalments. One partner died, one retired & the remaining three filed a petition in liquidation. There were debts of the partnership contracted during the lifetime of the deceased partner. The separate estate of such partner was alleged to be solvent, both as regarded those debts & the claims of separate creditors. The exors. of the deceased partner claimed to prove for the unpaid instalments of the value of his share, with interest:—*Held:* it was the settled rule in bkpcy. that a partner could not prove against his firm, in competition with the creditors of the firm, & that rule applied where one partner having died before the bkpcy., his share had been taken by the other partners under the provision of the partnership deed, & the money due in respect of it had not been paid to his exors. at the time of the bkpcy.—NANSON *v.* GORDON (1876), 1 App. Cas. 195; 45 L. J. Bcy. 89; 34 L. T. 401; 24 W. R. 740, H. L.; *affg.* S. C. *sub nom. Re* DIXON, *Ex p.* GORDON (1874), 10 Ch. App. 160, L. JJ.

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o. *Partnership debt of original firm—Assumed by new firm.*]—Circumstances in which a debt due by a firm consisting of two partners was deemed to be assumed by & provable against a succeeding firm consisting of the same two & two others as between the two successive firms *inter se.*—*Re* RUTLEDGE & Co., *Re* FLOWER, SALTING & Co., *Ex p.* ROLFE & BAILEY (1863), 2 W. & W. 16, 51. —AUS.

Sect. 6.—Rights of partners: Sub-sect. 6, A. & B.]

Annotations:—**Folld.** *Re* Blythe, *Ex p.* Blythe (1881), 16 Ch. D. 620. **Distd.** *Re* Wilcoxon, *Ex p.* Andrews (1884), 25 Ch. D. 505, C. A. **Mentd.** *Re* Hind, *Ex p.* Hind (1890), 62 L. T. 329, D. C.

4184. —— ——.]—Three persons carried on business in partnership without any articles of partnership. The profits were divided between them in equal shares. After the death of one of them the survivors continued to carry on business, retained in it without any authority the deceased partner's share of the capital, divided the profits of the business between themselves equally & became bkpt. Joint debts of the partnership of the three remained unpaid:—*Held:* the administratrix of the deceased partner could not prove in the liquidation in competition with his creditors in respect of his share of the capital.—*Re* BLYTHE, *Ex p.* BLYTHE (1881), 16 Ch. D. 620; 29 W. R. 900.

4185. —— ——.]—Where an option to purchase the share of a deceased partner has been exercised by the surviving partner, & a firm with a new partner constituted, which has assumed liability for the debt due to the exors. of deceased, & the firm then executes an assignment for the benefit of its creditors, although there are some creditors of the former firm whose debts are unpaid, the rule in *Ex p. Sillitoe*, No. 4172, *ante*, will not prevent the exors. proving against the assigned estate in competition with creditors of the new partnership, there being no initial & continuing joint liability of the old & new firms to creditors of the old firm, nor, *semble*, any novation of the debts of the old firm's creditors.—*Re* JOSEPH & BERGEL'S DEED OF ASSIGNMENT, PEARS *v.* BERGEL (1908), 100 L. T. 74.

4186. —— —— **For debts of old firm paid after dissolution.**]—A., B. & C. carried on the business of bankers in copartnership. A. advanced large sums of money to the concern, which he raised by selling out stock, & he took separate bonds for £18,000 from B. & C., conditioned for the replacing of £9,000 3 per cent. consols by each, being their respective proportions of the stock sold by A. The stock not being replaced, A. brought actions, & recovered judgments on the bonds. A. afterwards retired from the concern, & at that time £20,000 3 per cent. consols was due to him, & by the deed of dissolution B. & C. covenanted to replace it by four instalments, & that if they failed to do so, A. might resort to the judgments recovered on the bonds, & further, that he should have a lien on certain specified securities for that debt, & also, as an indemnity against partnership debts, which they covenanted to pay. One instalment was replaced when due, but B. & C. having failed to replace the second a new arrangement, not under seal, was entered into, whereby it was agreed that the transaction should be considered as a loan of money from the first, & that the sum produced by the sale of the £15,000 3 per cents. which remained due, which was £10,083, should be the debt, & be repaid at a future day with 5 per cent. interest. The value of £15,000 3 per cent. consols at the date of such last agreement was £8,437. Before any part of the £10,083 was paid, B. & C. became bkpts., & at the issuing of the commission, two out of the three remaining days fixed by the deed of dissolution for the retransfer of stock had passed:—*Held:* the second agreement was void for usury, but the deed of dissolution remained binding, & A. might prove under the commission against B. & C. for the £15,000 3 per cent. consols, the value of the two instalments due before the bkpcy. to be ascertained by the price of consols on the days when those sums respectively became due, the value of the third to be taken at the price of consols on the day when the commission issued, with a rebate for the interval between that day & the day fixed for the retransfer of that instalment.

A. having paid certain old partnership debts after he left the concern:—*Held:* he might prove for those also.—PARKER *v.* RAMSBOTTOM (1824), 3 B. &. C. 257; 5 Dow. & Ry. K. B. 138; 3 L. J. O. S. K. B. 16; 107 E. R 729.

Annotations:—**Distd.** *Re* Badnall, *Ex p.* Ellis (1827), 2 Gl. & J. 312, L. C. **Apld.** *Re* Caton, *Ex p.* Higgins (1842), 11 L. J. Bcy. 34, Ct. of R. **Refd.** Sammon *v.* Miller (1829), 9 B. & C. 770; *Re* Naylor, *Ex p.* Grazebrook (1832), 2 Deac. & Ch. 186, Ct. of R.; *Re* Dunn, *Ex p.* Paynter (1862), 6 L. T. 510. **Mentd.** Powles *v.* Page (1846), 10 Jur. 526.

4187. —— **Directed to be left in firm.**]—When testator has authorised the employment of his estate in trade, though the firm in which it is so employed becomes bkpt., no proof can be made against the estate of bkpts. in respect of the money of testator so employed.—SCOTT *v.* IZON (1865), 34 Beav. 434; 55 E. R. 703.

4188. —— —— **In regard to excess over sum authorised.**]—An exor. directed to carry on his testator's partnership trade, exceeded his authority by employing the assets to an extent not warranted by the will. The surviving partner & the exor. became bkpt.:—*Held:* (1) the assets employed within the authority were a part of the capital of the firm to pay its debts, & could not be proved; (2) the exor. might prove the excess of assets so employed as if he had employed the assets of another estate in the trade.—*Re* HODSON, *Ex p.* RICHARDSON (1819), Buck, 421, L. C.; *affg.* (1818), 3 Madd. 138.

Annotations:—**Distd.** Thompson *v.* Derham (1842), 1 Hare, 358. **Consd.** Owen *v.* Delamere (1872), L. R. 15 Eq. 134; *Re* Mellor, *Ex p.* Manchester Bank (1879), 12 Ch. D. 917; *Re* Mellor, *Ex p.* Butcher (1880), 13 Ch. D. 465, C. A. **Refd.** Fraser *v.* Murdoch (1881), 6 App. Cas. 855, H. L. **Mentd.** McNeillie *v.* Acton (1853), 4 De G. M. & G. 744, L. JJ.; Labouchere *v.* Tupper (1857), 11 Moo. P. C. C. 198, P. C.

4189. —— —— ——.]—Testator gave all his property to his wife for her life, & after her decease to his children, & declared that it should be lawful for his wife to retain in her hands, & to employ any sum not exceeding £6,000, in carrying on his trade. The will was proved by his wife & son, who carried on testator's business in partnership together until their bkpcy. All the money received in respect of testator's estate, & in respect of the business carried on from testator's death, until the bkpcy., was paid into the bank to the joint account of the widow & son, & all the money paid in respect of the business was paid out of such mixed fund. The net money received in respect of testator's estate exceeded the sum of £6,000:—*Held:* the legatees, under testator's will, had no right of proof against the joint estate of the widow & son, for the £6,000, but their right of proof was restricted to such part of testator's assets employed in the business as exceeded the £6,000.—*Re* BUTTERFIELD, *Ex p.* BUTTERFIELD (1847) De G. 570; 17 L. J. Bcy. 10; 10 L. T. O. S. 241; 11 Jur. 955, L. C.

Annotations:—**Consd.** *Re* Edmonds & Webb, *Ex p.* Edmonds (1867), 16 L. T. 718. **Apld.** *Re* White, *Ex p.* Westcott (1874), 9 Ch. App. 626, L. JJ.; *Re* Beale, *Ex p.* Corbridge (1876), 4 Ch. D. 246.

4190. —— **Employed ultra vires.**]—A father & son carried on business in partnership. The capital belonged to the father, the son having only an interest in the profits. The father died, & under the provisions of the partnership deed the partnership was dissolved, & the profits became

the property of the father. The father appointed the son his exor., & in that character he received money belonging to the father's separate estate & employed it without any authority in the business. A suit was afterwards instituted to administer the father's estate, & the son filed a liquidation petition:—*Held:* the receiver in the suit could prove against the son's estate for the money received by the son as exor. & misapplied, as the rule that a partner could not prove against the estate of his copartner, until all the partnership debts had been paid in full, did not apply where an exor. had committed a *devastavit* against the estate of a deceased partner.—*Re* WHITE, *Ex p.* WESTCOTT (1874), 9 Ch. App. 626; 43 L. J. Bcy. 119; 30 L. T. 739; 22 W. R. 813, L. JJ.

Annotations:—**Expld.** *Re* Dixon, *Ex p.* Gordon (1874), 10 Ch. App. 160, L. JJ. **Consd.** Nanson *v.* Gordon (1876), 1 App. Cas. 195, H. L.; *Re* Blythe, *Ex p.* Blythe (1881), 16 Ch. D. 620.

B. By solvent Partner against separate Estate of Copartner.

4191. No proof until joint creditors paid.]—A partner can neither prove nor enter a claim against the separate estate, before the payment of the joint debts.—*Re* MINCHIN, *Ex p.* CARTER (1827), 2 Gl. & J. 233, L. C.

Annotations:—**Distd.** *Re* Boothby, *Ex p.* Hall (1838), 3 Deac. 125, Ct. of R.; *Re* Levey & Robson, *Ex p.* Topping (1865), 34 L. J. Bcy. 13, L. C. **Apld.** *Re* Dixon, *Ex p.* Gordon (1874), 10 Ch. App. 160, L. JJ. **Distd.** *Re* Dixon, *Ex p.* Nanson (1874), 43 L. J. Bcy. 133. **Folld.** Nanson *v.* Gordon (1876), 1 App. Cas. 195, H. L. **Consd.** *Re* Joseph & Bergel's Deed of Assignment, Pears *v.* Bergel (1908), 100 L. T. 74. **Refd.** *Re* Badnall, *Ex p.* Ellis (1827), 2 Gl. & J. 312, L. C.; *Re* Naylor, *Ex p.* Grazebrook (1832), 2 Deac. & Ch. 186, Ct. of R. **Mentd.** *Re* Motion, *Ex p.* Bass (1867), 36 L. J. Bcy. 39, L. JJ.

4192. ——.]—A partner of bkpt. sought to prove a debt said to be of a private nature, & due on balance of account. It was alleged that the debt had been rejected, on the ground that the balance had not been ascertained:—*Held:* (1) no proof could be made as there were partnership debts unpaid; (2) the subsistence of accounts the balance of which was unascertained was no objection to the proof.—*Re* CASE, *Ex p.* ROBINSON (1834), 4 Deac. & Ch. 499, Ct. of R.

4193. ——.]—Where A., B. & C. are partners, & B. becomes bkpt., A. cannot prove under the fiat against B. without showing that all the partnership debts have been paid.—*Re* MALACHY, *Ex p.* MAY (1838), 3 Deac. 382; Mont. & Ch. 18; 8 L. J. Bcy. 1, Ct. of R.

4194. ——.]—A debt due by one partner to his copartners can properly be proved against the separate estate of debtor as soon as the joint debts of the partnership have been discharged by the solvent partner.—SCOTT *v.* IZON (1865), 34 Beav. 434; 55 E. R. 703.

4195. —— Even where joint estate shown to be sufficient for joint debts.]—A solvent partner cannot prove in bkpcy. against the estate of his copartner, so long as there are joint creditors unpaid, although evidence be offered that the joint estate is ample to pay the joint creditors.—*Re* MOTION, *Ex p.* BASS (1867), 36 L. J. Bcy. 39, L. JJ.

Annotations:—**Folld.** *Re* Dixon, *Ex p.* Gordon (1874), 10 Ch. App. 160, L. JJ. **Apprvd.** Nanson *v.* Gordon (1876), 1 App. Cas. 195, H. L.

4196. —— Effect & application of rule.]—The ct. refused to relax the rule in bkpcy., that on the bkpcy. of a firm there could not be a proof on behalf of the estate of one partner against the estate of another until all the joint debts were paid, although, in the circumstances of the case & having regard to the amounts of the estates, the result of relaxing the rule would have been to increase the proving estate to such an extent that it would have yielded a larger surplus to the joint estate than would arise from the estate sought to be proved against, if the rule were observed & the proof excluded.

The rule in question enures for the benefit of the separate creditors as well as of the joint creditors.—*Re* HOLDSWORTH, *Ex p.* COLLINGE (1863), 4 De G. J. & Sm. 533; 33 L. J. Bcy. 9; 9 L. T. 309; 9 Jur. N. S. 1212; 12 W. R. 30; 46 E. R. 1026, L. C.

Annotations:—**Expld.** *Re* Dixon, *Ex p.* Gordon (1874), 10 Ch. App. 160, L. JJ. **Apld.** Nanson *v.* Gordon (1876), 1 App. Cas. 195, H. L.

4197. —— Unless solvent partner has paid sum to bankrupt to pay joint creditors.]—Money paid by one partner to another before the bkpcy. of the latter, for the purpose of being paid over as his liquidated share of a debt to their joint creditors, if it be not so applied is provable as a debt under the commission of the bkpt. partner, although the solvent partner were not called upon to repay the debt to the joint creditor till after the bkpcy. of the other.—WRIGHT *v.* HUNTER (1800), 1 East, 20; 102 E. R. 8; *subsequent proceedings* (1801), 5 Ves. 792.

Annotations:—**Distd.** *Re* Badnall, *Ex p.* Ellis (1827), 2 Gl. & J. 312, L. C. **Refd.** Aflalo *v.* Fourdrinier (1829), 6 Bing. 306. **Mentd.** Brodie *v.* Howard (1855), 25 L. J. C. P. 57.

4198. —— Though carrying on separate business —Both liable for same joint debts.] — Partners, constituting distinct firms, may prove against each other, but in a partnership of two, one carrying on business separately, so they are both liable for the same joint debts, the solvent partner is not entitled to prove, under the bkpcy. of his copartner, a debt for goods sold by his distinct house to the firm, until the joint creditors have been satisfied.—*Re* STEWART, *Ex p.* ADAMS (1812), 1 Rose, 305, L. C.

Annotations:—**Consd.** *Re* Petherbridge, *Ex p.* Cook (1831), Mont. 228, L. C.; *Re* Barrow, *Ex p.* Moult (1832), Mont. 321, Ct. of R. **Folld.** *Re* Wilks, *Ex p.* Thompson (1834), 3 Deac. & Ch. 612, Ct. of R. **Expld.** *Re* Arrangement by Deed, *Ex p.* Ivens (1859), 33 L. T. O. S. 276. **Mentd.** *Re* Deane & Youle, *Ex p.* Goldsmid (1857), 1 De G. & J. 257, L. JJ.

PART XI. SECT. 6, SUB-SECT. 6.—B.

4191 i. *No proof until joint creditors paid.*]—A debt due by one partner in a firm to his copartners can properly be proved against the separate estate of debtor as soon as the joint debts of the partnership have been discharged.—MACKINTOSH *v.* ALMON (1886), 6 R. & G. 498.—**CAN.**

4191 ii. ——.]—D. contributed a portion of the capital to a partnership, his copartner undertaking to repay that amount should D. within a certain period withdraw from the partnership. D. did so withdraw, & thereafter the estate of the copartner was sequestrated:—*Held:* D. was not entitled to prove upon his copartner's estate for the amount due to him under the above agreement while any of the joint creditors remained unpaid.—DELL *v.* RICCI'S ESTATE (1903), 20 S. C. 605; 13 C. T. R. 906.—**S. AF.**

4191 iii. ——.]—A., a trader, being indebted to B. conveyed to her an undivided fourth of his business premises, & by deed of even date, which recited that B. had purchased as a provision for C. an infant, but retained full control during C.'s minority, & might make other dispositions of it in her discretion, A. covenanted to pay her one quarter of the profits, provided that until C.'s majority B. should not be liable as a partner to any losses & that A. would not hold B. out as a partner, but would indemnify her from losses, & that A. would behave & manage the business as one partner should do to another.

Subsequently A. & B. acted as partners with reference to a proposed sale of another quarter of the business to a stranger. A. became insolvent & B. sought to prove on his estate for other debts due by A. to her:—*Held:* B. was a partner of A., & could not prove on his estate in competition with the other creditors.—*Re* RUDDOCK (1879), 5 V. L. R. 51.—**AUS.**

Sect. 6.—Rights of partners: Sub-sect. 6, B.]

4199. —— Whether giving indemnity sufficient.]—A solvent partner is entitled to prove against the estate of a bkpt. copartner the amount of the balance due to him upon the partnership account, first satisfying the partnership debts, or indemnifying bkpt.'s estate against them.—*Re* ELGAR, *Ex p.* TAYLOR (1814), 2 Rose, 175.

Annotations:—**Consd.** *Re* Sheath, *Ex p.* Watson (1819), Buck, 449. **Refd.** *Re* Taylor, *Ex p.* Terrell (1819), Buck, 345.

4200. —— —— Indemnity accepted by joint creditors.]—A partner cannot prove against his copartner upon indemnifying the joint estate.

Until an indemnity is given, which is accepted by every joint creditor as a discharge of the debt, a partner never can be considered as a person liable, paying the debt, or part in discharge of the debt, within 49 Geo. 3, c. 121, s. 8 (LORD ELDON, C.).—*Re* SHEATH, *Ex p.* MOORE (1826), 2 Gl. & J. 166, L. C.

Annotations:—**Consd.** *Re* Minchin, *Ex p.* Carter (1827), 2 Gl. & J. 233, L. C. **Distd.** *Re* Levey & Robson, *Ex p.* Topping (1865), 34 L. J. Bcy. 13, L. C. **Refd.** *Re* Badnall, *Ex p.* Ellis (1827), 2 Gl. & J. 312, L. C.; *Re* Naylor, *Ex p.* Grazebrook (1832), 2 Deac. & Ch. 186, Ct. of R. **Mentd.** *Re* Young, *Ex p.* Cooper (1842), 11 L. J. Bcy. 29, Ct. of R.

4201. —— —— ——.]—A., B., C., D. & E. were in partnership. A. retired, receiving the joint & several bond of the continuing partners for his share in the capital, together with a covenant of indemnity against the firm's debts. C., D. & E. subsequently retired, after which B. possessed himself of the partnership property & carried on the business alone. B., C., D. & E. became bkpt. There were outstanding debts due from B., for which A. was jointly liable:—*Held:* A. was not entitled to prove the amount of the bond against the separate estate of B., nor to prove such debts as he should indemnify bkpt.'s estate against.

Unless an indemnity be accepted as a discharge by the joint creditors, the partner offering indemnity can never be entitled to prove as a person liable paying the debt after bkpcy., within 49 Geo. 3, c. 121, s. 8 (LORD LYNDHURST, C.).—*Re* BADNALL, *Ex p.* ELLIS (1827), 2 Gl. & J. 312; 6 L. J. O. S. Ch. 45, L. C.

Annotations:—**Refd.** *Re* Naylor, *Ex p.* Grazebrook (1832), 2 Deac. & Ch. 186, Ct. of R.; Abbott *v.* Hicks (1839), 7 Scott, 715; *Re* Levey & Robson, *Ex p.* Topping (1865), 34 L. J. Bcy. 13, L. C.

4202. —— Unless cognovit received after dissolution.]—A. being a dormant partner with B. dissolved partnership, & B. was declared indebted to A. on balance. A. sued B. for such balance, & received *cognovit* for debt & costs. B. became bkpt.:—*Held:* A. was entitled to prove his debt against the estate, although some partnership debts were unpaid.—*Re* NAYLOR, *Ex p.* GRAZEBROOK (1832), 2 Deac. & Ch. 186, Ct. of R.

Annotations:—**Consd.** *Re* Boothby, *Ex p.* Hall (1838), 3 Deac. 125, Ct. of R. **Distd.** *Re* Dixon, *Ex p.* Gordon (1874), 10 Ch. App. 160, L. JJ.

4203. —— Unless no chance of separate estate showing surplus for joint creditors—General rule relaxed.]—A firm of two became bkpt., one partner being indebted to the other. The debt arose from a contract apart from the copartnership, & was in existence at the time of the adjudication. It was admitted that there could not be any surplus of the debtor partner's estate for the joint creditors, whether the debt was allowed to be proved against that estate by the creditor partner or not:—*Held:* a proper case for relaxing the general rule, & the creditor partner might prove against the debtor partner's estate. Form of order.—*Re* LEVY & ROBSON, *Ex p.* TOPPING (1865), 4 De G. J. & Sm. 551; 46 E. R. 1033; *sub nom. Re* LEVEY, *Ex p.* TOPPING, 5 New Rep. 390; 34 L. J. Bcy. 13; 12 L. T. 3; 11 Jur. N. S. 210; 13 W. R. 445, L. C.

Annotations:—**Consd.** Lacey *v.* Hill, Leney *v.* Hill (1872), 8 Ch. App. 441, L. JJ. **Apld.** Nanson *v.* Gordon (1876), 1 App. Cas. 195, H. L. **Consd.** *Re* Wright, *Ex p.* Sheen (1877), 6 Ch. D. 235, C. A.; *Re* Head, *Ex p.* Head, [1894] 1 Q. B. 638.

4204. —— —— —— Effect of dividends on proof.]—Exors. of a deceased partner, whose separate estate was solvent, though the surplus was insufficient with the joint estate to pay the joint creditors in full, sought to prove against the separate estate of the copartner, for money had & received:—*Held:* (1) where a partnership was insolvent, a proof by the solvent partner against the separate estate of his insolvent partner did not violate the rule, which forbade joint creditors from proving against the separate estate until the separate creditors had been paid in full, as the dividends on such proof swelled the surplus of the solvent partner's separate estate, & went eventually to pay the joint debts; (2) the proof should be allowed.—*Re* HEAD, *Ex p.* HEAD, [1894] 1 Q. B. 638; 63 L. J. Q. B. 206; 70 L. T. 35; 1 Mans. 38; 10 R. 115.

4205. —— Joint creditors allowed proof on separate estate.]—A partnership carried on between A. & B. was dissolved, A. leaving his share on mtge., & B. carrying on the business alone. On B.'s bkpcy. joint creditors of the old firm were admitted to prove against B.'s separate estate. A. claimed to prove for his share:—*Held:* as the joint creditors had been admitted to prove against B.'s estate, A.'s proof must be rejected, as otherwise A. would be proving in competition with them.—*Re* HIND, *Ex p.* HIND (1890), 62 L. T. 327, D. C.

4206. No proof until accounts in partnership taken.]—B., a banker, entered into partnership with M. & P., as merchants, under the firm of M. & Co., & by the partnership deed B. & M. mutually covenanted to bring £6,500 each into the business. There was also a subsidiary agreement that B. should accept bills for the firm at a commission, & that the firm should negotiate them, & keep B. in funds to meet the acceptances. B. became bkpt., & M. & P. executed deeds of arrangement with their creditors. M. claimed to prove in B.'s bkpcy. for a sum of £2,773 due from B. to M. on the covenant in the deed for capital not brought in by B.:—*Held:* the sum due on the covenant being due on account of the partnership, it could not be proved by one partner against the estate of his copartner without first taking the accounts of the partnership.—*Re* BRAGINTON, *Ex p.* MAUDE (1867), 2 Ch. App. 550; 16 L. T. 577; 15 W. R. 856, L. JJ.

Annotation:—**Mentd.** Narraway *v.* Beattie, Cama's Estate (1872), 26 L. T. 310.

4207. Proof admitted—Party proving only quasi-partner—No joint creditors.]—An agreement was entered into between A. & B., whereby in effect A. was to carry on a certain business in the name of "A. & Co." for the benefit of himself & any person whom B. might at any time within eight years nominate. B. was to make certain advances to A. for the purpose of the business & become surety for him to a certain co., & A. was to give B. promissory notes for his advances & any sums he might pay as surety, & to carry on the business in partnership with B.'s nominee for twenty-one years on certain specified terms. The profits of the business were to be for the first eight years applied in paying A. £100 a year, & then in paying B. his advances with interest, & the residue was to be divided between A. & B.'s nominee in certain

specified proportions, & losses were to be borne in the same proportions. The agreement gave B. a right to see the accounts relating to the business, & contained other special clauses, under which B. might at any time within the eight years have nominated himself as a partner. Before the eight years had elapsed, & before any nomination had been made by B., A. became bkpt., being indebted to B. for advances. There being no person who claimed to be a joint creditor of A. & B. :—*Held :* B.'s exor. was entitled to prove against A.'s estate for the advances, the agreement not having constituted A. & B. partners as between themselves. —*Re* HARRIS, *Ex p.* DAVIS (1863), 4 De G. J. & Sm. 523 ; 32 L. J. Bcy. 68 ; 8 L. T. 745 ; 9 Jur. N. S. 859 ; 46 E. R. 1022, L. C.

4208. —— —— Held out as partner.]—A person, alleged to have held himself out as a partner with a trader to three of his creditors, claimed to prove a debt in the trader's separate liquidation. Two of the three creditors had also proved in that liquidation. The third was fully secured, but had taken no proceedings against the *quasi*-partner :—*Held :* the *quasi*-partner was entitled to prove.

A person who has held himself out as a partner with a trader to a small number of the creditors of the latter, is not thereby precluded from proving in the separate bkpcy. of the trader, his estate being insufficient to leave a surplus, for the debt due to him from the trader (JAMES, L.J.).—*Re* WRIGHT, *Ex p.* SHEEN (1877), 6 Ch. D. 235 ; 37 L. T. 451 ; 26 W. R. 195, C. A.

Annotation :—**Consd.** *Re* Pulsford, *Ex p.* Hayman (1878), 8 Ch. D. 11, C. A.

4209. —— In respect of what claims—Claim for return of price of share of business—Partnership induced by fraud.]—A. induced by the fraudulent representations of B. as to the profits of his business, gave him a certain sum of money for a share of it. On discovery of the fraud, A. filed a bill in equity for an account, to have the partnership declared void, & for a receiver, & a receiver was ordered. B. became bkpt. A petition by A. to be admitted to prove under his commission was refused, with liberty to make a claim.—*Re* HOOPER, *Ex p.* BROOME (1811), 1 Rose, 69, L. C.

Annotation :—**Consd.** Bury *v.* Allen (1845), 1 Coll. 589, in which the ct. sent for the order book in bkpcy. from which it appeared that A. was given liberty to prove such debt under the commission as he should be able to substantiate, & was admitted a creditor for what he should be able to prove, & to be paid a dividend in respect thereof ratably with the rest of the creditors under the commission, but so as not to disturb any dividend already made, but if he should not be able to make a proof, he was to be at liberty to make & enter a claim.

4210. —— —— Claim for return of premium—Compensation in nature of unliquidated damages.]—A. agreed to take B. into partnership with him for fourteen years, in consideration of a premium of £2,500, one half of which was to be paid at the signing of the articles, & the other half at the time of the execution of a deed of partnership to be founded on the articles. The articles were signed, the first instalment of the premium was paid, & the parties entered into partnership. After the lapse of a few months, A., under considerable provocation from B., excluded B. from the partnership. The connection was not renewed, the deed was not executed, nor was the second instalment paid, but there was a formal dissolution of the partnership on a certain day. A. afterwards became bkpt. :—*Held :* in the accounts to be taken between A.'s assignees & B., the latter was to be credited with the whole amount of premium, & B. was entitled, without prejudice to any question, to enter a claim for the whole premium under the bkpcy., as one of two partners might have a demand against the other for compensation in the nature of unliquidated damages, & enforceable in equity only.—BURY *v.* ALLEN (1845), 1 Coll. 589 ; 63 E. R. 556.

Annotations :—**Apld.** Burdon *v.* Barkus (1862), 2 De G. F. & J. 42, L. JJ. **Consd.** Atwood *v.* Maude (1868), 3 Ch. App. 369, L. C. & L. J. **Mentd.** Mackenna *v.* Parkes (1866), 15 L. T. 500.

4211. —— —— Partnership debts paid or payable after dissolution by retiring partner.]—On the dissolution of a partnership between A. & B. the stock, etc., was assigned to B., he covenanting to pay the debts & to indemnify A. On the bkpcy. of B. the joint creditors resorted to A., who paid some claims, other claims were still depending :—*Held :* A. was entitled to prove in B.'s bkpcy., for what he had paid or might pay, upon indemnifying B.'s estate against the joint debts.—*Re* WILSON, *Ex p.* OGILVY (1814), 2 Rose, 177, L. C.

4212. —— —— Proportion of debts of old firm paid by retiring partner.]—On the dissolution of a partnership between H. & D., H. entered into a new partnership, & with his new partners was declared bkpt. D. subsequent to the bkpcy. paid the debts of the old firm :—*Held :* D. was entitled to prove for a moiety of the sums paid by him on account of the debts of the firm of H. & D. against the separate estate of H.—*Re* WYAT & THOMPSON, *Ex p.* SMITH (1850), Fonbl. 179 ; 16 L. T. O. S. 176.

4213. —— —— Sums paid as result of bankrupt improperly using firm name.]—The proof of two solvent partners was admitted under the bkpcy. of the third, for a debt, which by an unauthorised use of the partnership name he had created against the firm, & which, after the bkpcy., they were compelled to discharge, all the debts of the partnership having been discharged.—*Re* SLANEY, *Ex p.* YOUNG (1814), 2 Rose, 40, L. C.

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q. *Proof admitted—Where party proving dormant partner.*]—A., a dormant partner with bkpt., retired without any settlement of accounts, & took a bond for £300. One creditor knew of his being a partner, but never received any notice of the dissolution, & supplied goods to the supposed firm on the faith of the partnership continuing :—*Held :* A. was entitled to prove on the estate of bkpt. for the entire amount.—*Re* M'MANUS (1858), 7 I. Ch. R. 82.—**IR.**

r. —— *In respect of what claims—Balance due by retiring partner—Unascertained at date of insolvency.*]—Upon the dissolution of a partnership between W. & M., it was agreed that all assets should vest in W., who assumed the liabilities of the firm, & that an account should be taken of the copartnership business to ascertain the respective shares or interest of the partners therein, or the amount payable by either to the other. M. then carried on business on his own behalf, & becoming insolvent, made an assignment to pltf. as assignee in insolvency. It was claimed that upon taking accounts between M. & W. a balance would be found due to W., for which he was entitled to rank upon M.'s estate :—*Held :* W.'s claim was an equitable debt, capable of being ascertained by the ct. for which therefore he was entitled to so rank on M.'s estate.—HALL *v.* LANNIN (1879), 30 C. P. 204.—**CAN.**

s. —— —— *Claim for return of over-advances.*]—After dissolution of a partnership & sequestration of the estates of the firm & of pltf.'s co-partners :—*Held :* the claim of one of the partners for repayment of over-advances—for which he alleged his co-partners were jointly indebted to him—must be made against his copartners & their separate estates, & not against the co. or its estate.—NORTON'S TRUSTEES *v.* NORDEN'S TRUSTEES (1848), 3 Men. 330.—**S. AF.**

t. *Amount of proof—Deduction of dividend received—From estate of one of several co-debtors.*]—A person who has realised a portion of his debt upon the insolvent estate of one of his co-debtors, cannot be allowed to rank upon the estate in liquidation of his other co-debtors jointly & severally liable without first deducting the amount he has previously received from the estate of his co-debtor.—ONTARIO BANK *v.* CHAPLIN (1891), 20 S. C. R. 152.—**CAN.**

Sect. 6.—Rights of partners: Sub-sect. 6, B. & C. Sect. 7.]

Annotations :—**Consd.** Aflalo *v.* Fourdrinier (1829), 6 Bing. 306. **Mentd.** Clements *v.* Langley (1833), 5 B. & Ad. 372 ; Wallis *v.* Swinburne (1847), 17 L. J. Ex. 169.

4214. —— **For what amount.**]—A solvent partner, paying, after the bkpcy. of his copartners, all the joint debts, may prove against the separate estates of his partners, but his proof will be limited to the amount of their respective shares of the joint estate so paid, & if any of their estates be insufficient to pay 20*s.* in the pound, the solvent partner cannot prove the deficiency against the others.—*Re* SHEATH, *Ex p.* WATSON (1819), Buck, 449 ; 4 Madd. 477 ; 56 E. R. 781.

Annotations :—**Consd.** Aflalo *v.* Fourdrinier (1829), 6 Bing. 306 ; Wallis *v.* Swinburne (1847), 1 Exch. 203. **Mentd.** Basset *v.* Dodgin (1833), 2 Moo. & S. 777.

C. By Firm against Partner.

4215. Rule against proof not applicable—Partnership dissolved—Retiring partner becoming bankrupt after dissolution.]—Where a firm has dissolved partnership, & one of the late partners becomes bkpt., there is no foundation for the doctrine that the separate creditors of bkpt. must be paid off before the partnership can be admitted as a creditor.—*Re* ALLEN, *Ex p.* GILL (1863), 9 L. T. 308 ; 9 Jur. N. S. 1303, L. C.

4216. Debt incurred by fraud.]—Bkpt. had taken property from the partnership fund & applied it to his own use without the knowledge of his partners. A separate commission issued against him & a joint commission against all the partners :—*Held :* the assignees under the joint commission could prove against the separate estate.—FORDYCE'S CASE, *Ex p.* CUST (1774), 1 Cooke's Bankrupt Laws, 8th ed., p. 531.

Annotations :—**Consd.** *Ex p.* Lodge & Fendal (1790), 1 Ves. 166, L. C. **Folld.** *Ex p.* Yonge (1814), 3 Ves. & B. 31, L. C. ; Lacey *v.* Hill, Leney *v.* Hill (1876), 4 Ch. D. 537 ; Read *v.* Bailey (1877), 3 App. Cas. 94, H. L.

See, also, No. 3955, *ante.*

4217. ——.]—H., a banker, took into partnership K., who was unacquainted with banking, & took no part in the business of the firm. H., who managed the business, from time to time drew large sums out of the bank, concealing the overdrawings by means of fictitious entries in the books of the bank. On the death of H. it was discovered that by reason of the overdrawings & the employment of the money abstracted in losing speculations on the Stock Exchange, the bank was insolvent, & K. was adjudicated bkpt. An action was instituted for the administration of the separate estate of H., in which the trustee in bkpcy. of the firm claimed to prove in respect of the funds fraudulently drawn out by H. :—*Held :* the trustee was entitled to prove.

The length of time during which the fraud was carried on cannot affect the rights of the creditors of the firm (LORD BLACKBURN).—READ *v.* BAILEY (1877), 3 App. Cas. 94 ; 47 L. J. Ch. 161 ; 37 L. T. 510 ; 26 W. R. 223, H. L. ; *affg.* S. C. *sub nom.* LACEY *v.* HILL, LENEY *v.* HILL (1876), 4 Ch. D. 537, C. A.

Annotations :—**Consd.** *Re* Collie, *Ex p.* Adamson (1878), 8 Ch. D. 807, C. A. **Mentd.** Mersey Steel & Iron Co. *v.* Naylor, Benzon (1882), 51 L. J. Q. B. 576, C. A.

4218. —— **What amounts to fraud.**]—A partnership is not entitled to prove against the separate estate of an individual member of it, in respect of funds drawn by such member out of the general stock, unless the same have been drawn out fraudulently, *i.e.* against the articles of partnership, without the knowledge, consent, privity, or subsequent approbation of his copartners, or to increase his private estate.—*Re* RAMSEY & ALDRICH, *Ex p.* HARRIS (1813), 2 Ves. & B. 210 ; 1 Rose, 437 ; 35 E. R. 298, L. C.

Annotations :—**Folld.** Lacey *v.* Hill, Leney *v.* Hill (1876), 4 Ch. D. 537, C. A. **Apprvd.** Read *v.* Bailey (1877), 3 App. Cas. 94, H. L.

4219. —— ——.]—If one partner is entrusted with the management, & he withdraws partnership money for his own use, & duly & openly enters it in the partnership books, this is not a fraud, which will entitle the joint estate to prove against his separate estate, but if he disguises the transaction in the books, or omits or conceals it, it is otherwise. —*Re* HARDING, *Ex p.* SMITH (1821), 1 Gl. & J. 74 ; *sub nom. Re* HAY, *Ex p.* SMITH, 6 Madd. 2 ; 56 E. R. 988.

Annotations :—**Consd.** *Re* Mackenzie & Abbott, *Ex p.* Turner (1833), 4 Deac. & Ch. 169, Ct. of R. **Apld.** *Re* Higginson & Deane, *Ex p.* Hinds (1849), 14 L. T. O. S. 449. **Apprvd.** Read *v.* Bailey (1877), 3 App. Cas. 94, H. L.

4220. —— ——.]—Two partners traded as merchants at Liverpool & Barbadoes, one residing & transacting the business at each place. The Liverpool partner, without the authority or knowledge of the other, laid out partnership money in the purchase of railway shares in his own name, but on account of the partnership, & in substance declared himself a trustee of the shares for the firm. Afterwards the firm became bkpt. :—*Held :* the joint estate had no right of proof against the separate estate of the Liverpool partner for the amount laid out upon the shares.—*Re* HIGGINSON, *Ex p.* HINDS, *Ex p.* HIGGINSON (1850), 3 De G. & Sm 613 ; 14 L. T. O. S. 449 ; 14 Jur. 286 ; 64 E. R. 629.

4221. —— **Unless waiver or acquiescence.**]—The conduct of the parties in a partnership may supersede the stipulations of the articles, & raise a presumption of assent to a different agreement, & an approbation of a mode of dealing with the partnership funds, from their knowledge of, & acquiescence in it.—*Re* RAMSEY & ALDRICH, *Ex p.* HARRIS (1813), 2 Ves. & B. 210 ; 1 Rose, 437 ; 35 E. R. 298, L. C.

Annotations :—**Folld.** *Re* Higginson & Deane, *Ex p.* Hinds (1849), 14 L. T. O. S. 449 ; Lacey *v.* Hill, Leney *v.* Hill (1876), 4 Ch. D. 537, C. A. **Apprvd.** Read *v.* Bailey (1877), 3 App. Cas. 94, H. L.

4222. —— ——.]—Proof cannot be made by the joint estate against the separate estate, except in the case of a fraudulent abstraction from the joint funds by one of the partners, & not then, if there has been any waiver of the tortious act by the other partner so as to reduce it to a matter of contract.—*Re* MACKENZIE & ABBOTT, *Ex p.* TURNER (1833), 4 Deac. & Ch. 169 ; 1 Mont. & A. 54, Ct. of R.

Annotation :—**Consd.** *Re* Higginson & Deane, *Ex p.* Hinds (1849), 14 L. T. O. S. 449.

4223. —— —— **What is acquiescence.**]—A partner appropriated consols belonging to the partnership, & on the next day he informed one of his copartners. He was debited half-yearly with the dividends on the amount appropriated : —*Held :* the joint estate could prove against his separate estate for the value of the consols, the conduct of the other partners being nothing like acquiescence amounting to subsequent approbation.—*Re* SIKES & WILKINSON, *Ex p.* WATKINS (1828), Mont. & M. 57.

Annotation :—**Consd.** *Re* Mackenzie & Abbott, *Ex p.* Turner (1833), 4 Deac. & Ch. 169, Ct. of R.

PART XI. SECT. 6, SUB-SECT. 6.—C.

w. General rule.]—For the purpose of proving in insolvency a partnership must be treated as a person distinct from its members. The general rule is that a partnership may not prove upon the insolvent estates of its members.—SILBERT (PHILIP) & Co. *v.* EVANS (HERBERT) & Co., [1912] T. P. D. 425.—S. AF.

4224. Goods supplied to partner in separate trade.]—Bkpt. had carried on a trade distinct from that of his firm. He was indebted to his firm for goods supplied :—*Held :* his partners were entitled to prove, it being quite different from the common case of a partner not carrying on a distinct trade borrowing money.—*Ex p.* HESHAM (1810), 1 Rose, 146, L. C.

Annotation :—**Mentd.** *Re* Deane & Youle, *Ex p.* Goldsmid & King (1857), 1 De G. & J. 257, L. JJ.

4225. ——.]—Proof may be made by the joint estate of bkpt. firm against the separate estate of one of the partners, in respect of goods supplied by the firm in the ordinary course of business to his separate trade of the same character as that of the firm, but wholly unconnected therewith, if the debt is in respect of dealings as between trade & trade, & not merely between the firm & one of its partners.—*Re* DOWNTON & SATCHWELL, *Ex p.* DOWNTON & SATCHWELL (ASSIGNEES) (1862), 6 L. T. 615.

4226. ——What is separate trade.]—B., a banker, entered into partnership with M. & P., as merchants, under the firm of M. & Co. There was a subsidiary agreement that, when purchases were made on behalf of the firm, B. should accept bills for the firm at a commission, & that the firm should negotiate them, & keep B. in funds to meet the acceptances. B. became bkpt., & M. & P. executed deeds of arrangement with their creditors. M., on behalf of the firm of M. & Co., claimed to prove in B.'s bkpcy. for £5,082 due from him to the firm on their current account :—*Held :* the transactions between B. & M. & Co. were not dealings between trade & trade so as to take the case out of the rule against a firm proving a debt against the estate of one of the partners, but were merely dealings by B. for the convenience of the partnership, & the fact of all the partners being insolvent, & having no personal interest, did not prevent the application of the rule against a partner competing with his own creditors.—*Re* BRAGINTON, *Ex p.* MAUDE (1867), 2 Ch. App. 550 ; 16 L. T. 577 ; 15 W. R. 856, L. JJ.

Annotation :—**Consd.** Narraway *v.* Beattie, Cama's Estate (1872), 26 L. T. 310.

4227. Proof by company—Against firm of which two partners were shareholders in company.]—A fiat issued against a firm of three, two of whom were shareholders in a banking co. :—*Held :* the co. might prove for a joint debt due from the three.—*Re* HAGUE, *Ex p.* LAW (1840), Mont. & Ch. 590 ; 1 Mont. D. & De G. 16 ; 9 L. J. Bcy. 14 ; 4 Jur. 127, Ct. of R.

4228. —— Against shareholder carrying on separate trade.]—Bkpt. was a shareholder in an unincorporated joint stock banking co., not established under Country Bankers Act, 1826 (c. 46), the rules of which provided that it should have a lien on a shareholder's shares for any balance due from the shareholder. Bkpt. carried on a separate banking business, which was indebted to the banking co. The co. claimed a lien on the shares & on deposited securities, & to prove for the residue :—*Held :* bkpt.'s dealings with the co. were in respect of a separate trade, & the co. had a right of proof.—*Re* YOUNG, *Ex p.* COOPER (1842), 2 Mont. D. & De G. 1 ; 11 L. J. Bcy. 29 ; 6 Jur. 467, Ct. of R.

Annotation :—**Mentd.** West *v.* Reid (1843), 2 Hare, 249.

4229. —— For liability of employee shareholder on shares allotted to him to obtain registration of company.]—*Held :* the assignee of a joint-stock co., which had become bkpt., was not entitled to prove for deposits or contribution against the estate of a shareholder, a clerk in the co., to whom the shares had been allotted in order to enable the co. to obtain registration, & who had also become bkpt.—*Re* WOODROFFE (1849), Fonbl. 14 ; 14 L. T. O. S. 137.

4230. —— Balance due by contributory—Winding up under Companies Act, 1862, (c. 89), s. 199.]—Where an unregistered co. is wound up under the above sect. & a contributory becomes bkpt., the official liquidator may prove under s. 95 (5) of the Act for any sum due from bkpt.'s estate as a separate debt in competition with the separate creditors, in like manner as in the case of a registered co.—*Re* ADAMS, *Ex p.* BALL (1874), 10 Ch. App. 48 ; 31 L. T. 396 ; 23 W. R. 119, L. C. & L. JJ.

See, further, COMPANIES.

SECT. 7.—BANKRUPTCY OF TENANT IN COMMON OR JOINT ADVENTURER.

4231. Assignees tenants in common with other co-owner.]—The effect of the bkpcy. of a tenant in common of goods is to render the assignees tenants in common with the other co-owner.—MORGAN *v.* MARQUIS (1853), 9 Exch. 145 ; 23 L. J. Ex. 21 ; 2 C. L. R. 276 ; 156 E. R. 62.

Annotation :—**Consd.** Lewis *v.* White (1863), 2 New Rep. 81.

4232. Passing of share without being specifically liable—For advances by co-owner.]—The owners of a ship are interested in it as tenants in common, & upon a bkpcy. bkpt.'s share passes to the creditors under the bkpcy., without being liable specifically to the claims of the other part owners, in respect of their disbursements & liabilities for the ship.—*Re* NICHOLSON, *Ex p.* HARRISON (1814), 2 Rose, 76, L. C.

Annotations :—**Mentd.** *Re* Drury, *Ex p.* Leslie (1833), 3 L. J. Bcy. 4 ; Green *v.* Briggs (1848), 6 Hare, 395 ; *Re* Leslie, Leslie *v.* French (1883), 23 Ch. D. 552 ; The Vindobala (1887), 13 P. D. 42.

4233. *S. P. Ex p.* YOUNG (1813), 2 Ves. & B. 242 ; 2 Rose, 78, n. ; 35 E. R. 311.

Annotations :—**Refd.** Richardson *v.* Bank of England (1838), 2 Jur. 911, L. C. **Mentd.** Holderness *v.* Shackels (1828), Dan. & Ll. 203 ; *Re* Drury, *Ex p.* Leslie (1833), 3 L. J. Bcy. 4 ; Green *v.* Briggs (1848), 6 Hare, 395 ; *Re* Leslie, Leslie *v.* French (1883), 23 Ch. D. 552 ; The Vindobala (1887), 13 P. D. 42.

4234. —— For proportion of disbursements.]—A., B. & C. were part-owners of a ship engaged in the whale fishery. The mode of managing the cargo was that, on the arrival of the vessel at her homeward port, the whalebone was taken into the possession of B., & sold by him, & the proceeds were applied towards the discharge of the expenses of the ship. The blubber was deposited in a warehouse by the owners of the ship, & the oil produced was put into casks, each owner's share being weighed out, & placed separately in the warehouse, in casks marked with his initials. After the division, the warehouseman delivered to the order of each part-owner his share of the oil, unless notice was given by the ship's husband that the part-owner's share of the disbursements had not been paid. In that case, the warehouseman used to detain the oil till the ship's husband's

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4226 i. *Goods supplied to partner in separate trade—What is separate trade.*]—A partner in a firm claimed to prove on behalf of the firm a debt in the insolvent estate of another partner, who carried on a separate business, the debt being one as between merchant & merchant & having nothing to do with the relation of the parties as members of the same firm. There were distinct capitals, separate books, & separate premises :—*Held :* the claim was admissible.—SILBERT (PHILIP) & Co. *v.* EVANS (HERBERT) & Co., [1912] T. P. D. 425.—S. AF.

Sect. 7.—Bankruptcy of tenant in common or joint adventurer. Sects. 8 & 9. Part XII. Sect. 1: Sub-sect. 1.]

demand had been satisfied. The ship having arrived, the above course was followed. The share set apart for A. was twenty-nine tons, which was stowed in the warehouse in casks, which had A.'s initials on them. A. became bkpt. Twenty tons of the oil had been delivered to A. before his bkpcy., the remaining nine tons remained in the warehouse. The warehouseman having had orders from the ship's husband not to deliver the remaining oil, as A.'s share of the disbursements had not been paid, & an action of trover having been brought by the assignees against the warehouseman for the residue of A.'s oil :—*Held :* the other part-owners had originally a lien on it for his share of the disbursements of the ship, & such right was not devested by the separation of A.'s share from the residue, & placing it in casks marked with his name.—HOLDERNESS *v.* SHACKELS (1828), 8 B. & C. 612 ; Dan. & Ll. 203 ; 3 Man. & Ry. K. B. 25 ; 7 L. J. O. S. K. B. 80 ; 108 E. R. 1170.

Annotation :—**Apld.** Green *v.* Briggs (1848), 6 Hare, 395.

4235. —— For obligation of bankrupt to pay bill of exchange.]—A. & Co., & B. & Co. engaged in an adventure to India & China upon the terms, that £10,000 was to be invested in India bills, the proceeds of which were to be remitted to China, A. & Co. giving instructions as to one half, & B. & Co. as to the other half, & the outlay of money to either party to be saved by A. & Co. negotiating their drafts upon B. & Co., & renewing them till the funds came home, & that the £10,000 was to be advanced by the parties in equal shares, but B. & Co.'s moiety was to be provided for by a bill drawn on them by A. & Co., payable at six months, & A. & Co.'s moiety by another bill drawn by them on B. & Co. payable at four months, which were to be discounted by A. & Co. Bills & goods were remitted from India to China, where they were realised by the agents of A. & Co., & the proceeds invested by them in the purchase of other goods, one portion of which was consigned to A. & Co., & the other to B. & Co. in England. B. & Co. became bkpt. before their portion of the return proceeds arrived, & A. & Co. were obliged to pay the bill drawn by them for B. & Co.'s moiety of the £10,000 :—*Held :* there was not such a joint adventure, as to give A. & Co. a lien on B. & Co.'s portion of the return proceeds, for the amount of the bill.—*Re* BOGGS, *Ex p.* GEMMEL (1843), 3 Mont. D. & De G. 198, L. C.

Annotation :—**Mentd.** Bottomley *v.* Nuttall (1858), 5 C. B. N. S. 122.

SECT. 8.—CONSOLIDATION OF ESTATES.

4236. Power of court—Estates so mixed as to be inseparable.]—*Qu. :* whether the rule that where joint & separate estates are so mixed that it is impossible to separate them, the ct. may order them to be consolidated still exists.—*Re* KRIEGEL, WARING & CO., *Ex p.* TROTMAN (1893), 68 L. T. 588 ; 10 Morr. 99 ; 5 R. 349, D. C.

Annotation :—**Mentd.** *Re* Barker (1914), 21 Mans. 238.

4237. Whether resolution by creditors sufficient—Reference to ascertain whether for general benefit—Absent creditors not bound.]—A meeting of the joint & separate creditors of a partnership, called by advertisement, agreed to the consolidation of the estates :—*Held :* such a resolution alone could not bind the interest of the absent creditors of both classes, but was a sufficient reason for a reference to inquire whether the proposal was for the general benefit.—*Re* HIGTON & BREWER, *Ex p.* STRUTT (1821), 1 Gl. & J. 29.

Annotation :—**Folld.** *Re* Hope, *Ex p.* Part (1832), 2 Deac. & Ch. 1, Ct. of R.

4238. —— —— ——.]—The joint & separate creditors, at a meeting duly convened for that purpose, agreed to consolidate the two estates :—*Held :* there must be a reference to the comrs. to ascertain whether the consolidation proposed would be for the benefit of the general body of creditors, & such a resolution alone could not bind the interests of the absent creditors.—*Re* HOPE, *Ex p.* PART (1832), 2 Deac. & Ch. 1, Ct. of R.

4239. Grounds for refusing—Existence of both joint & separate property.]—On an application to consolidate the joint & separate estates of two bkpts. :—*Held :* the admission of the existence of both joint & separate property carried its own answer.—*Re* LYE, *Ex p.* EMLY (1811), 1 Rose, 61, L. C.

4240. —— ——.]—On the bkpcy. of partners, who had previously carried on business separately, the joint liabilities were £1,200, & the assets £900. One of the partners having become entitled under a will to a sum of £988 :—*Held :* no order to consolidate ought to be made, as the principal asset, *e.g.* the money coming under the will, was separate & distinct, & was more than one half of the total assets.—*Re* KRIEGEL, WARING & CO., *Ex p.* TROTMAN (1893), 68 L. T. 588 ; 10 Morr. 99 ; 5 R. 349, D. C.

Annotation :—**Folld.** *Re* Barker (1914), 21 Mans. 238.

4241. —— Dissent of one creditor.]—On a petition for the consolidation of joint & separate estates, a separate creditor dissented :—*Held :* the dissent of one creditor was fatal to the application, there being no difficulty in keeping the two estates distinct.—*Re* BULMAN, *Ex p.* SHEPPARD (1833), 3 Deac. & Ch. 190 ; *sub nom. Re* BULWER, *Ex p.* SHEPPARD, Mont. & B. 415 ; *sub nom.* ANON., 2 L. J. Bcy. 83, Ct. of R.

4242. Grounds for granting—Not mere difficulty.]—On an application to consolidate the joint & separate estates of two bkpts. the difficulty of distinguishing one from the other is no ground for making the order.—*Re* LYE, *Ex p.* EMLY (1811), 1 Rose, 61, L. C.

4243. —— —— & expense.]—The ct. will not sanction a consolidation of the joint & separate estates of bkpt. partners, merely because the estates are so intermixed that the investigation of proofs & distinguishing claims against the joint & separate estates may be attended with difficulty & expense.—*Re* BARKER (SYDNEY) & CO. (1914), 21 Mans. 238.

4244. Effect of order—On double proof.]—After two proofs had been made against the separate estates of two of three partners on a joint & several bond by the two, owing to the confusion of the accounts an order was made consolidating the joint & separate estates. The creditor claimed to be paid two dividends on his double proof :—*Held :* as the creditor before the

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PART XI. SECT. 8.

y. Assignment of joint & separate estates together—Both separate estates solvent—Not set aside.]—Two partners, before the Insolvency Act, assigned their joint & separate estates together, for the benefit of their joint & separate creditors, *pari passu.* An assignee under the Act, afterwards appointed, filed a bill to set aside these assignments, on the ground that, to put the separate creditors of each on an equality with the joint creditors in respect of the joint property, & of the separate property of the other partner, was a fraud on the joint creditors. But it appearing that both the separate estates were solvent, & that the equality complained of was an advantage to the joint creditors, the bill was dismissed with costs.—MCDONALD *v.* MCCALLUM (1865), 11 Gr. 469.—**CAN.**

consolidation had established his right to the double proof, the order for consolidation, which had been made to avoid litigation, did not deprive him of his rights.—*Re* FULLER, *Ex p.* FULLER (1833), 3 Deac. & Ch. 520; 1 Mont. & A. 222, Ct. of R.

4245. —— Followed by dividend from consolidated estate—On common estate of common partner.]—A. was copartner with B., C. & D. as bankers, & was partner in another banking firm, with B. & C. A. died, & E. was admitted a partner in the first bank alone. The two firms became bkpt., & under an order of the ct., the estates of the two firms were consolidated. Pltf., a creditor of the first bank in A.'s life, received a dividend out of the consolidated estate:—*Held:* A.'s estate was not thereby released.—HARRIS *v.* FARWELL (1846), 13 Beav. 403; 15 L. J. Ch. 185; 7 L. T. O. S. 426; 51 E. R. 155; *subsequent proceedings* (1851), 15 Beav. 31.

SECT. 9.—**CONSOLIDATION OF PROCEEDINGS.**]

4246. Jurisdiction of court—Adjudication on petition against partners—Previous petition against one partner separately.]—An adjudication of bkpcy. was made upon a petition presented against two partners in trade. A petition had been previously presented by the same creditor against one of the partners separately, & some proceedings had been taken under it, but no adjudication had been made:—*Held:* there was power to order the proceedings under the separate petition to be consolidated with those under the joint petition.—*Re* HELLIWELL, *Ex p.* MACKENZIE (1875), L. R. 20 Eq. 758; 44 L. J. Bcy. 117; 33 L. T. 59.

4247. —— Separate receiving orders against partners after dissolution—Joint assets & liabilities in existence.]—Where a partnership has been dissolved, & afterwards separate receiving orders are made against the late partners, & there are joint assets & liabilities still in existence, there is jurisdiction to make an order consolidating the proceedings under the separate receiving orders.—*Re* ABBOTT, *Ex p.* OFFICIAL RECEIVER, [1894] 1 Q. B. 442; 63 L. J. Q. B. 253; 69 L. T. 765; 10 T. L. R. 69; 10 Morr. 306; 10 R. 78.

4248. —— Administration in bankruptcy of deceased partner's estate—Bankruptcy proceedings against surviving partner.]—When a member of a partnership dies insolvent & an order is made for the administration of his estate in bkpcy., & afterwards the surviving partner becomes bkpt., the ct. has jurisdiction to direct the proceedings in the two estates to be consolidated.—*Re* GREAVES, *Ex p.* OFFICIAL RECEIVER, [1904] 2 K. B. 493; 73 L. J. K. B. 975; 91 L. T. 80; 52 W. R. 633; 20 T. L. R. 564; 48 Sol. Jo. 546; 11 Mans. 270.

4249. Who may oppose application—Bankrupt.]—In an application to consolidate proceedings in bkpcy. bkpt. has no *locus standi* to oppose.—*Re* HELLIWELL, *Ex p.* MACKENZIE (1875), L. R. 20 Eq. 758; 44 L. J. Bcy. 117; 33 L. T. 59.

Part XII.—Priority of Debts.

SECT. 1.—WHAT CREDITORS AND DEBTS PREFERRED.

See, now, 1914 Act, s. 33.

SUB-SECT. 1.—FRIENDLY SOCIETIES.

See 1914 Act, s. 33 (9), Friendly Societies Act, 1896 (c. 25), s. 35, *&, generally,* FRIENDLY SOCIETIES.

4250. "Upon bankruptcy"—Bankruptcy supervening after termination of office.]—At the date when the treasurer of a friendly society ceased to be an officer of the society he was liable to account for money of the society which he had received & had improperly retained. Shortly afterwards he became bkpt.:—*Held:* the society was entitled, by virtue of Friendly Societies Act, 1896 (c. 25), s. 35, to be paid out of his assets the sum due from him in priority to all his other creditors.—*Re* EILBECK, *Ex p.* "GOOD INTENT" LODGE, No. 987 OF THE GRAND UNITED ORDER OF ODD FELLOWS (TRUSTEES), [1910] 1 K. B. 136; 79 L. J. K. B. 265; 101 L. T. 688; 26 T. L. R. 111; 54 Sol. Jo. 118; 17 Mans. 1.

4251. "Any officer"—Person in habit of receiving money on notes bearing interest—No formal appointment as treasurer.]—A person, in the habit of receiving the money of a friendly society, having no treasurer appointed, upon notes carrying interest, payable a month after demand, is not an officer of the society, so as to entitle them to a preference under 33 Geo. 3, c. 54, s. 10.—*Ex p.* ASHLEY, *Ex p.* CORSER (1801), 6 Ves. 441; 1 Cooke's Bankrupt Laws, 7th ed. p. 265; 31 E. R. 1134, L. C.

Annotations:—**Followed.** *Ex p.* Ross (1802), 6 Ves. 802, L. C. **Consd.** *Re* Batson, *Ex p.* Riddell (1842), 3 Mont. D. & De G. 80. **Refd.** *Re* Barrell, *Ex p.* Bailey (1854), 23 L. J. Bcy. 36, n. **Mentd.** *Re* Bulmer, *Ex p.* Johnson (1853), 22 L. J. Bcy. 65, L. C.

4252. —— Society's bankers.]—By the rules of a friendly society, the affairs of the society were to be under the management of a treasurer, secretary & a committee; & a power was given to any general meeting, to remove or appoint the bankers of the society. Bankers of the society, had in their hands, at the time of their bkpcy., money belonging to the society:—*Held:* they were not "officers" of the society, within 4 & 5 Will 4, c. 40, & the society had no right to be paid in full out of their estate.—*Re* CLARKE, *Ex p.* HARRIS (1845), De G. 162; 14 L. J. Bcy. 25; 5 L. T. O. S. 80, Ct. of R.

Annotation:—**Refd.** *Re* West of England & South Wales District Bank, *Ex p.* Swansea Friendly Soc. (1879), 11 Ch. D. 768.

4253. —— ——.]—By the rules of a friendly society it was provided that there should be appointed a treasurer or treasurers, in whose hands should be deposited all the cash belonging to the society, until same should be placed out at interest, & that, as soon as a sufficient sum should be collected, it should, after leaving in the club-box a sufficient sum to pay the sick & other expenses of the society, be deposited in the hands of the treasurer or treasurers of the society, & that the clerk & two stewards should take same to the bank. No formal appointment of treasurer was made, but the money of the society was paid into a bank:—*Held:* the bankers were not "employed" as officers of the society, so as to

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4254 i. "*By virtue of his office*"—*Funds appropriated by treasurer*—*Application of* 18 *&* 19 *Vict. c.* 63, *s.* 23.]—The treasurer of a friendly society arranged with his creditors; he had appropriated funds of the society:—*Held:* money in his possession by virtue of his office & 18 & 19 Vict. c. 63, s. 23, applied.—*Re* ARRANGING TRADER (1871), 5 I. L. T. 34.—**IR.**

Sect. 1.—*What creditors and debts preferred: Subsects.* 1 & 2.]

entitle the society upon their bkpcy. to payment in full.—*Re* RUFFORD & WRAGGE, *Ex p.* ORFORD (1852), 1 De G. M. & G. 483; 21 L. J. Bcy. 31; 20 L. T. O. S. 36; 16 Jur. 851; 42 E. R. 639, L. JJ.

4254. "By virtue of his office"—Application of 33 Geo. 3, c. 54, s. 10.]—*Held:* the above sect. only applied to cases where the officer of the friendly society had, by virtue of his office, been entrusted with the money & effects of the society.—*Re* THICK, *Ex p.* BUCKLAND (1818), Buck, 214.

Annotation:—**Consd.** *Re* Batson, *Ex p.* Riddell (1842), 3 Mont. D. & De G. 80.

4255. —— Necessity for strict proof.]—In order to entitle a benefit society to prove against the estate of bkpt. for money received by him as treasurer of the society, & claim its repayment in full under 4 & 5 Wm. 4, c. 40, s. 12, it is necessary strictly to prove that bkpt. received the same by virtue of an office to which he has been legally appointed.—*Re* BRODIE (1848), 10 L. T. O. S. 422.

4256. —— Debts due individually.]—*Held:* 33 Geo. 3, c. 54, giving preference to friendly societies, having money due to them from their officers, dying or becoming bkpt. or insolvent, did not extend to debts from them individually, & not in their official characters.—*Ex p.* AMICABLE SOCIETY OF LANCASTER (1801), 6 Ves. 98; 31 E. R. 957.

Annotations:—**Consd.** *Re* Batson, *Ex p.* Riddell (1842), 3 Mont. D. & De G. 80. **Refd.** *Re* Barrell, *Ex p.* Bailey (1854), 23 L. J. Bcy. 36, n.

4257. —— ——.]—The preference, given to friendly societies by 33 Geo. 3, c. 54, s. 10, over other creditors is confined to debts in respect of money in the hands of their officers by virtue of their offices, & independent of contract, & does not extend to money held by the treasurer upon the security of his promissory note payable with interest upon demand.—*Ex p.* STAMFORD FRIENDLY SOCIETY (1808), 15 Ves. 280; 33 E. R. 760, L. C.

Annotations:—**Consd.** *Re* Batson, *Ex p.* Riddell (1842), 3 Mont. D. & De G. 80. **Refd.** *Re* Barrell, *Ex p.* Bailey (1854), 23 L. J. Bcy. 36, n.

4258. —— ——.]—Bkpt. had in his hands, at the time of his bkpcy., money belonging to a friendly society, not by virtue of his office as treasurer, but *alieno jure* as by way of loan from the society for which they held his promissory note:—*Held:* it was not a case within 1849 Act, s. 167, whereby they would be entitled to be repaid in full out of bkpt.'s estate in priority over the other creditors.—*Re* SHATTOCK, *Ex p.* LONG ASHTON JUNIOR FRIENDLY SOCIETY (1861), 5 L. T. 370.

4259. —— Money paid on notes carrying interest.]—Money paid by order of a friendly society from time to time upon notes carrying interest, there being no treasurer appointed, is not money in the hands of the party by virtue of any office within 33 Geo. 3, c. 54, s. 10, entitling the society to a preference in case of bkpcy.—*Ex p.* ROSS (1802), 6 Ves. 802; 31 E. R. 1316, L. C.

Annotations:—**Consd.** *Re* Batson, *Ex p.* Riddell (1842), 3 Mont. D. & De G. 80. **Refd.** *Re* West of England & South Wales District Bank, *Ex p.* Swansea Friendly Soc. (1879), 11 Ch. D. 768; John O'Gaunt Lodge of Oddfellows *v.* Bell (1883), Diprose & Gammon, 67.

4260. —— Money held at interest but not on loan.]—Money belonging to a friendly society was entrusted to its treasurer, for which he was to pay interest. He also had in his hands another sum, for which he was not to pay interest. He entered into the statutory bond, as treasurer for the whole sum, & afterwards became bkpt.:—*Held:* no part of the money was to be treated as a loan to the treasurer in his private character, & the society was entitled to payment in full.—*Re* WOODLIFFE, *Ex p.* RAY (1839), 3 Deac. 537; Mont. & Ch. 5, Ct. of R.

4261. —— Money received for transmission to London agents.]—The trustees of a friendly society were in the habit of paying money into a bank, in order that it might be transmitted to their London bankers to be paid by them into the Bank of England. A sum was paid into the bank for the above purpose, but before it was transmitted to London, the bankers became bkpt.:—*Held:* the bankers had not money in their hands by virtue of their office or employment.—*Re* WISE, *Ex p.* WHIPHAM (1844), 3 Mont. D. & De G. 564; 13 L. J. Bcy. 8; 2 L. T. O. S. 426; 8 Jur. 204.

Annotation:—**Distd.** *Re* Clarke, *Ex p.* Harris (1845), De G. 162, Ct. of R.

4262. —— Money collected to be paid over to treasurer.]—An officer of a friendly society who, under the rules of the society, properly receives money, though only for the purpose of handing it over to the treasurer of the society, has such money "in his possession by virtue of his office" within the Friendly Societies Act, 1875 (c. 60); & it may be claimed by the trustees of the society in the event of such officer's bkpcy. in preference to any other debt or claim against his estate.—*Re* WELCH, *Ex p.* ODDFELLOWS SOCIETY (TRUSTEES) (1894), 63 L. J. Q. B. 524; 70 L. T. 691; 42 W. R. 320; 38 Sol. Jo. 310; 1 Mans. 62; 10 R. 140, D. C.

Annotation:—**Refd.** *Re* Eilbeck, *Ex p.* Good Intent Lodge, No. 987 of the Grand United Order of Odd Fellows Trustees, [1910] 1 K. B. 136.

4263. —— Money received by secretary outside ordinary function.]—Under the rules of a friendly society a treasurer was appointed, whose duty was to render an account of all money received & paid by him, to take charge of the funds, & pay all demands, & also a secretary, whose duty was to keep the accounts & perform the usual secretarial duties. The secretary, with the knowledge & consent of the trustees of the society & the treasurer, received money of the society & misapplied it:—*Held:* though an officer of the society, the secretary had not received the money so misapplied by virtue of his office, so as to give the trustees a priority.—*Re* ABERDEIN (1896), 13 T. L. R. 7; 41 Sol. Jo. 12.

4264. "Any money belonging to the society"—Though unidentifiable.] — Debts due to a friendly society by its insolvent treasurer, in his capacity as officer, must be paid out of his general estate in preference to any other claims against the estate, although the trustee has not received, & has no chance of receiving, any money which could be identified as the money of the society, & the estate consists only of stock-in-trade, furniture & book-debts.—*Re* ATKINS, *Ex p.* EDMONDS (1882), 51 L. J. Ch. 406; 46 L. T. 240; 30 W. R. 432.

Annotation:—**Apprvd.** *Re* Miller, *Ex p.* Official Receiver, [1893] 1 Q. B. 327, C. A.

4265. —— ——.]—The trustees of a friendly society have a preferential claim on the assets of a bkpt. treasurer of the society for the balance due from him to the society at the commencement of the bkpcy., even where the money is not in his possession in specie & cannot be traced.—*Re* MILLER, *Ex p.* OFFICIAL RECEIVER, [1893] 1 Q. B. 327; 62 L. J. Q. B. 324; 68 L. T. 367; 57 J. P. 469; 41 W. R. 243; 9 T. L. R. 194; 37 Sol. Jo. 404; 10 Morr. 21; 4 R. 256, C. A.

Annotations:—**Folld.** *Re* Eilbeck, *Ex p.* Good Intent Lodge, No. 987 of the Grand United Order of Odd Fellows Trustees, [1910] 1 K. B. 136. **Refd.** *Re* Welch, *Ex p.* Star Soc. of Oddfellows Trustees (1894), 1 Mans. 62, D. C.

4266. "The society"—Benefit building society—1849 Act, s. 167.]—A benefit building society is not entitled, on the bkpcy. of its treasurer, to priority over the other creditors.—*Re* BARRELL, *Ex p.* BAILEY (1854), 5 De G. M. & G. 380; 23 L. J. Bcy. 36; 2 W. R. 401; 18 Jur. 988; 19 J. P. 327; 43 E. R. 917, L. JJ.

Annotations:—**Apld.** *Re* Williams, Jones *v.* Williams (1887), 36 Ch. D. 573. **Refd.** John O'Gaunt Lodge of Oddfellows *v.* Bell (1883), Diprose & Gammon, 67.

4267. Loss of right of priority—Failure to set aside ultra vires transaction—Failure to call in money.]—The treasurer of a friendly society, having a debt due to him from a person who offered a security, took the security in the name of the society, & retained the amount of his debt out of the society's money in his hands. Some time afterwards he became a bkpt., having in the meanwhile debited himself annually in his accounts with the society, with the interest on the amount for which the security was taken. The security proved insufficient, & was not of the description, or taken in the manner, required by stat.:—*Held:* the omission on the part of the society to take steps for setting aside the transaction & calling in the money before the bkpcy., did not deprive them of their statutory right to be paid in full, before the other creditors.—*Re* BAKER, *Ex p.* BURGE (1841), 1 Mont. D. & De G. 540; 10 L. J. Bcy. 30; 5 Jur. 346, Ct. of R.

4268. —— Failure to take security.]—The trustees of a friendly society claimed, under Friendly Societies Act, 1875 (c. 60), s. 15, payment of a sum alleged to have been received by bkpt. in his capacity of treasurer to the society in priority to the other creditors of bkpt.:—*Held:* as the trustees of the society had not taken sufficient security from their treasurer, he & his securities not having sealed or delivered the requisite bond, the condition precedent to a preferential recovery against the trustees of a bkpt. treasurer of a friendly society had not been fulfilled.—JOHN O'GAUNT LODGE OF ODDFELLOWS *v.* BELL (1883), Diprose & Gammon, 67.

4269. —— —— Neglect to audit accounts.]—The priority over other creditors, which is given to friendly societies for debts due to them from their treasurer, etc., is not lost by their neglecting for some time to make him give the security required by their rules & by statute, nor by their neglect to audit his accounts.—ABSOLOM *v.* GETHING (1863), 32 Beav. 322; 32 L. J. Ch. 786; 9 Jur. N. S. 1263; 55 E. R. 126; *sub nom.* ABSALUM *v.* GETHIN, 8 L. T. 132; 11 W. R. 332.

Annotation:—**Refd.** John O'Gaunt Lodge of Oddfellows *v.* Bell (1883), Diprose & Gammon, 67.

4270. —— —— ——.]—The rules of a benefit society provided that the secretary's accounts should be regularly presented & audited. The secretary misappropriated the money of the society & died leaving his estate insolvent:—*Held:* the society was entitled to be paid out of the estate the amount of the defalcations in priority to other creditors, & the want of due diligence on the part of the society in examining the accounts was no bar to the claim.—MOORS *v.* MARRIOTT (1878), 7 Ch. D. 543; 26 W. R. 626; 42 J. P. 452; *sub nom. Re* MARRIOTT, MOORS *v.* MARRIOTT, 47 L. J. Ch. 331.

Annotations:—**Refd.** *Re* Welch, *Ex p.* Trustee (1894), 42 W. R. 320, D. C.; *Re* Eilbeck, *Ex p.* Good Intent Lodge, No. 987 of the Grand United Order of Odd Fellows Trustees, [1910] 1 K. B. 136.

4271. —— Money left in treasurer's hands in excess of immediate needs of society.]—*Held:* in the circumstances the right to priority was not lost, where the money had been left in the treasurer's hands by the carelessness of the society in excess of the immediate needs of the society.—*Re* WELCH, *Ex p.* ODDFELLOWS SOCIETY (TRUSTEES) (1894), 63 L. J. Q. B. 524; 70 L. T. 691; 42 W. R. 320; 38 Sol. Jo. 310; 1 Mans. 62; 10 R. 140, D. C.

Annotation:—**Mentd.** *Re* Eilbeck, *Ex p.* Good Intent Lodge, No. 987 of the Grand United Order of Odd Fellows Trustees, [1910] 1 K. B. 136.

SUB-SECT. 2.—SAVINGS BANKS.

See 1914 Act, s. 33 (9), Trustee Savings Bank Act, 1863 (c. 87), s. 14, Savings Banks Act, 1891 (c. 21), s. 13, *&, generally*, BANKERS & BANKING, Vol. III., pp. 134 *et seq.*

4272. Against what estate—Separate estate—Joint fiat against treasurer & partner.]—A joint fiat issued against the treasurer of a savings bank & his partner in trade:—*Held:* the trustees could only claim priority of payment for any debt owing by him out of the separate estate.—*Re* ASHLEY, *Ex p.* APPACH (1840), 1 Mont. D. & De G. 83, Ct. of R.

4273. In what proceedings—Administration action in Chancery Division—Not in bankruptcy.]—The actuary of a savings bank died insolvent, owing the bank money received in his capacity of actuary. In an action in the Ch. Division for the administration of the actuary's estate:—*Held:* the bank would be entitled to priority by virtue of Savings Banks Act, 1863 (c. 87), s. 14, but 1883 Act, s. 40, took away the right to such priority in bkpcy. proceedings.—*Re* WILLIAMS, JONES *v.* WILLIAMS (1887), 36 Ch. D. 573; 57 L. J. Ch. 264; 57 L. T. 756; 36 W. R. 34; 3 T. L. R. 805.

See, now, Savings Banks Act, 1891 (c. 21), s. 13.

4274. "By virtue of his office"—Money paid direct to bank but acknowledged by treasurer—Treasurer partner in bank.]—The treasurer of a savings bank, on his appointment entered into the usual bond for performance of his duties, but did not receive any money, the deposits being paid by the managers directly to a banking firm, of which the treasurer was a partner, to the credit of the trustees of the savings bank, who were allowed interest upon it. The treasurer nevertheless signed the returns required by 9 Geo. 4, c. 92, s. 46, to the comrs. for the reduction of the National Debt, & thereby acknowledged the amount of the balance standing to the credit of the trustees to be money in his hands as treasurer, thus;—"Remaining in my hands £ , T. L., Treasurer." The firm became bkpt. On a petition by the trustees of the savings bank seeking payment in full out of the separate estate of the bkpt. treasurer:—*Held:* the balance was in the hands of the treasurer as treasurer at his bkpcy. & might be recovered in full by the savings bank.—*Re* BATSON, *Ex p.* RIDDELL (1842), 3 Mont. D. & De G. 80; 12 L. J. Bcy. 19; 7 Jur. 21, Ct. of R.

4275. —— Deposits received by cashier for committee.]—A linen draper was appointed actuary & cashier of a savings bank, the rules of which provided that one or more members of the committee should attend at the cashier's shop to receive the deposits. The committee failed to attend, & permitted the deposits to be received by the cashier. Upon his bkpcy.:—*Held:* the deposits were not money in his hands by virtue of his office, & could not be claimed in full by the savings bank.—*Re* JARDINE, *Ex p.* FLEET (1850), 4 De G. & Sm. 52; 19 L. J. Bcy. 10; 15 L. T. O. S. 435; 14 Jur. 685; 64 E. R. 730.

Annotation:—**Folld.** *Re* Aberdein (1896), 13 T. L. R. 7.

Sect. 1.—*What creditors and debts preferred: Sub-sects.* 3, 4 *&* 5.]

SUB-SECT. 3.—CLAIMS UNDER WORKMEN'S COMPENSATION ACT, 1906 (c. 58).

See 1914 Act, s. 33 (1) (*d*), *&, generally*, MASTER & SERVANT.

4276. "Amount due in respect of compensation"—Costs of obtaining award.]—The costs incurred in recovering an award under the above Act do not form part of the "amount due in respect of compensation" & are not a preferential debt in bkpcy. within s. 5 (3) of that Act.—*Re* JINKS (1914), 112 L. T. 88; 58 Sol. Jo. 741, D. C.

SUB-SECT. 4.—RATES AND TAXES.

See, now, 1914 Act, s. 33 (1) (*a*).

4277. Against what estate—Banker of commissioners of pavements—Acting as treasurer.]—An Act enacted, that in case any treasurer, collector, officer, or other person appointed by the comrs. having the control of the pavements of any places mentioned in the Act, for the collection & receipt of money to be collected & received by virtue of any rates & assessments, etc., shall happen to become bkpt. before he shall have fully paid & satisfied all money received by him or them, for or in respect of any such rates or assessments, or for or on account of the comrs., etc., the assignees shall pay in full all the money due to such comrs. (if bkpt.'s estate be sufficient), in preference to all debts, except those due to the King:—*Held:* bankers employed by the comrs., without any actual appointment, were within the words "other persons" used in the sect., as being in the nature of treasurers, & as the Act did not require the appointment of treasurers, collectors, etc., to be in writing, the employment was equivalent to an appointment.—FROST *v.* BOLLAND (1826), 5 B. & C. 611; 8 Dow. & Ry. K. B. 384; 4 L. J. O. S. K. B. 277; 108 E. R. 228.

Annotation:—**Refd.** Dougan *v.* Bolland (1826), 8 Dow. & Ry. K. B. 435.

4278. *S. P.* DOUGAN *v.* BOLLAND (1826), 5 B. & C. 622; 8 Dow. & Ry. K. B. 435; 4 L. J. O. S. K. B. 278; 108 E. R. 232.

4279. —— Estate administered in Chancery Division.]—*Held:* the priority as to rates applied in the case of a deceased insolvent, whose estate was being administered in the Ch. Division where the date of his death occurred after the commencement of 1888 Act.—*Re* HEYWOOD, PARKINGTON *v.* HEYWOOD, [1897] 2 Ch. 593; 67 L. J. Ch. 25; 77 L. T. 423; 46 W. R. 72; 42 Sol. Jo. 33; 4 Mans. 321.

Annotations:—**Apld.** *Re* Laycock, Laycock *v.* Income Tax Special Comrs., [1919] 1 Ch. 241. **Refd.** *Re* Whitaker, Whitaker *v.* Palmer, [1900] 2 Ch. 676.

See, further, No. 4284, *ante*, Part XIV., Sect. 2, *post*.

4280. What rates—Arrears of water rate.]—Debtor having been adjudicated a bkpt., his trustee in bkpcy. took possession of his premises & found that the water rate was in arrear. The trustee offered to pay in advance from the date of the adjudication for a supply of water, but the water co. declined to supply it, unless the arrears were paid, & cut off the water. Thereupon the trustee paid the arrears under protest:—*Held:* the trustee, being in the position of an "incoming tenant" under Metropolis Water Act, 1871, s. 48, was not liable for the arrears, & was entitled to recover from the water co. the amount paid under protest.—*Re* FLACK, *Ex p.* BERRY, [1900] 2 Q. B. 32; 69 L. J. Q. B. 458; 82 L. T. 503; 48 W. R. 446; 44 Sol. Jo. 348; 7 Mans. 141.

4281. —— Arrears of gas rent.]—Arrears of gas rent paid by the official receiver under protest to a gas co., to prevent the supply of gas being cut off debtor's premises in the occupation of the official receiver, are not preferential payments which the trustee in bkpcy. can recover back.—*Re* SMITH, *Ex p.* MASON, [1893] 1 Q. B. 323; 67 L. T. 596; 57 J. P. 72; 41 W. R. 159; 9 T. L. R. 15; 37 Sol. Jo. 30; 9 Morr. 304; 5 R. 47.

Annotations:—**Apprvd.** Paterson *v.* Gas Light & Coke Co., [1896] 2 Ch. 476, C. A. **Refd.** *Re* Marriage, Neave, North of England Trustee Debenture & Assets Corpn. *v.* Marriage, Neave (1896), 75 L. T. 169, C. A.

4282. For what amount—Whole assessment where payable in advance.]—On Jan. 17, 1887, when a receiving order was made & adjudication took place, bkpt. was tenant of a house & shop which he held under a lease for twenty-one years. The trustee in the bkpcy. did not disclaim the lease, but on Feb. 1, he sold his interest in it, bkpt. remaining in occupation as tenant under the purchaser. At the date of the receiving order there was due from bkpt. a Local Board rate, made on Oct. 8, 1886, for the half-year from Sept. 30, 1886, to Mar. 25, 1887, & payable in advance:—*Held:* the estate of bkpt. was liable to pay the rate for the whole half-year, & not merely an apportioned part of it up to the date of the order of adjudication.—*Re* THOMAS, *Ex p.* YSTRADYFODWG LOCAL BOARD (1887), 57 L. J. Q. B. 39; 58 L. T. 113; 36 W. R. 143; 4 T. L. R. 90; 4 Morr. 295.

4283. —— All money recovered "for & on behalf of commissioners" of pavements.]—Bankers employed by comrs. of pavements received on account of the comrs. Exchequer bills, which they afterwards sold, & received the proceeds. Before that money was paid to the comrs., the bankers became bkpts.:—*Held:* the comrs. were entitled, under the sect. set out in No. 4277, *ante*, to recover in full from the assignees the balance due to them, as that sect. was not confined to money received by virtue of rates or assessments, but included all money received "for & on account of the comrs.," & when the bankers sold the Exchequer bills, they received the proceeds to the use of the owners of the bills.—DOUGAN *v.* BOLLAND (1826), 5 B. & C.

PART XII. SECT. 1, SUB-SECT. 3.

4276 i. "*Amount due in respect of compensation*"—*Order for lump sum—Preferential payments in Bankruptcy (Ireland) Act*, 1889, *s.* 4 (6).]—Where the employer of a workman who had obtained compensation under Workmen's Comp. Act, 1906, had become an arranging debtor, the Ct. of Bkpcy. ordered the official assignee to lodge to the credit of the workman's compensation matter in the county ct. a sum, out of the money in ct., sufficient to purchase a Post Office Savings Bank life annuity equal in amount to 75 per cent. of the annual value of the weekly payment which had been awarded to the workman, to abide such order as the county ct. judge should make in relation thereto.—*Re* J. (ARRANGING DEBTOR), *Ex p.* REID (1911), 45 I. L. T. 247.—**IR.**

PART XII. SECT. 1, SUB-SECT. 4.

4280 i. *What rates—Local rates—Harbour dues.*]—Harbour dues payable to the Cork Harbour Comrs. are not local rates entitled to preferential payment under Irish 1872 Act, s. 49.—*Re* H. & Co. (1891), 27 L. R. Ir. 271.—**IR.**

b. *What taxes—City taxes.*]—The City of Halifax has no preferential claim for taxes against the assignee under Insolvent Act, 1875.—*Re* MARTER (1882), 3 R. & G. 412.—**CAN.**

c. —— *Assessments on real estate.*]—31 Vict. c. 36, making assessments on real estate in St. J. a special lien on the property, for two years after the taxes accrued, applies where the owner has assigned but after such time the corpn. can only rank for taxes as ordinary creditors.—ST. JOHN CORPN. *v.* MCLEOD (ASSIGNEE) (1877), 1 P. & B. 423.—**CAN.**

d. *Arrears of taxes.*]—Upon insolvency of lessees, there were goods sufficient to pay the taxes in arrear. The goods having been removed, the assignee was ordered to pay the taxes forthwith, with all costs.—*Re* BOWES (1880), 5 A. R. 353.—**CAN.**

622 ; 8 Dow. & Ry. K. B. 435 ; 4 L. J. O. S. K. B. 278 ; 108 E. R. 232.

In winding up of companies.]—*See* COMPANIES.

SUB-SECT. 5.—WAGES OR SALARY.

See, now, 1914 Act, s. 33 (1) (*b*), (*c*).

4284. "Property of bankrupt"—Estate administered in Chancery Division—Death after commencement of 1888 Act.]—*Held :* the priority as to wages applied in the case of a deceased insolvent whose estate was being administered in the Ch. Division where the date of his death occurred after the commencement of the above Act.—*Re* HEYWOOD, PARKINGTON *v.* HEYWOOD, [1897] 2 Ch. 593 ; 67 L. J. Ch. 25 ; 77 L. T. 423 ; 46 W. R. 72 ; 42 Sol. Jo. 33 ; 4 Mans. 321.

Annotations :—**Apld.** *Re* Laycock, Laycock *v.* Income Tax Special Comrs., [1919] 1 Ch. 241. **Refd.** *Re* Whitaker, Whitaker *v.* Palmer, [1900] 2 Ch. 676.

See, further, No. 4279, *ante*, Part XIV., Sect. 2, *post*.

4285. "Wages or salary"—Sums deducted from wages for doctor's fund—Not paid over at date of bankruptcy.]—Employers & their workmen arranged, but not by any agreement in writing signed by the latter, that deductions should be made from the wages towards a "doctor's fund" established to pay a doctor, who attended & supplied with medicines the workmen & their families. The sums deducted were from time to time handed by the employers to the doctor. There was no evidence that the doctor had accepted the liability of the employers. In the liquidation of the employers :—*Held :* the fund, so far as it had not been paid to the doctor, must be repaid in full to the workmen, as it was wages not validly paid within Truck Act, 1831 (c. 36), & to preferential payment of which the workmen were entitled under 1869 Act, s. 32.—*Re* MORRIS, *Ex p.* COOPER (1884), 26 Ch. D. 693 ; 51 L. T. 374, C. A.

Annotations :—**Mentd.** Lamb *v.* G. N. Ry. Co., [1891] 2 Q. B. 281 ; Hewlett *v.* Allen, [1894] A. C. 383, H. L. ; Williams *v.* North's Navigation Collieries, [1906] A. C. 136, H. L.

4286. —— Varying according to work done—Commission on tonnage turned out.]—Workmen were employed & paid for their services partly by fixed salary & partly by way of commission upon the tonnage of ships turned out from the building yards :—*Held :* wages varying in amount in proportion to the work done were "wages" within 1888 Act.—*Re* EARLE'S SHIPBUILDING & ENGINEERING CO., BARCLAY & CO. *v.* EARLE'S SHIPBUILDING & ENGINEERING CO., [1901] W. N. 78.

Annotation :—**Refd.** *Re* Klein, *Ex p.* Goodwin (1906), 22 T. L. R. 664.

4287. —— Undrawn commission.]—A commercial traveller had been in the employ of debtor prior to the receiving order, & his pay was £2 a week, with a commission on all business done by him for debtor, & as a rule he drew £2 10*s.* a week & left the rest of his commission until he wanted it. At the date of the receiving order there was due to him commission for the four months preceding the receiving order. He had been paid his £2 per week :—*Held :* the commission was "salary," & a good preferential debt.—*Re* KLEIN, *Ex p.* GOODWIN (1906), 22 T. L. R. 664 ; 50 Sol. Jo. 577.

4288. —— Allowance for customary notice included.]—Where clerks or servants claim to be paid in full, the ct. will include an allowance for notice according to the custom of the trade or profession.—*Re* STIFF, *Ex p.* JENNINGS (1863), 7 L. T. 601.

4289. "Clerk or servant, labourer or workman"—Generally.]—In determining whether a person is a "labourer or workman" within Bkpcy. Acts, the principles laid down in authorities decided under Truck Act, 1831 (c. 37), are not applicable.—*Re* DISNEY, *Ex p.* ALLSOP (1875), 32 L. T. 433.

PART XII. SECT. 1, SUB-SECT. 5.

4285 i. "*Wages or salary*"—*Bills taken in payment & dishonoured—Claim as for wages.*]—Servants, who have accepted bills from their employer in payment of wages, may, if the bills are dishonoured & the drawer is insolvent, claim as for wages.—KEEFE *v.* SHANNON & CO.'S TRUSTEES (1817), 1 Nfld. L. R. 52.—**NFLD.**

4285 ii. —— *Hire of horses & carts.*]—Amounts due to carters for hire & use of horses & carts cannot be considered wages under Insolvency Act, 1862, s. 22.—*Re* RIDLEY (1870), 5 Nfld. L. R. 351.—**NFLD.**

4285 iii. —— *Money advanced.*]—A claim by a servant to rank as preferential creditor for money advanced was not allowed.—REGAN *v.* LANGLEY (1908), 12 O. W. R. 1101.—**CAN.**

4285 iv. —— *Passage money.*]—Passage money of servant can only rank as wages when it has been expressly agreed that it should be paid as part of the hire of the servant.—*Re* COOK'S INSOLVENCY (1820), 1 Nfld. L. R. 218.—**NFLD.**

4285 v. —— *For time after agreement expired—Wrongfully withheld.*]—There is no liability on a trustee in insolvency for the wages of a servant for any time after his agreement has expired, even though he has been improperly kept out of his wages.—*Re* KAVANAGH'S INSOLVENT ESTATE (1862), 4 Nfld. L. R. 708.—**NFLD.**

4285 vi. —— —— *By insolvency—Damages.*]—A contract of service for a term was terminated before expiry by the insolvency of the employer :—*Held :* the servant was entitled to prove as a concurrent creditor for the amount of damages sustained by him by the breach, although occasioned by the insolvency itself.—CLARK *v.* DENNY (1884), 4 E. D. C. 300.—**S. AF.**

4285 vii. ——*Outside current year.*]—On the insolvency of the master in the month of Feb., a servant claimed to be paid in full a balance due as wages for the year terminating in the Sept. preceding the insolvency :—*Held :* entitled only to a preferential claim from commencement of his current term of hiring.—*In the Insolvency of* LANGMEAD (1865), 5 Nfld. L. R. 110.—**NFLD.**

4285 viii. —— *Transferee of wages.*]—The purchaser of wages-claims of employees of a co. making a general assignment for creditors has, under Wages Act, 1910, s. 3, a preferential claim in priority to the ordinary creditors, although the claims were purchased before the assignment.—PORTERFIELDS *v.* HODGINS (1913), 14 D. L. R. 832 ; 29 O. L. R. 409 ; 5 O. W. N. 162 ; 30 O. L. R. 651 ; 17 D. L. R. 859 ; 6 O. W. N. 2.—**CAN.**

4288 i. —— *In lieu of notice—Hiring terminated by bankruptcy.*]—Where a contract for hire is determined by the bkpcy. of the employer, the employee cannot include in his preferential claim any sum for wages in lieu of notice. Such claim should be made under Bkpcy. Act, 1883, s. 118, the amount being assessed as there directed, & proved for as an ordinary debt.—*Re* RENSHAW, *Ex p.* OFFICIAL ASSIGNEE (1891), 9 N. Z. L. R. 727.—**N.Z.**

4289 i. "*Clerk or servant, labourer or workman*"—*Commercial traveller—Paid by commission on goods sold.*]—A commercial traveller who receives remuneration by percentage on all goods sold, whether by himself or any one else, is not entitled to a preferential claim under Insolvency Act, 1871 (No. 379), s. 113 (11).—*Re* EDWARDS & SON, *Ex p.* TOMLINS (1885), 11 V. L. R. 304.—**AUS.**

4289 ii. —— *Day labourers.*]—Under Insolvent Act, 1875, day labourers had no privilege for wages.—VANALSTYNE & GRAY & STEWART (1879), 2 L. N. 302.—**CAN.**

4289 iii. —— *Fishermen*—15 *Geo.* 3, *c.* 31, *s.* 16—5 *Geo.* 4, *c.* 51, *s.* 10.]—All persons engaged in the manipulation or curing of fish are, under above Acts, entitled to a preference.—*Re* SULLIVAN'S INSOLVENT ESTATE (1846), 3 Nfld. L. R. 1.—**NFLD.**

4289 iv. —— —— *Where proceeds of voyage assigned.*]—Fishery servants have a statutory right, to be paid their wages in full out of the proceeds of the "voyage" or season's fishing, in the hands of the merchant currently supplying the "planter" with whom they shipped.—MOREEN *v.* RIDLEY (1846), 3 Nfld. L. R. 4.—**NFLD.**

4289 v. —— —— *Bait suppliers.*]—The servant of the bait supplier is not entitled to a preferable security for his wages.—MCGRATH *v.* KAVANAGH (1861), 4 Nfld. L. R. 565.—**NFLD.**

4289 vi. ——.]—The term "servants" under Insolvency Act (1862), s. 22, includes skinners, cullers, & all persons who render personal service on the fish trading establishment of insolvents, & are entitled to be paid in full the balances due them for the

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4290. —— —— **Whether limited to yearly servants.**]—*Held:* the proviso as to servants in 6 Geo. 4, c. 16, s. 48, did not include a mere weekly servant.—*Re* COOPER, *Ex p.* SKINNER (1833), 3 Deac. & Ch. 332; Mont. & B. 417; *sub nom. Re* SKINNER, *Ex p.* COOPER, 2 L. J. Bcy. 72, Ct. of R.

Annotation:—**Consd.** *Re* Cowell, *Ex p.* Collier (1834), 4 Deac. & Ch. 520, Ct. of R.

4291. —— —— ——.]—The hiring of a clerk or servant need not be for a year.—*Re* COWELL, *Ex p.* COLLIER (1834), 4 Deac. & Ch. 520; 2 Mont. & A. 29, Ct. of R.

4292. —— **Accountant & book-keeper—Yearly salary—Also petitioning creditor.**]—An accountant employed to keep the books of a trader at a fixed salary of £120 per annum up to the time of the bkpcy., was also the petitioning creditor in respect of his salary:—*Held:* not a clerk or servant within 1849 Act.—*Re* WILLIS, *Ex p.* BUTLER (1857), 28 L. T. O. S. 375.

4293. —— **Book-keeper—Yearly salary—Part-time employment.**]—A person employed in evenings by bkpt. to make up his books, at a salary of £20 a year:—*Held:* a clerk or servant within 1849 Act, s. 168, & entitled to three months' salary.—*Re* MILES, *Ex p.* OLDHAM (1858), 32 L. T. O. S. 181.

4294. —— **Clerk—Priority not confined to trade clerks.**]—*Held:* 6 Geo. 4, c. 16, s. 48, was not confined to trade clerks.—*Re* WYATT, *Ex p.* GOUGH (1833), 3 Deac. & Ch. 189; Mont. & B. 417; 2 L. J. Bcy. 72, Ct. of R.

4295. —— —— **Advancing money with option of becoming partner.**]—A party advanced money to a trader under an agreement, that the lender should act as clerk to the borrower, & manage the money department of the business, with liberty, if the lender pleased, to enter into partnership with the borrower. The lender became ill, & at the instance of the trader absented himself from the business three months before the issuing of the fiat:—*Held:* the lender was a "clerk" within 1842 Act, s. 28.—*Re* CLOSSON, *Ex p.* HARRIS (1845), De G. 165; 5 L. T. O. S. 203; 9 Jur. 497, Ct. of R.

4296. —— —— **Paid by commission on goods sold.**]—A clerk who is to be paid by a commission on the goods sold by him, & not at a fixed salary, is not a clerk within 1849 Act, s. 168.—*Re* HELDMANN, *Ex p.* SIMMONS (1858), 30 L. T. O. S. 311.

4297. —— **Clerk & foreman—Paid by wages & clothes.**]—A clerk & foreman hired at two guineas a week, & two suits of clothes a year, is entitled to preferential payment.—*Re* HUMPHREYS, *Ex p.* HUMPHREYS (1833), 3 Deac. & Ch. 114; Mont. & B. 413; 2 L. J. Bcy. 71, Ct. of R.

4298. —— **Company official—Managing director.**]—A managing director of a co. is not a "clerk or servant" within 1888 Act.—*Re* NEWSPAPER PROPRIETARY SYNDICATE, LTD., HOPKINSON *v.* NEWSPAPER PROPRIETARY SYNDICATE, LTD., [1900] 2 Ch. 349; 69 L. J. Ch. 578; 83 L. T. 341; 16 T. L. R. 452; 8 Mans. 65.

Annotation:—**Refd.** Woods *v.* Winskill, [1913] 2 Ch. 303.

4299. —— —— **Secretary—Employing deputy.**]—The secretary of a co., being also secretary of another co., employed a clerk to perform his duties to the first co., attending at the office for a short time every day to supervise the work, in addition to attending directors' meetings, etc.:—*Held:* although a secretary of a co. might be a "clerk or servant" within 1888 Act, a secretary who did not give his whole time to the co., & who discharged his duties by a deputy paid & appointed by himself, was not within the Act.—CAIRNEY *v.* BACK, [1906] 2 K. B. 746; 75 L. J. K. B. 1014; 96 L. T. 111; 22 T. L. R. 776; 50 Sol. Jo. 697; 14 Mans. 58.

Annotations:—**Mentd.** Evans *v.* Rival Granite Quarries Co., [1910] 2 K. B. 979, C. A.; Sinnott *v.* Bowden, [1912] 2 Ch. 414.

4300. —— **Drill sergeant—Attending school at payment per lesson.**]—A drill sergeant attending a school twice a week, & paid at the rate of four shillings a lesson, is not a clerk or servant, labourer or workman, so as to be entitled to payment of salary or wages in full.—*Re* HEATH, *Ex p.* WALTER (1873), L. R. 15 Eq. 412; 42 L. J. Bcy. 49; 37 J. P. 438; 21 W. R. 523.

4301. —— **Editor of newspaper.**]—The city editor of a newspaper is a "servant" of the proprietor, & entitled to preferential payment of wages or salary.—*Re* STIFF, *Ex p.* CHIPCHASE (1862), 11 W. R. 11.

4302. —— —— **Yearly salary paid weekly—Engagement terminable on customary notice.**]—The editor of a newspaper at a yearly salary paid weekly, with an engagement terminable by custom at a month's notice, is entitled to payment of salary in full up to the date of bkpcy. & for a month more.—*Re* STIFF, *Ex p.* JENNINGS (1863), 7 L. T. 601.

4303. —— **Guard of coach—Paid weekly wages.**]—*Held:* the guard of a coach at weekly wages was not within 6 Geo. 4, c. 16, s. 48.—*Re* COOPER, *Ex p.* SKINNER (1833), 3 Deac. & Ch. 332; Mont. & B. 417; *sub nom. Re* SKINNER, *Ex p.* COOPER, 2 L. J. Bcy. 72, Ct. of R.

Annotation:—**Consd.** *Re* Cowell, *Ex p.* Collier (1834), 4 Deac. & Ch. 520.

4304. —— **Manager of works—Yearly salary paid weekly.**]—The manager or overlooker of a cotton mill, engaged at a weekly salary subsequently altered to a yearly salary to be paid weekly, is entitled to be paid six months' wages in full.—*Re* COWELL, *Ex p.* COLLIER (1834), 4 Deac. & Ch. 520; 2 Mont. & A. 29, Ct. of R.

4305. —— —— **Paid by piecework—Employing other men.**]—The manager of a brickyard in the place of a weekly wage undertook the manufacture of bricks by piece-work, to be paid at so much per thousand for the bricks produced. He con-

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current year.—*Re* RIDLEY (1870), 5 Nfld. L. R. 351.—**NFLD.**

4289 vii. —— *Hotel manager—Monthly salary.*]—The manager of an hotel paid at a monthly salary was permitted to rank as a preferred creditor.—REGAN *v.* LANGLEY (1908), 12 O. W. R. 1101.—**CAN.**

4289 viii. —— *Master of ship.*]—The ship J. A. was sold to claimant, who agreed to take charge of the vessel as master, for monthly wages. He, having been put in charge, proceeded in her to P., where the owners having gone into insolvency, she was attached by the official assignee. Claimant remained on board, not being recognised by the assignee, yet not being dismissed for some months afterwards:—*Held:* the master, not having been dismissed by the assignee, was entitled to his wages to the full extent of his claim, with costs of suit.—THE JEAN ANDERSON, Y. A. D. 244.—**CAN.**

4289 ix. —— *Packer—Salary & piecework.*]—Pltf. contracted (*a*) to supply labour & pack salmon by piece-work; & (*b*) to act as foreman of the labourers supplied by him, at a monthly salary. The employer having assigned for the benefit of creditors, pltf. sought to enforce the preference given by Creditors' Trust Deeds Act, 1901, s. 36, in respect to both the salary & the piece-work:—*Held:* the preference must be restricted to the salary.—TAM *v.* ROBERTSON, 9 B. C. R. 505; 23 C. L. T. Occ. N. 238.—**CAN.**

4289 x. —— *Partner.*]—On the sequestration of a partnership estate a salaried partner cannot claim payment of his salary out of the assets in competition with other creditors.—WALKER *v.* RECEIVERS GRAND JUNCTION RYS. (1905), 22 S. C. 86; 15 C. T. R. 93.—**S. AF.**

tinued to employ the men who had been working for bkpt. at the same rate of wages, other persons being engaged & paid separately by bkpt. to do part of the work. He continued exclusively in the service of bkpt. as manager of the brickworks. He was liable to be discharged at a week's notice by bkpt., who had the right to discharge & engage all men working under him, & to make alterations in the rate paid for the bricks:—*Held:* the manager was a workman within 1883 Act, & not a contractor, & he was entitled in priority to the wages due to him in respect of services rendered to bkpt. before the date of the receiving order.—*Re* FIELD, *Ex p.* HOLLYOAK (1887), 35 W. R. 396; 4 Morr. 63.

4306. —— Managing clerk superintending works, employing & discharging workmen—Yearly salary paid weekly.]—A managing clerk at a yearly salary, payable weekly, whose business it is to superintend the works, employ, pay & discharge the workmen, is a trade servant within 1849 Act, s. 168.—*Re* EASTHAM & LAWLEDGE, *Ex p.* DRIVER (1858), 31 L. T. O. S. 287.

4307. —— Mate of vessel—Employed by master & part owner of vessel.]—*Held:* the mate of a vessel, hired by the master, who was also one of the owners, at certain wages, was a servant, within 6 Geo. 4, c. 16, s. 48, & was entitled to six months' wages, upon the bkpcy. of the master of the vessel.—*Re* HUDSON, *Ex p.* HOMBORG (1842), 2 Mont. D. & De G. 642; 11 L. J. Bcy. 24; 6 Jur. 898, Ct. of R.

4308. —— Music master—Attending school at payment per hour.]—A music master, attending a school twice a week, & paid at the rate of 2*s.* 6*d.* an hour for the time during which he was occupied:—*Held:* not a clerk or servant, labourer or workman, so as to be entitled to payment of salary or wages in full.—*Re* HEATH, *Ex p.* WALTER (1873), L. R. 15 Eq. 412; 42 L. J. Bcy. 49; 37 J. P. 438; 21 W. R. 523.

4309. —— Singer at tavern—Paid fixed salary for certain period.]—A party, engaged as a vocalist to sing at a tavern nightly for a certain period at a fixed salary, is not a servant within 1849 Act, s. 168.—*Re* DUNHAM, *Ex p.* HARCOURT (1858), 31 L. T. O. S. 188.

4310. —— Singer in opera—Engaged for season at fixed rate for each performance—Construction of contract.]—An opera singer, engaged for the season at a fixed rate for every performance:—*Held:* on the construction of the contract a "servant," & entitled to preferential payment.—*Re* WINTER GERMAN OPERA, LTD. (1907), 23 T. L. R. 662.

4311. —— Traveller—At annual salary.]—A commercial traveller engaged upon an annual salary is a "servant or clerk."—*Re* BADNALL, *Ex p.* NEAL (1829), Mont. & M. 194.

4312. —— Workman—Paid by piecework under separate contracts—No engagement for specific time.]—*Held:* the workmen of a coachmaker, who worked by the piece, & received a specific sum for every job, under separate & distinct contracts, & where there was no hiring for a specific time, were not servants within 6 Geo. 4, c. 16, s. 48.—*Re* MACNEIL, *Ex p.* GRELLIER (1831), Mont. 264; 7 L. J. O. S. Ch. 78, L. C.

Annotations:—**Consd.** *Re* Skinner, *Ex p.* Cooper (1833), 2 L. J. Bcy. 72. **Reid.** *Re* Disney, *Ex p.* Allsop (1875), 32 L. T. 433. **Mentd.** *Re* Streather, *Ex p.* Crawfoot (1831), Mont. 270, L. C.

4313. —— —— Paid weekly according to hours worked—No engagement for specific time.]—Labourers employed as excavators worked when they thought fit, & were paid weekly according to the number of hours they had worked:—*Held:* not servants.—*Re* STREATHER, *Ex p.* CRAWFOOT (1831), Mont. 270, L. C.

Annotation:—**Mentd.** *Re* Macneil, *Ex p.* Grellier (1831), Mont. 264.

4314. —— —— Paid by piecework—Employing other men.]—A miner employed to get ironstone, & paid by the yard or by the ton, & who has under him men for whose wages he alone is responsible, but who is bound to conform to the regulations in force at the mine, by which he is obliged to work himself a stated number of hours per day, & is subject to be dismissed for misconduct, & who cannot leave or absent himself without the consent of the manager, is a "labourer or workman," within 1869 Act, s. 32 (2).—*Re* DISNEY, *Ex p.* ALLSOP (1875), 32 L. T. 433.

4315. "Before date of receiving order"—Four months preceding appointment of interim receiver.]—The right of a clerk or servant of bkpt. to be paid wages or salary in priority to other debts is confined to services rendered to bkpt. during the four months next before the date of the receiving order.

If an *interim* receiver is appointed before a receiving order is made, in that case, for the purpose of computing the four months, the date of the receiving order means the date of the appointment of the *interim* receiver.—*Re* SMITH, *Ex p.* FOX (1886), 17 Q. B. D. 4; 55 L. J. Q. B. 288; 54 L. T. 307; 34 W. R. 535; 3 Morr. 63.

4316. When payable—Not until sufficient funds to pay expenses of working the fiat.]—*Held:* the payment in full to a clerk or servant under 6 Geo. 4, c. 16, s. 48, was not payable until a sufficient sum was available after paying the expenses of working the fiat.—*Re* BURKILL, *Ex p.* HAMPSON (1842), 2 Mont. D. & De G. 462; 6 Jur. 376, Ct. of R.

4317. —— At once—Though funds insufficient to enable trustee to investigate debtor's affairs.]—Under the liquidation of B. five workmen claimed debts of less than £50 each. The county ct. judge, after several adjournments, ordered the trustee to pay those debts. The trustee appealed, on the ground that if he paid the debts, he should have no funds to enable him to investigate the affairs of debtor:—*Held:* the workmen were entitled to have their debts paid at once in full.—*Re* BOWEN, *Ex p.* POWIS (1873), L. R. 17 Eq. 130 43 L. J. Bcy. 24; 29 L. T. 654; 22 W. R. 218.

4318. When right of priority lost—Clerk leaving employment—Compelled to do so—Inability to obtain salary.]—A clerk compelled to leave bkpt.'s service several months before the bkpcy., on account of his master's inability to pay his salary,

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4312 i. —— *Workman—Claim for broken period.*]—The preference claim of a workman under Bkpcy. Act, 1883, s. 137 (2), (3), extended to three months' wages at current rates, notwithstanding that the amount was made up of wages claimed for broken periods extending over a longer time than three months.—*Re* GREENWOOD, *Ex p.* STEWART (1886), 5 N. Z. L. R. 271.—**N.Z.**

e. "*Within one month before*" *assignment—Computation of time.*]—By Creditors' Trust Deeds Act, 1901, an assignee must pay in priority to the claims of ordinary creditors wages of persons in the employ of the assignor at the time of the assignment, or "within one month before." An assignment was made on Nov. 27, 1901:—*Held:* a workman who was in such employ previous to & including Oct. 26, 1901, was not entitled to a preference.—*Re* CLAYOQUOT FISHING & TRADING CO., LTD. (1902), 9 B. C. R. 80.—**CAN.**

4316 i. *When payable—Before discharge of bankrupt—After proof of claim.*]—Bkpcy. Act, 1883, s. 137, requiring wages to be paid by a bkpt. before he was entitled to his discharge, applied only when the wages creditors had proved their claims.—*Re* BISSETT (1885), 3 N. Z. L. R. 354.—**N.Z.**

4318 i. *When right of priority lost—Dismissal from employment.*]—Em-

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is entitled to six months' wages in full.—*Re* GREEN, *Ex p.* SANDERS (1836), 2 Deac. 40; 2 Mont. & A. 684, Ct. of R.

Annotation:—**Consd.** *Re* Sawer, *Ex p.* Gee (1839), 3 Deac. 563, Ct. of R.

4319. —— —— Involuntarily through decrease in business—Allowing final dividend to be declared before claiming.]—A clerk, who had involuntarily quitted bkpt.'s service nine months previous to the fiat, through the approaching insolvency of bkpt. & his decreasing business, the trade going on in the meantime, & he obtaining employment elsewhere:—*Held:* not entitled to six months' wages in full, especially where he had allowed the first & final dividend to be declared before making his claim.—*Re* SAWER, *Ex p.* GEE (1839), 3 Deac. 563; Mont. & Ch. 99, Ct. of R

4320. —— —— Through illness—Consent of employer.]—A clerk was absent from the business on account of illness, but with the concurrence of the employer for three months immediately preceding the latter's bkpcy.:—*Held:* not such an interruption of service as to deprive the clerk of his right to preferential payment.—*Re* CLOSSON, *Ex p.* HARRIS (1845), De G. 165; 5 L. T. O. S. 203; 9 Jur. 497, Ct. of R.

4321. —— Neglect of duty or misconduct—Necessity for proof.]—*Semble:* the misconduct of a clerk might deprive him of his right, under 6 Geo. 4, c. 16, s. 48, to be paid six months' salary in full.

Where an affidavit, in opposition to a petition by a clerk, stated that, on the clerk's accounts being taken, it would appear that by his imprudence property of his employer had been lost:—*Held:* such passage in the affidavit should be expunged as scandalous & impertinent, the employer not having proposed to take the accounts & sustain the charge.—*Re* BURKILL, *Ex p.* HAMPSON (1842), 2 Mont. D. & De G. 462; 11 L. J. Bcy. 12; 6 Jur. 376, Ct. of R.

SUB-SECT. 6.—CLAIMS BY LANDLORD.

See 1914 Act, s. 33 (4).

See, also, Part XX., Sect. 17, *post.*

4322. Tenant's effects sold by trustee.]—Where bkpt.'s goods are sold by an assignee, a landlord can only come in for his rent *pro ratâ* with the other creditors.—ANON. (1740), 1 Atk. 102; 26 E. R. 67, L. C.

Annotations:—**Refd.** Briggs *v.* Sowry (1841), 8 M. & W. 729; *Re* Mackenzie, *Ex p.* Hertfordshire Sheriff, [1899] 2 Q. B. 566, C. A.

4323. ——.]—If the landlord of bkpt. suffers his assignees to sell off his goods, he is not entitled to his whole rent, but must come in *pro ratâ* with other creditors under the commission.—*Ex p.* DESCHARMES (1742), 1 Atk. 103; 26 E. R. 68, L. C.

Annotation:—**Distd.** Mavor *v.* Croome (1823), 8 Moore, C. P. 171.

4324. Undertaking given by official receiver to landlord entitled to distrain—Form of undertaking.]—On Aug. 4, 1893, a receiving order was made against bkpt. On Aug. 1, 1893, a sum of £90 was due by bkpt. to S. the landlord of part of his premises, of which £45 was a quarter's rent in arrear & £45 a quarter payable in advance, & on Aug. 11 the sum of £62 10*s.*, being two quarters' rent, was due to the landlords of other premises held by bkpt. S. put in a distress, & the other landlords having threatened to distrain, the official receiver gave to each of them the following undertaking:—"In consideration of your forbearing to proceed with the distress, which you have threatened to levy upon such goods of debtor as are liable to a distress for rent in arrear due to you by debtor in respect of the premises, I hereby undertake, without prejudice to the rights of preferential creditors under 1888 Act, in the event

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ployees who had left or been dismissed some months before an assignment for benefit of creditors could not be collocated on the dividend sheet by special privilege for arrears of salary & wages.—*Re* MITCHELL'S ESTATE (1877), 2 R. & C. 379.—**CAN.**

4318 ii. —— *Servant leaving employment—Compelled to do so—Inability to obtain wages.*]—*Held:* not entitled to privilege.—*Re* CASE, *Ex p.* NAPIER (1875), 3 Pug. 134.—**CAN.**

PART XII. SECT. 1, SUB-SECT. 6.

f. *Extent of privilege.*]—A landlord is not a privileged creditor, but is only entitled to a lien upon the process of the goods of the insolvent which he might have distrained.—*Re* MCCRAKEN, DALLAS *v.* STINSON (1879), 4 A. R. 486.—**CAN.**

g. *S. P. Re* KENNEDY, MASON *v.* HIGGINS (1875), 36 U. C. R. 471.—**CAN.**

h. ——.]—The privilege of the landlord on the proceeds of the effects found on the premises leased is not affected by 1864 Act, & has precedence over the privilege of the assignee & the insolvent for the costs of their respective discharges under the Act.—*Re* MORGAN, WHYTE & BIRON (1867), 13 L. C. J. 187.—**CAN.**

See, also, Part XX., Sect. 17, *post.*

4322 i. *Tenant's effects sold by trustee.*]—Upon the insolvency of the lessee, the assignee in insolvency sold the insolvent estate, including the goods upon the demised premises, on credit, without paying the rent due thereon:—*Held:* the landlord was entitled to an order for immediate payment of the arrears.—*Re* MCCRAKEN, DALLAS *v.* STINSON (1879), 4 A. R. 486.—**CAN.**

j. *Tenant's effects destroyed by fire—Insurance money—R. S. O.*, 1897, *c.* 170, *s.* 34.]—An assignee entered into possession of leased premises which thereafter were destroyed by fire & the assignee received the insurance thereon. The landlord claimed to rank on the insurance money as a preferred creditor for rent which had accrued prior to the assignment:—*Held:* he must rank ratably with other unsecured creditors.—MILLER *v.* TEW (1909), 14 O. W. R. 1173; 20 O. L. R. 77; 1 O. W. N. 269.—**CAN.**

k. *No goods on which to distrain.*]—A landlord is entitled to prove preferentially to other creditors of the bkpcy. for three months' rent due or accruing due prior to the sequestration order, notwithstanding that there were no goods of bkpt. on which distress could be levied at the date of the order.—*Re* GARLING, *Ex p.* BRAY (1893), 14 N. S. W. B. 7.—**AUS.**

l. —— *Landlord not entitled.*]—*Re* BROWN, *Ex p.* TOLSON (1861), 1 W. & W. 1, 93.—**AUS.**

m. *S. P. Re* GAMBLE (1893), 19 V. L. R. 627.—**AUS.**

n. *S. P.* MAGANN *v.* FERGUSON (1898), 29 O. R. 235.—**CAN.**

o. *Notice to trustee of rent due.*]—The practice of the Ct. of Bkpcy. which prevailed up to 1899, to pay a landlord six months' rent out of the funds in ct. where he has given notice to the assignees of the rent being due, though he has neither distrained nor threatened to distrain, should be adhered to.—*Re* MILLS, [1909] 2 I. R. 114; 42 I. L. T. 275.—**IR.**

p. *Rent & damages for dilapidations—Agricultural lease.*]—A tenant in an agricultural lease having been sequestrated. & the trustee having been allowed to lay down & reap the crop of the current year, the lease was thereafter renounced:—*Held:* the landlord had a preferable claim on the estate for the rent of the last year, & *semble* for an ascertained claim for damages in respect of dilapidations.—MUNRO *v.* FRASER (1858), 21 Dunl. (Ct. of Sess.) 103.—**SCOT.**

q. *Assignees remaining in possession—Rent due at date of bankruptcy.*]—Where assignees remain in possession of bkpt.'s lands without disclaiming, the landlord is not entitled to the rent due at the date of the bkpcy., but must prove against bkpt.'s estate therefor.—*Re* MATTHEWS (1888), 21 L. R. Ir. 507.—**IR.**

r. —— *Rent due at date of assignment—Subsequent rent.*]—Under 58 Vict. c. 26, s. 3 (4), (5) (O.), the preferential lien for rent extends not only to a year's rent prior to the assignment for creditors, but also to three months' rent thereafter, whether the assignee retains possession or not; & in case the assignee elects to retain possession, the lien extends for such further period, over the three months, as the possession lasts.—CLARKE *v.* REID (1896), 27 O. R. 618.—**CAN.**

s. *S. P.* ALDERSON *v.* WATSON (1916), 35 O. L. R. 564.—**CAN.**

t. —— *Rent after date of sequestration.*]—*Held:* the landlord was entitled to a preference for rent to the date of the sale of the assets.—*Re* DUNN'S INSOLVENT ESTATE (1911), 32 N. L. R. 539.—**S. AF.**

of my realising such or any part thereof, to treat the amount of money for which you are now legally entitled to distrain as a first charge on the net proceeds of any realisation of such goods which may come into my hands, subject only to the rights of such preferential creditors as aforesaid." Bkpt.'s estate realised in the whole £335 net, of which £248 represented the net proceeds of the goods mentioned in the undertaking. The preferential debts amounted to £47, & the estimated costs of administering bkpt.'s estate were £220. The trustee claimed that the £47 & £220 should be deducted from the £335, & only the balance of £68 should be paid over to the landlords, who contended that the balance of the £248, after deducting the £47 should be applied in payment of their rent & costs:—*Held:* the landlords, on the true construction of the undertaking, had the same rights to be paid out of the £248, subject to the payment of the £47 to the preferential creditors, in priority to the claims of the trustee as they would have had, if they had proceeded & sold under their distress, & the application of the trustee must be dismissed.—*Re* CHAPMAN, *Ex p.* GOODYEAR (1894), 10 T. L. R. 449.

SUB-SECT. 7.—CLAIMS FOR RETURN OF APPRENTICESHIP FEES.

See, now, 1914 Act, s. 34.

4325. Apprentice—Articled clerk to attorney.]—*Held:* an articled clerk to an attorney was not an apprentice within 6 Geo. 4, c. 16, s. 49, as such, was not entitled to a return of a reasonable portion of the premium upon his master becoming bkpt. as a scrivener.—*Re* BUSH & PRIDEAUX, *Ex p.* PRIDEAUX (1838), 3 My. & Cr. 327; 3 Mont. & A. 516; 40 E. R. 951, L. C.

Annotation:—**Distd.** St. Pancras, Middlesex, Parish *v.* Clapham, Surrey, Parish (1860), 2 E. & E. 742.

4326. Application for return—To whom made.]—An application for the return of an apprenticeship premium paid to bkpt. ought to be made to the registrar, & not to the judge in ct.—*Re* RICHARDSON, *Ex p.* GOULD (1887), 35 W. R. 381; 4 Morr. 47.

4327. Amount recoverable—Agreement concluded—Indenture not executed.]—Where an agreement of apprenticeship had been concluded, the fee paid, & the apprentice was serving, but the indentures had not been executed at the time of the bkpcty.:—*Held:* the father was entitled to the return of a reasonable part of the fee.—*Re* DONKIN, *Ex p.* HAYNES (1826), 2 Gl. & J. 122.

4328. Unpaid premium—Owing by one member of partnership—Set-off against debt due to firm—Amount payable reduced.]—*Re* PESTELL, *Ex p.* SOAMES, No. 3578, *ante.*

SUB-SECT. 8.—JOINT AND SEPARATE CLAIMS.

See Part XI., *ante.*

SUB-SECT. 9.—CROWN DEBTS.

See No. 4475, *post,* & cases, *infra.*

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u. *Surrender by operation of law.*]—A landlord is not entitled to a preferential claim for rent accrued after the assignment, where there has been a surrender by operation of law.—GOLD *v.* ROSS (1903), 10 B. C. R. 80.—**CAN.**

w. *Distress not made.*]—Under Insolvent Act, 1875, ss. 74–125, the assignee is bound to recognise the claim of the landlord, although he may not have distrained, as a "preferential lien" with respect to the goods on the demised premises, for whatever rent became due during the year before the assignment.—*Re* HOSKINS & HAWKEY (1877), 1 A. R. 379.—**CAN.**

PART XII. SECT. 1, SUB-SECT. 7.

4326 i. *Application for return—Jurisdiction of court—Arranging debtor.*]—The ct. has not jurisdiction under 20 & 21 Vict. c. 60, s. 250, & 35 & 36 Vict. c. 58, s. 66, to order that a fee paid to an arranging trader, should be returned, where the arrangement has been concluded, providing for the complete distribution of his assets, without having made any provision for the payment of such apprentice fee.—*Re* J. L. (1874), 8 I. L. T. 160.—**IR.**

PART XII. SECT. 1, SUB-SECT. 9.

a. *Whether preferential—Royal prerogative — Deceased insolvent.*]—The maxim "*Quando jus domini regis et subditi insimul concurrunt, jus regis præferri debet*" does not extend to the administration of the estate of an insolvent under Insolvency Act, 1874.—*Re* BAYNES, *Ex p.* A.-G. (1898), 9 Q. L. J. 33.—**AUS.**

b. —— ——.]—The Crown claiming as a simple contract creditor has a priority over other creditors of equal degree. This prerogative privilege belongs to the Crown as representing the Dominion of Canada, when claiming as a creditor of a provincial corpn. in a provincial ct., & is not taken away in insolvency proceedings by 45 Vict. c. 23.—R. *v.* BANK OF NOVA SCOTIA (1885), 11 S. C. R. 1; 4 Cart. 391.—**CAN.**

c. —— ——.]—The Crown has no priority under an assignment for the general benefit of creditors.—CLARKSON *v.* A.-G. OF CANADA (1888), 15 O. R. 632; 16 A. R. 202.—**CAN.**

d. —— ——.]—When the administration of an estate is under a decree of the High Ct., under Presidency Towns Insolvency Act, 1909, s. 49, debts due to the Crown shall be paid in priority to all other debts.—BANK OF UPPER INDIA *v.* BENGAL ADMINISTRATOR-GENERAL (1917), 22 C. W. N. 793.—**IND.**

e. —— —— *Constitutional law—Commonwealth Australian Soldiers Repatriation Act (No. 37 of 1917).*]—The Commonwealth Minister of Repatriation claimed priority for a debt due to him in respect of a loan made to an insolvent soldier under the above Act on the ground that by s. 19 thereof it was given the same priority as a Crown debt:—*Held:* the question of validity of the above sect. was a matter respecting the limits *inter se* of the constitutional powers of the Commonwealth & those of the States within s. 74 of the Constitution, & the ct. was precluded from answering it.—*Re* DREW, [1919] V. L. R. 600.—**AUS.**

f. —— —— —— 6 *Anne, c.* 26.]—The Lords Comrs. of the Admlty. lodged a claim for preferential ranking for a sum due for breach of contract, on the ground that the law of England with regard to the preference of Crown debts over those due to subjects had been imported into the law of Scotland by s. 7 of the above Act:—*Held:* not entitled to preferential ranking.—ADMIRALTY *v.* BLAIR'S TRUSTEE, [1916] S. C. 247; 1 S. L. T. 19; 53 Sc. L. R. 188.—**SCOT.**

g. *What constitutes—General rule.*]—In determining whether or no a debt falls under the denomination of a Crown debt, the question is not in whose name the debt stands, but whether the debt, when recovered, falls into the coffers of the State.—JUDAH *v.* SECRETARY OF STATE FOR INDIAN COUNCIL (1886), I. L. R. 12 Calc. 445.—**IND.**

h. —— *Costs of proceedings to recover debt.*]—Costs incurred in proceedings to enforce a Crown debt are a preferential debt.—*Re* CORLEY (1889), 23 L. R. Ir. 249.—**IR.**

k. —— *Judgment debt in name of Secretary of State for India in Council.*]—A judgment debt due to the Secretary of State for India in Council, arising out of transactions at a public sale of opium held by the Secretary of State for India in Council, is a "debt due to our Sovereign lady the Queen" within 11 & 12 Vict. c. 21, s. 62.—JUDAH *v.* SECRETARY OF STATE FOR INDIAN COUNCIL (1886), I. L. R. 12 Calc. 445.—**IND.**

l. —— *Recognisance by guardian.*]—Recognisance by a guardian in the matter of a minor not being a real debt due to the Crown, the person secured by it can derive no preference in bkpcy. over other creditors.—*Re* DALTON (1809), 2 Mol. 442.—**IR.**

m. —— —— *Or surety of tenant.*]—The recognisance by a surety of a tenant under the Ct. of Ch. is not a Crown debt within the exception of the Insolvent Acts.—ANON. (1833), 1 Ir. L. Rec. N. S. 21.—**IR.**

n. —— *Legacy duty—How priority asserted.*]—A Crown debt for legacy duty was entitled to priority over the general creditors, & such priority could be asserted by motion in the bkpcy. matter, & existed notwithstanding the vesting of bkpt.'s estate in his assignees.—*Re* GALVIN, [1897] 1 I. R. 520.—**IR.**

o. —— *Loan to soldier — State War Council—Australian Soldiers Repatriation Act,* 1916.]—Money lent by the State War Council or the trustees of the Australian Soldiers Repatriation Fund under Australian Soldiers Repatriation Act, 1916, to a returned soldier, who becomes bkpt., do not constitute a Crown debt entitled to priority.—*Re* SYKES (1918), 18 S. R. N. S. W. 118.—**AUS.**

p. —— —— *Commonwealth Australian Soldiers Repatriation Act (No. 37 of 1917).*]—A loan to an insolvent soldier under the above Act by the Commonwealth Australian Minister of Repatriation is not a Crown debt.—*Re* DREW, [1919] V. L. R. 600.—**AUS.**

Sect. 1.—*What creditors and debts preferred: Sub-sect.* 10. *Sect.* 2: *Sub-sect.* 1.]

SUB-SECT. 10.—OTHER CASES.

See, also, Part XIV., Sect. 2, *post.*

4329. Tenant—In respect of surplus goods sold under distress—On bankruptcy of constable.]—Goods were sold under a distress for rent. A surplus remained in the hands of the constable, who became bkpt.:—*Held:* the tenant had no preference over the other creditors.—*Ex p.* DOBSON (1733), 2 Eq. Cas. Abr. 109; 7 Vin. Abr. 74, pl. 7; 22 E. R. 93.

4330. Commissioners under 51 Geo. 3, c. 15—Exchequer bills issued to manufacturer.]—The comrs. under the above Act for issuing Exchequer bills to manufacturers, etc., were admitted, under s. 48 of the Act, to prove, by their secretary, the full amount of their principal with interest up to the complete payment of the principal in preference to all other creditors of bkpt.—*Re* READ, *Ex p.* HOLDEN (1811), 1 Rose, 173.

See 1914 Act, s. 151.

4331. Judgment creditor.]—A creditor by statute of J., if J. become bkpt., & the statute not sued & executed before the bkpcy., shall come in only *pro ratâ*, though there were lands in fee bound by the statute.—NEWLAND *v.* —— (1706), 1 P. Wms. 92; 2 Eq. Cas. Abr. 116, pl. 1; 24 E. R. 308.

4332. —— Delay of general creditors in setting aside proceedings.]—Two creditors had entered up judgment against a trader on a warrant of attorney, but had not registered it according to Judgments Act, 1838 (c. 110). They attended a meeting for investigating the affairs of debtor, & were there informed by a solr., who attended on behalf of the general creditors, that he had in his pocket the means of preventing them from obtaining any preference. The solr. had with him at the time a declaration of insolvency which he had previously obtained from the trader. Having made the above statement, he inquired, as he deposed, of the judgment creditors whether they intended to seek any preference by means of their judgment, & received an answer from them in the negative, but he purposely abstained from mentioning registration. On the investigation taking place it had appeared that the trader had freehold property of considerable value, & the further investigation was adjourned to an appointed day. The solr. forbore to file the declaration of insolvency, but the judgment creditors registered their judgment a few days after that of the meeting. On the trader becoming bkpt. some months afterwards:—*Held:* the general creditors having allowed so long a time to pass without taking any step to set aside the proceedings could not resist the priority obtained.—*Re* BOYLE, *Ex p.* BOYLE (1853), 3 De G. M. & G. 515; 22 L. J. Bcy. 78; 22 L. T. O. S. 110; 17 Jur. 979; 43 E. R. 202, L. JJ.

Annotation:—Ref'd. *Re* Owen, [1894] 3 Ch. 220.

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q. —— *Rent of telephone.*]—Bkpt. had rented a telephone service-wire from the Postmaster-General:—*Held:* the latter was entitled to, as a preferential Crown debt, the amount he claimed as liquidated damages in respect of the rent of the telephone.—*Re* NIBLOCK, [1907] 2 I. R. 559.—**IR.**

r. —— ——.]—Bkpt. had rented from the Postmaster-General a telephone service-wire under an agreement by which the rent was payable yearly in advance. One year's rent having accrued due after the adjudication:—*Held:* the debt being a Crown debt the Postmaster-General was (subject to the provisions of Preferential Payments in Bkpcy. (Ireland) Act, 1889) entitled to be paid in full.—*Re* BEHAN, [1914] 2 I. R. 29.—**IR.**

PART XII. SECT. 1, SUB-SECT. 10.

s. *Current supplies — Fisheries.*]—Under 49 Geo. 3, c. 27, payment for current supplies is a preferable claim, & among current supplies fish-making & freight hold a higher rank than the others.—*Re* A. B. & Co.'s INSOLVENT ESTATE (1821), 1 Nfld. L. R. 241 (271).—**NFLD.**

t. —— ——.]—The law of current supply does not extend to a general trader.—HUNTER & CO. *v.* LANGDON'S TRUSTEES (1823), 1 Nfld. L. R. 297.—**NFLD.**

u. —— —— *Debts contracted within two years of insolvency.*]—The preference given by 49 Geo. 3, c. 27, s. 7, to the creditor whose debts were contracted within two years preceding the declaration of insolvency, is confined to debt contracted for supplies furnished for the prosecution of the fisheries. Where a person carries on business to a great extent as a general merchant, & is also concerned in the prosecution of the fisheries, his property & effects, in the event of his insolvency, will not become liable to the law of current supply.—BREHAUT & SHEPPARD *v.* LE MESSURIER'S ESTATE TRUSTEES (1823), 1 Nfld. L. R. 361 (414).—**NFLD.**

w. —— ——.]—Where a mercantile firm supplies articles for the fishery to a subordinate merchant to be paid for at the end of the current fishery season in fishery products; & he in turn supplies fishermen & planters upon the same terms:—*Held:* the preference given such "supplier" in the insolvency of the "supplied" by 5 Geo. 4, c. 67, exists only between the ultimate supplier & the person actually fishing.—*Re* ALEXANDER'S INSOLVENT ESTATE (1831), 2 Nfld. L. R. 29.—**NFLD.**

y. *Doctors—Attendance during last illness.*]—For medical fees for attendance during the last illness of a person, a medical man has a preference upon the estate of such person which has been sequestrated after his death.—*Re* WOLFF, *Ex p.* DAUMAS (1888), 6 S. C. 127.—**S. AF.**

a. —— ——.]—For some months prior to his death a patient was constantly attended by Dr. M. On July 1 the patient took to his bed & died the following day:—*Held:* M. could only be preferred in respect of medical fees for attendance on July 1 & 2.—MCNALLY *v.* WIGGETT'S TRUSTEES (1905), 22 S. C. 686.—**S. AF.**

b. *Execution creditor.*]—The mtgor. of land made an assignment in insolvency, subsequent to an execution. It appeared that there was a surplus after payment of all claims proved against the lands in a suit by the mtgee.:—*Held:* the execution creditor was entitled to priority as against the creditors of the mtgor. under the assignment in insolvency.—DARLING *v.* WILSON (1869), 16 Gr. 255.—**CAN.**

c. ——.]—An execution creditor, whose execution against lands has been placed in the sheriff's hands, & has by him been transmitted to the Registrar of Land Titles, is entitled to be paid by the assignee under an assignment for the benefit of creditors, made subsequently to the filing of the execution, in precedence to all other debts.—*Re* SCRIBNER & WHEELER (1910), 14 W. L. R. 524; 3 Sask. L. R. 185.—**CAN.**

d. —— *Costs.*]—The lien of a pltf. for costs under an execution in the sheriff's hands, against an insolvent, at the time of an assignment by him for the benefit of creditors is not superseded by such assignment, & the sheriff may sell for the amount of such costs:—*Held:* a pltf. losing his lien by reason of the sheriff not selling cannot rank as a preferential creditor. If he could so rank it would only be on net funds available after payment of proper charges incurred in the management of the estate.—GILLARD *v.* MILLIGAN (1897), 28 O. R. 645.—**CAN.**

e. *Insurance money — Goods of customer.*]—A miller who was insured against fire received hay to be cut, & sent in return receipt notes or invoices with the following clause printed on them:—"All goods held in trust covered by insurance against fire." A fire having occurred, hay belonging to a customer was destroyed, &, the miller having become insolvent, the trustee on his sequestrated estate recovered from the insurance co. the estimated loss by the fire:—*Held:* the bailor was entitled to a ranking on the money recovered preferable to the general creditors.—COCHRAN & SON *v.* LECKIE'S TRUSTEE (1906), 43 Sc. L. R. 715; 8 F. (Ct. of Sess.) 975; 14 S. L. T. 154.—**SCOT.**

f. *Costs of voluntary surrender—Preferred to general bond holder.*]—WIDDICOMBE *v.* VAN DER BYL'S ESTATE (1909), 26 S. C. 42; 19 C. T. R. 117.—**S. AF.**

g. *Judgments or orders—Confession of judgment.*]—6 Geo. 4, c. 14, s. 126, was not repealed by 3 & 4 Vict. c. 105.—*Re* PERRIN (1842), 4 I. Eq. R. 362; 2 Dr. & War. 147; 1 Con. & Law. 567.—**IR.**

h —— *Decree for alimony.*]—On an assignment under Creditors' Trust Deeds Act, R. S. B. C., c. 13, a decree for alimony does not give the assignor's wife a preference over his other unsecured creditors.—FRANCIS *v.* WILKERSON (1918), 25 B. C. R. 132; 2 W. W. R. 956.—**CAN.**

j. —— ——.]—The precedence given to an assignment for the general

4333. —— Insolvent testator.]—If a creditor of an insolvent testator recovers judgment for his debt against the exor. before the date of a judgment in an administration action, he is, notwithstanding Jud. Act, 1875 (c. 77), s. 10, entitled to be paid out of the assets in priority to the other creditors of equal degree.—*Re* MAGGI, WINEHOUSE *v.* WINEHOUSE (1882), 20 Ch. D. 545; 51 L. J. Ch. 560; 46 L. T. 362; 30 W. R. 729.

Annotations:—**Consd.** *Re* Williams, Jones *v.* Williams (1887), 36 Ch. D. 573; *Re* Art Engraving Co. (1888), 60 L. T. 381; *Re* Leng, Tarn *v.* Emmerson, [1895] 1 Ch. 652, C. A.; *Re* Whitaker, Whitaker *v.* Palmer, [1900] 2 Ch. 676. **Dbtd.** *Re* Whitaker, Whitaker *v.* Palmer, [1901] 1 Ch. 9, C. A. **Refd.** *Re* Gould, *Ex p.* Official Receiver (1887), 19 Q. B. D. 92, C. A.; *Re* Whitaker, Whitaker *v.* Palmer, [1904] 1 Ch. 299; *Re* Ambler, Woodhead *v.* Ambler, [1905] 1 Ch. 697, C. A.

See, further, EXECUTORS & ADMINISTRATORS.

4334. Person paying off distress—For benefit of estate.]—A person, who has paid off a distress on bkpt.'s property, & made other payments after adjudication, whereby bkpt.'s estate is benefited, & the creditors have the advantage thereof, is entitled to be repaid same before the creditors receive any dividend out of the estate.—*Re* HUMPHREYS, *Ex p.* KENNARD (1870), 21 L. T. 684.

Annotation:—**Consd.** *Re* Craig, *Ex p.* Hinchcliffe, [1916] 2 K. B. 497.

Payments for benefit of estate generally.]—*See* Part VII., Sect. 5, *ante.*

SECT. 2.—WHAT CREDITORS AND DEBTS POSTPONED.

See, now, 1914 Act, s. 36.

SUB-SECT. 1.—LOANS FROM WIFE TO HUSBAND.

See 1914 Act, s. 36 (2).

4335. Right of proof—Loan to husband for business purposes—Illegal marriage with deceased wife's sister.]—B., a trader, in 1857 went through the ceremony of marriage with M., a sister of his deceased wife, & thenceforth lived with her as his wife. In 1858 a sum of £2,000, which came to her under the will of her father, was by her direction paid to B., to be employed by him in his business, it being at the same time agreed that B. should be a trustee of the £2,000 for M., & that a settlement should be executed to carry out the agreement. In 1876 B. filed a liquidation petition. No settlement of the £2,000 had been executed:—*Held:* that M. was not entitled to prove in the liquidation for the £2,000 in competition with the creditors of the business.—*Re* BEALE, *Ex p.* CORBRIDGE (1876), 4 Ch. D. 246; 46 L. J. Bcy. 17; 35 L. T. 768; 25 W. R. 324.

4336. —— Loan to trading firm in which husband partner.]—Where a wife lends her money to a trading partnership, of which her husband is a member, she is, notwithstanding Married Women's Property Act, 1882, s. 3, entitled, on the bkpcy. of the partnership, to prove against the joint estate in competition with other creditors, as the benefit of creditors by R. S. O. 1887, c. 124, s 9, over "all judgments & all executions not completely executed by payment" does not extend to a judgment for alimony registered under R. S. O. 1887, c. 44, s. 30, against the lands of deft. prior to the registration of an assignment by him, & pltf. in such a judgment is not obliged to rank with the other creditors of deft.—ABRAHAM *v.* ABRAHAM (1891), 19 O. R. 256; 18 A. R. 436.—**CAN.**

k. —— *Destitute Persons Act,* 1894, *s.* 24.]—Arrears actually due to a wife or children under an order made in pursuance of the above sect. may possibly be entitled to priority in bkpcy.—*Re* BECK, *Ex p.* BECK (1904), 24 N. Z. L. R. 491.—**N.Z.**

l. *Marriage settlement—Wife's fortune paid to husband.*]—Under a marriage settlement the wife's fortune was paid to her husband, he became bkpt.:—*Held:* the claim of the wife, to the extent of the fortune, took priority, so far as the settled property was concerned, over the general creditors of the husband.—DOHERTY *v.* POWER, [1916] 1 I. R. 337.—**IR.**

m. *Price of goods supplied by creditor.*]—At a meeting of the creditors of an insolvent, G. offered to supply goods to carry on the business & to await payment for same on condition that insolvent be granted an extension of time. This offer was accepted & goods supplied:—*Held:* any balance due G. for advances made by him in good faith should be paid in full in priority over the claims of other creditors.—*Re* MATEJKA (1906), 5 W. L. R. 1.—**CAN.**

n. *Stockbrokers — Price of shares bought for principal.*]—R. & H., stockbrokers, were instructed to buy certain shares. They wrote to other stockbrokers, M. & A., to procure the shares, which they did, & advised R. & H. that the shares had been bought "by your order, & on your account." The name of the purchaser was communicated to M. & A. for the purpose of being entered in the transfer. The transfer was completed, & sent by M. & A. to R. & H., who delivered it to the purchaser in exchange for his cheque for the price. R. & H. did not cash this cheque, but the same day sent to M. & A. their own cheque for the price of the shares. This cheque was dishonoured, & R. & H. thereafter became bkpt.:—*Held:* M. & A. had dealt with R. & H., as brokers for a principal, & were not entitled to be ranked preferable for the amount of the purchaser's cheque.—MACKENZIE & AITKEN *v.* ROBERTSON (1886), 23 Sc. L. R. 309; 13 R. (Ct. of Sess.) 494.—**SCOT.**

PART XII. SECT. 2, SUB-SECT. 1.

4335 i. *Right of proof—Loan before Married Women's Property Act,* 1890.]—A wife, who lent her husband separate property before the above Act, is not to be postponed in the proof of her debt in the estate of her husband, who has become insolvent since that Act, until the other creditors are satisfied.—*Re* BROOMFIELD (1895), 6 Q. L. J. 176.—**AUS.**

4335 ii. —— *Loan to husband for business purposes.*]—The wife of insolvent was entitled to property in her own right, the rents from which were received by her husband from time to time, & for some years previous to his insolvency appropriated to his business, with the wife's knowledge. The wife claimed to rank for money so appropriated:—*Held:* when husband & wife lived together, the wife could not charge the husband's estate as her debtor for her separate income which she had permitted him to receive.—*Re* HARVEY (1890), 7 Nfld. L. R. 442.—**NFLD.**

4335 iii. —— ——.]—M. assigned his property to trustees for the benefit of his creditors, & his wife preferred a claim against the estate for money lent to M. & used in his business. The wife had money of her own & M. had received it:—*Held:* as the whole case was one of fact, *viz.*, whether the money was given to M. as a loan by, or gift from, his wife, & as such fact was found in favour of the wife & confirmed on appeal, the second appellate ct. would not interfere with such finding.—WARNER *v.* MURRAY (1889), 16 S. C. R. 720.—**CAN.**

4335 iv. —— ——.]—A wife, who has advanced money to her husband for the purpose of his trade, can prove in an arrangement matter along with the other creditors.—*Re* BYRNE (1896), 30 I. L. T. 63.—**IR.**

4335 v. —— ——.]—A wife lent money to her husband, on the stipulation that she was to be allowed interest. The husband applied the money to the payment of his debts, & on his bkpcy., the wife alleged that the sum in question was due as money had & received by bkpt. for her use. The evidence showed that the loan was for the purpose of the husband's business:—*Held:* the wife's dividend should be postponed.—*Re* ROSS (BANKRUPT) (1909), 43 I. L. T. 196.—**IR.**

4335 vi. ——.]—A wife entrusted her property to her husband for the purpose of his business as a cab-driver. While conducting this business G. recovered judgment against him for a tort. The husband was subsequently adjudicated a bkpt.:—*Held:* the wife's claim as a creditor on the estate was not deferred until the claim of G. had been satisfied, inasmuch as G.'s claim was not "for valuable consideration for money or money's worth" within Married Women's Property Act, 1908, s. 8, but that she was entitled to receive dividends *pari passu* with G.—O'HALLORAN'S OFFICIAL ASSIGNEE *v.* O'HALLORAN (1909), 29 N. Z. L. R. 79.—**N.Z.**

4335 vii. —— —— *Apart from business in which he was partner—Married Women's Property Act,* 1908, *s.* 8 (1).]—A wife lent money to her husband for the purposes of a business separate from that of a partnership of which he was a member. Both husband & the partnership became bkpt.:—*Held:* the wife could prove against her husband's estate in priority to the joint creditors of the firm. S. 1 of the above Act postponing a wife's claim, where the loan was for the purpose of her husband's business, until his other creditors have been satisfied, does not include creditors of a firm of which he is a member.—REEVES *v.* REEVES' OFFICIAL ASSIGNEE, [1919] N. Z. L. R. 385.—**N.Z.**

Sect. 2.—What creditors and debts postponed: Subsects. 1 & 2.]

sect. applies only where the husband is a sole trader.—*Re* TUFF, *Ex p.* NOTTINGHAM (1887), 19 Q. B. D. 88; 56 L. J. Q. B. 440; 56 L. T. 573; 35 W. R. 567; 4 Morr. 116.

Annotation:—**Consd.** *Re* Clark, *Ex p.* Schulze, [1898] 2 Q. B. 330, C. A.

4337. —— Loan not for husband's business.]—A married woman lent her husband money for purposes unconnected with business, & on his bkpcy. sought to prove for the amount; the trustee admitted the proof, but postponed her claim to a dividend until the other creditors' claims were satisfied:—*Held:* her claim was not postponed, Married Women's Property Act, 1882, s. 3, having no application to a loan by a wife to her husband unconnected with his trade or business.—*Re* TIDSWELL, *Ex p.* TIDSWELL (1887), 56 L. J. Q. B. 548; 57 L. T. 416; 35 W. R. 669; 3 T. L. R. 688; 4 Morr. 219.

Annotations:—**Folld.** Mackintosh *v.* Pogose, [1895] 1 Ch. 505. **Apprvd.** *Re* Clark, *Ex p.* Schulze, [1898] 2 Q. B. 330, C. A.

4338. —— ——.]—A wife, married in 1883, after marriage allowed her separate property to pass into her husband's hands, but not as a gift nor as a loan for the purposes of his trade. The husband having applied part of the property to his own use, settled the residue, together with property of his own, upon trusts under which he took a life interest, with a proviso for cesser in the event of his bkpcy.; the wife had no notice of any fraudulent intention on the husband's part:—*Held:* the property not having been lent to the husband for the purpose of his trade or business, the wife was not postponed till the other creditors had been satisfied.—MACKINTOSH *v.* POGOSE, [1895] 1 Ch. 505; 64 L. J. Ch. 274; 72 L. T. 251; 43 W. R. 247; 39 Sol. Jo. 218; 2 Mans. 27; 13 R. 254.

Annotations:—**Mentd.** *Re* Tetley, *Ex p.* Jeffrey *v.* Tetley (1896), 3 Mans. 226; *Re* Johnson, Johnson, *Ex p.* Matthews & Wilkinson, [1904] 1 K. B. 134.

4339. —— ——.]—On a claim by a wife to prove against the estate of her bkpt. husband for money lent to him for purposes unconnected with his trade or business:—*Held:* Married Women's Property Act, 1882, s. 3, did not apply, & the wife was not postponed till the other creditors had been paid in full.—*Re* CLARK, *Ex p.* SCHULZE, [1898] 2 Q. B. 330; 67 L. J. Q. B. 759; 78 L. T. 735; 46 W. R. 678; 14 T. L. R. 462; 42 Sol. Jo. 573; 5 Mans. 201, C. A.

4340. —— Onus of proof as to purpose of loan.]—When a married women seeks to prove under her husband's bkpcy. for money lent by her to him, she must show that the money was not lent for the purposes of his trade or business, & if she fails to do so, she cannot prove or vote until all the other creditors have been paid 20*s.* in the pound.—*Re* GENESE, *Ex p.* DISTRICT BANK OF LONDON (1885), 16 Q. B. D. 700; 55 L. J. Q. B. 118; 34 W. R. 79; 2 Morr. 283.

Annotations:—**Consd.** *Re* May, Crawford *v.* May (1890), 45 Ch. D. 499; *Re* Leng, Tarn *v.* Emmerson, [1895] 1 Ch. 652, C. A. **Expld.** *Re* Cronmire, *Ex p.* Cronmire, [1901] 1 K. B. 480, C. A. 1 believe that all that Cave, J., intended to say in *In re Genese, Ex p. District Bank of London*, was this: When any one claims to prove in bkpcy. he must of course show a *primâ facie* case, &, having regard to the facts of that case, the *primâ facie* inference was that the money lent by the wife to the husband was lent to him for the purpose of his business; but the learned judge had no intention of saying that, according to the true construction of Married Women's Property Act, 1882 (c. 75), s. 3, it threw on the wife in every case the obligation of proving that the money was not lent to the husband for the purpose of his business (VAUGHAN WILLIAMS, L.J.).

4341. —— ——.]—A wife deposited the title deeds of her separate real estate with bankers & signed a memorandum of deposit as security for advances made by the bank to her husband for the purposes of his business. She afterwards paid off the amount advanced. On the husband's death an order was made for the administration of his estate in bkpcy. The wife claimed to prove for the amount of the advances paid off & for a further sum lent to her husband, but did not in her affidavit say the money was not lent for the purposes of his business. The trustee produced no evidence that it was lent for that purpose & did not cross-examine the wife:—*Held:* the wife was entitled to prove against her husband's estate for the amount she had paid the bank, & for the further sum.—*Re* CRONMIRE, *Ex p.* CRONMIRE, [1901] 1 K. B. 480; 70 L. J. K. B. 310; 84 L. T. 342; 8 Mans. 140, C. A.

See, further, EXECUTORS & ADMINISTRATORS.

4342. Right to repayment—Insurance premiums paid before & after bankruptcy of husband.]—Bkpt. having assigned a policy on his own life by way of mtge. to his bankers, requested his wife on the eve of his bkpcy. to pay the premiums & interest for him, & she, after paying one premium before the commencement of the bkpcy., paid the premiums & interest during his bkpcy. until his death, when the policy money was received by the mtgees., who retained thereout the amount due to them on their mtge. & paid the balance to the official receiver. The wife claimed to be repaid out of the balance the sums she had paid for premiums & interest. The official receiver had no previous knowledge that the wife had been making the payments, but it subsequently appeared that that fact had been disclosed by bkpt. in his preliminary examination taken before a former official receiver. The official receiver moved for a declaration that he was entitled to retain the balance of the policy money as part of bkpt.'s estate:—*Held:* even assuming that all the payments were made during the bkpcy., the ct. ought not to allow the official receiver, having regard to the knowledge of his predecessor, to retain the policy money without repaying to the wife the sums she had paid for premiums & interest.—*Re* TYLER, *Ex p.* OFFICIAL RECEIVER, [1907] 1 K. B. 865; 76 L. J. K. B. 541; 97 L. T. 30; 23 T. L. R. 328; 51 Sol. Jo. 291; 14 Mans. 73, C. A.

Annotations:—**Distd.** *Re* Hall, *Ex p.* Official Receiver [1907] 1 K. B. 875, C. A. **Expld. & Distd.** Tapster *v.* Ward (1909), 101 L. T. 25. **Distd.** *Re* Phillips, [1914] 2 K. B. 689; *Re* Craig, *Ex p.* Hinchcliffe (1916), 115 L. T. 157. **Consd.** *Re* Stokes, *Ex p.* Mellish, [1919] 2 K. B. 256; *Re* Thellusson, *Ex p.* Abdy (1919), 88 L. J. K. B. 1210, C. A. **Refd.** Wells *v.* Wells, [1914] P. 157, C. A.

See, also, cases in Part VII., Sect. 1, & No. 2410, *ante.*

In administration of insolvent estates.]—*See* EXECUTORS & ADMINISTRATORS.

4340 i. —— *Onus of proof as to purpose of loan.*]—When a reasonable inference can be drawn from the facts that money loaned by a wife was intended for her husband's trade or business, the *onus* is on her to show that it was lent for some other purpose.—*Re* ROSS (BANKRUPT) (1909), 43 I. L. T. 196.—**IR.**

q. —— *Assignment of debt.*]—A husband six days prior to his sequestration granted to his wife a promissory note, payable one day after date for the amount of sums lent to him at various times by his wife out of her separate estate. The wife, on the day she received the note assigned it & the sum contained therein for less than its value to a relative, who thereafter lodged a claim for the full amount in the husband's sequestration:—*Held:* only entitled to be ranked upon whatever assets might remain after the whole claims of the ordinary creditors had been satisfied.—COCHRANE *v.* LAMONT'S TRUSTEE (1891), 18 R. (Ct. of Sess.) 451; 28 Sc. L. R. 299.—**SCOT.**

SUB-SECT. 2.—LOANS FOR BUSINESS PURPOSES AND CONSIDERATION FOR SALE OF GOODWILL.

See Partnership Act, 1890 (c. 39), ss. 2 (3) (*d*), 3, & PARTNERSHIP.

4343. What business.]—The term "business" in Partnership Act, 1890, s. 2 (3) (*d*), applies to any separate commercial venture, in which a trader or firm of traders embarks.—*Re* ABENHEIM, *Ex p.* ABENHEIM (1913), 109 L. T. 219.

4344. What funds—Trust funds authorised to be employed in trading concern.]—A trust fund, which the settlor authorises the trustees to employ in a trading concern, becomes part of the capital embarked, to which the creditors of the firm have priority of resort as against all claims on behalf of the *cestuis que trust*.—*Re* EDMONDS & WEBB, *Ex p.* EDMONDS (1867), 16 L. T. 718.

4345. On what contracts—Interest at fixed rate—Subject to deduction if profits deficient.]—A loan was made to a trader under a contract in writing, which provided that he should pay as interest a fixed sum half-yearly, & in case he should be unable to pay any portion of the interest "by reason of deficiency of profits, a due allowance" should be made by the lender in a fair & reasonable manner. The trader became bkpt.:—*Held:* the above stipulation was too vague to be capable of receiving any certain construction, & as it could not be separated from the rest of the agreement, it could not be treated as a contract for the lender to receive "a rate of interest varying with the profits," & the lender was not postponed.—*Re* VINCE, *Ex p.* BAXTER, [1892] 2 Q. B. 478; 61 L. J. Q. B. 836; 67 L. T. 70; 9 Morr. 222; *sub nom. Re* VINCE, *Ex p.* TRUSTEE IN BANKRUPTCY 41 W. R. 138; 36 Sol. Jo. 610, C. A.

Annotation:—**Mentd.** County Hotel & Wine Co. *v.* L. & N. W. Ry. Co., [1918] 2 K. B. 251.

4346. —— Remuneration at fixed rate out of profits—Option to become partner.]—Money was advanced to a trader under an agreement in writing, whereby the lender had control of the business & an option, which was not exercised, of becoming a partner, & received by way of remuneration for his services & for interest on his advance, a fixed weekly payment out of the profits of the business:—*Held:* the lender was not a partner, but the money was advanced upon the terms of "receiving a share of the profits" within Partnership Act, 1890, s. 2 (3) (*d*), & the lender was postponed until all other creditors of bkpt. were paid in full.—*Re* YOUNG, *Ex p.* JONES, [1896] 2 Q. B. 484; 65 L. J. Q. B. 681; 75 L. T. 278; 45 W. R. 96; 12 T. L. R. 633; 3 Mans. 213.

Annotation:—**Refd.** *Re* Abenheim, *Ex p.* Abenheim (1913), 109 L. T. 219.

4347. —— Verbal agreement.]—A verbal agreement to lend money on the terms that the lender shall receive a share of the profits of a business is within Partnership Act, 1890, s. 3; & if the borrower is adjudged a bkpt., the lender is not entitled to recover anything in respect of his loan, until the claims of the other creditors have been satisfied.—*Re* FORT, *Ex p.* SCHOFIELD, [1897] 2 Q. B. 495; 66 L. J. Q. B. 824; 77 L. T. 274; 46 W. R. 147; 13 T. L. R. 557; 41 Sol. Jo. 698; 4 Mans. 234, C. A.

Annotations:—**Refd.** *Re* Abenheim, *Ex p.* Abenheim (1913), 109 L. T. 219. **Mentd.** *Re* Mason, *Ex p.* Bing, [1899] 1 Q. B. 810.

4348. —— Original contract for share of profits—New contract for interest in lieu of share.]—Debtor borrowed money at a fixed rate of interest & for a share of the profits of his business, & he also agreed to teach the lender the business. Subsequently the original agreement was cancelled, & debtor agreed to pay a higher rate of interest in lieu of the share of profits:—*Held:* the advance having been made upon condition of receiving a share of the profits, the debt was postponed to those of the other creditors, & the fact that the original arrangement was altered, made no difference, it not being clearly shown that what took place amounted to an entirely new loan.—*Re* STONE (1886), 33 Ch. D. 541; 55 L. J. Ch. 795; 55 L. T. 256; 35 W. R. 54; 2 T. L. R. 894.

Annotation:—**Refd.** *Re* Hildesheim, *Ex p.* The Trustee, [1893] 2 Q. B. 357, C. A.

4349. —— —— ——.]—Money was advanced to a trader by way of loan under an agreement in writing, which provided that the borrower should pay to the lender interest at the rate of 5 per cent. *per annum*, & one-fourth of the net profits of the business. The borrower being in a position to repay the advance offered to do so, & after negotiations a new agreement in writing was entered into, by which the lender agreed to "continue his existing loan," & the borrower agreed to pay, instead of the former rate of interest & share of profits interest at the rate of 10 per cent. *per annum*:—*Held:* what occurred did not amount to a repayment of the original advance, & a new advance upon new terms, but was merely the substitution of new terms in respect of the original advance, & the claim of the lender must be postponed, until the other creditors of the borrower had been paid in full.—*Re* HILDESHEIM, *Ex p.* THE TRUSTEE (1893), 2 Q. B. 357; 69 L. T. 550; 9 T. L. R. 634; 37 Sol. Jo. 703; *sub nom. Re* HILDESHEIM, *Ex p.* HILDESHEIM, 42 W. R. 138; *sub nom. Re* HILDESHEIM, *Ex p.* SMITH, 10 Morr. 238; 4 R. 543, C. A.

Annotation:—**Refd.** *Re* Abenheim, *Ex p.* Abenheim (1913), 109 L. T. 219.

4350. —— —— Further loan at interest.]—In 1893 A. & B. entered into partnership, & C. agreed to lend them capital for the business, receiving a share of the profits in lieu of interest. In June, 1895, A. & B. by deed, to which C. was a party, dissolved partnership, B. continuing the business & taking over & becoming solely responsible for the debt due to C., & a further sum advanced without any express stipulation as to interest. In Aug. B. & C. entered into a deed by which it was agreed that C. should continue to receive a share of profits in lieu of interest in respect of the original advance, but that the further advance & any future advances should carry a fixed rate of interest. B. became bkpt.:—*Held:* C. must be postponed in respect of all her advances prior to Aug., 1895.

Where a loan, made in consideration of a share in the profits of a business, is increased without any agreement as to the interest, the inference is that it was lent on the same terms as the first advance.—*Re* MASON, *Ex p.* BING, [1899] 1 Q. B. 810; 68 L. J. Q. B. 466; 80 L. T. 92; 47 W. R. 270; 43 Sol. Jo. 227; 6 Mans. 169.

4351. —— Option of lender to take share of profits instead of interest—Release of original debtor firm—Liability of members substituted.]—A firm borrowed money for a commercial adventure, on the terms that it was to be repaid with interest, or, at the option of the lender, by a share of the profits. The lender subsequently agreed to receive in lieu of interest shares in a proposed co. The co. was not formed, & the original agreement was varied, by the firm agreeing to pay interest, & to give the lender a share of the profits of the venture. No profits were made, & the firm was released

Sect. 2.—What creditors and debts postponed: Subsects. 2 & 3. Part XIII. Sect. 1.]

from its liability, the individual members accepting bills of exchange for the amount of the loan, which firm guaranteed. The firm became bkpt.: —*Held:* the release of the firm & the substitution of the liability of its members, constituted a new agreement, under which the lender could prove his debt against the joint estate in competition with the other creditors:—*Semble:* the original agreement was within the mischief of Partnership Act, 1890, ss. 2, 3.—*Re* ABENHEIM, *Ex p.* ABENHEIM (1913), 109 L. T. 219.

4352. —— Share of profits—Security taken.]—Advances were made to a trader, secured by a mtge. of leaseholds, & in consideration of a share in the profits of the business. On the bkpcy. of the mtgor.:—*Held:* the mtgee. must be postponed to the other creditors.—*Re* RAMSDEN, *Ex p.* MCARTHUR (1871), 40 L. J. Bcy. 86; 19 W. R. 821.

4353. —— —— ——.]—Money was lent to a trader on the security of a mtge. of his business premises & of the goodwill of the business. The mtge. provided that, in lieu of interest on the loan, the borrower should pay half-yearly, during the continuance of the loan, such a sum as should be equal to half the net profits of the business during the preceding half-year. On the bkpcy. of the mtgor. his trustee applied to the ct. for an order that the lender should concur in assigning the property to a purchaser free from the mtge.:—*Held:* the lender was only prevented from recovering his debt in competition with the other creditors, & was not deprived of any of his ordinary rights as mtgee.—*Re* LONERGAN, *Ex p.* SHEIL (1877), 4 Ch. D. 789; 46 L. J. Bcy. 62; 36 L. T. 270; 25 W. R. 420, C. A.

Annotation:—**Consd.** Badeley *v.* Consolidated Bank (1886), 34 Ch. D. 536.

4354. —— Price of trade name & goodwill in form of annuity—Sale by widow of deceased husband's business.]—A widow sold the trade name & goodwill of the business carried on by her late husband. Part of the consideration was the payment to her of an annuity, which was not expressed to be payable out of the profits of the business.

In the purchaser's bkpcy. she proved for the capitalised value of the annuity:—*Held:* the annuity was not a share of the profits of the business, & her proof was not postponed until the claims of the other creditors had been paid in full.—*Re* GIEVE, *Ex p.* SHAW (1899), 80 L. T. 737; 47 W. R. 616; 15 T. L. R. 363; 43 Sol. Jo. 511; 6 Mans. 249, C. A.

4355. "Recover"—Does not mean "retain."]—The word "recover" [in Partnership Law Amendment Act, 1865 (c. 86), s. 5] means recover, & does not mean "retain" (JAMES, L.J.).—*Re* LONERGAN, *Ex p.* SHEIL (1877), 4 Ch. D. 789; 46 L. J. Bcy. 62; 36 L. T. 270; 25 W. R. 420, C. A.

Annotation:—**Mentd.** Badeley *v.* Consolidated Bank (1886), 34 Ch. D. 536.

4356. What creditors—All creditors—Not only trade creditors.]—M. lent money to T., a trader, under a written agreement, by which M. was to receive in lieu of interest 40 per cent. on the profits of T.'s business, & after a certain period was to have liberty to determine the agreement at any time, in which event the money was to be repaid by instalments secured by bills of exchange. While the agreement was in force M., in conjunction with H., lent T. other sums of money on a vested agreement, for which interest at 10 per cent. was to be paid. M. determined the agreement, & T. gave M. bills of exchange for the money advanced under it, except certain profits which were carried over to the 10 per cent. account; but M. & H. went on advancing to T. other sums on the 10 per cent. account. After all the trade debts of T. which had been due during the pendency of the agreement had been paid, T. became bkpt.:—*Held:* M. could not prove for the money advanced under the agreement, though all other debts existing during its continuance had been paid.—*Re* TEW, *Ex p.* MILLS (1873), 8 Ch. App. 569; 28 L. T. 606; 21 W. R. 557, L. J.

Annotations:—**Folld.** *Re* Grason, *Ex p.* Taylor (1879), 12 Ch. D. 366, C. A. **Apld.** *Re* Stone (1886), 33 Ch. D. 541. **Consd.** *Re* Hildesheim, *Ex p.* The Trustee, [1893] 2 Q. B. 357, C. A. **Refd.** *Re* Abenheim, *Ex p.* Abenheim (1913), 109 L. T. 219.

4357. —— —— ——.]—A lender of money to a trader, on the terms of receiving a share of the profits of his business, cannot prove for the loan in the bkpcy. of the borrower in competition with any of his creditors, not merely those creditors whose debts were contracted in relation to the business in respect of which the loan was made, or while that business was being carried on, but any of the creditors who are entitled to prove in the bkpcy. Till all the other creditors have been paid in full, such a lender is not entitled to prove for any purpose whatever.

A loan was made to a trader, on the terms of the lender receiving half the profits of the business. Subsequently the trader, being insolvent, assigned all his property to a trustee, on trust for sale, & out of the proceeds of sale to pay the lender a small sum, then to pay his creditors (other than the lender) in full, & afterwards to pay the lender the balance of his loan, with interest at 10 per cent. The lender was a party to the deed. The trustee realised the property & paid the creditors (other than the lender) a dividend of 6*s.* in the pound. That exhausted the proceeds of sale, & the lender received nothing beyond the small payment made to him in the first instance. All the creditors released the trustee, but they expressly reserved their rights against the trader. The trader afterwards filed a liquidation petition:—*Held:* the arrangement did not amount to a repayment of the loan & a relending of the money on new terms, &, the lender could not prove in competition with the other creditors.—*Re* GRASON, *Ex p.* TAYLOR (1879), 12 Ch. D. 366; 41 L. T. 6; 28 W. R. 205, C. A.

Annotations:—**Apld.** *Re* Genese, *Ex p.* District Bank of London (1885), 16 Q. B. D. 700. **Folld.** *Re* Mason, *Ex p.* Bing, [1899] 1 Q. B. 810. **Refd.** *Re* Hildesheim, *Ex p.* The Trustee, [1893] 2 Q. B. 357, C. A.; *Re* Fort, *Ex p.* Schofield, [1897] 2 Q. B. 495, C. A.; *Re* Abenheim, *Ex p.* Abenheim (1913), 109 L. T. 219.

PART XII. SECT. 2, SUB-SECT. 2.

4352 i. *On what contracts—Share of profits.*]—If A. supplies B. with money & credit to carry on trade upon the condition of receiving a proportion of the profit of such trade, A. cannot, upon the bkpcy. of B., participate in a dividend of his effects until all other creditors have been paid in full.—REDDY *v.* HACKETT'S TRUSTEES (1825), 1 Nfld. L. R. 446.—**NFLD.**

4352 ii. —— —— *Security taken—Advance by clerk.*]—K., a clerk employed by bkpt., advanced £800 for use in his business, K. to be paid interest & half the profits in lieu of extra salary, & to have a lien on goods purchased with the £800, bkpt. to take all risk:—*Held:* K. was not a partner, & his debt should not be postponed to debts of the other creditors.—*Re* BORTHWICK, *Ex p.* KIRKPATRICK (1875), 9 I. L. T. 155.—**IR.**

SUB-SECT. 3.—OTHER CASES.

4358. Creditor under voluntary bond or covenant.]—The old rule of the Ct. of Bkpcy. that creditors under voluntary bonds or covenants must be postponed in the receipt of dividends to creditors for valuable consideration, was abolished by 1869 Act; & a creditor under a voluntary covenant, whose proof has been admitted, is entitled to be paid *pari passu* with all other creditors, except those to whom priority is specifically given.—*Re* STEWART, *Ex p.* POTTINGER (1878), 8 Ch. D. 621; 47 L. J. Bcy. 43; 38 L. T. 432; 42 J. P. 743; 26 W. R. 648, C. A.

Annotation:—**Consd.** *Re* Hawkins, *Ex p.* Troup, [1895] 1 Q. B. 404, C. A.

4359. ——.]—A voluntary bond can be proved *pari passu* with other debts.—*Re* COATES, *Ex p.* SCOTT (1892), 9 Morr. 87.

4360. Creditor holding cognovit allowing debtor to trade unmolested.]—M. was made bkpt. in 1840, & did not obtain a certificate of conformity. S. was a creditor, but did not prove for the whole of his debt. In 1841 S. sued M. for the balance, & he executed a *cognovit*. In 1842 M. began to trade again, & carried on business until 1852, when he executed an assignment to his creditors. S. had knowledge of the trading for some time previous to the second stoppage. An adjudication of bkpcy. having followed the assignment, S. entered up judgment on the *cognovit*, & proved under the second bkpcy. as a judgment creditor:—*Held:* S. having suffered M. to trade again unmolested, was postponed, & could not participate in bkpt.'s subsequently acquired estate until the second creditors were fully paid.—*Re* M'LINTOCK, *Ex p.* SCOTT (1854), 23 L. T. O. S. 258, 270.

Part XIII.—Distribution of Estate and Payment of Dividends.

SECT. 1.—**IN GENERAL.**

See, now, 1914 Act, s. 62.

4361. Jurisdiction of court—As regards distribution of estate.]—A person, who had taken the benefit of Insolvent Debtors Act, first in 1814, & a second time in 1820, died in 1826, leaving assets more than sufficient for the payment of all the debts which he had contracted subsequently to his second insolvency:—*Held:* a ct. of equity had jurisdiction to apply the assets in payment (1) of the subsequent debts, (2) of the debts scheduled under the second insolvency, & (3) of the debts scheduled under the first insolvency.—BARTON *v.* TATTERSALL (1830), 1 Russ. & M. 237; 1 Taml. 378; 39 E. R. 92; *subsequent proceedings* (1831), 2 Russ. & M. 541.

Annotations:—**Apld.** *Re* Bender, *Ex p.* Fenwick (1836), 5 L. J. Bcy. 46, Ct. of R.; Ward *v.* Painter (1839), 2 Beav. 85. **Consd.** *Re* Moylan (1852), 16 Beav. 220; *Re* Hare, *Ex p.* Welchman (1879), 11 Ch. D. 48, C. A.; *Re* Clagett's Estate, Fordham *v.* Clagett (1882), 20 Ch. D. 637, C. A.; *Re* Smith, Green *v.* Smith (1883), 24 Ch. D. 672. **Refd.** *Re* Lyon, *Ex p.* Robinson (1844), 2 L. T. O. S. 440; *Re* Emmings (1849), 14 L. T. O. S. 208.

See 1914 Act, s. 39.

See, also, Part XIV., *post.*

4362. —— ——.]—Proceedings on the part of pltfs. in equity to have a claim admitted having been refused by the Ct. of Review, a supplemental bill was filed, praying an injunction to restrain the assignees from paying any dividend, which might be declared until the cause in equity was heard, or without reserving a sufficient fund to answer pltfs'. demand:—*Held:* if the Ct. of Ch. had jurisdiction in the distribution of bkpt.'s estate, the ct. ought, upon general principles, after an adjudication in bkpcy. on the subject of the distribution, to refrain from exercising such jurisdiction. *Semble:* the ct. had no jurisdiction to interfere in the mere distribution of bkpt.'s estate, either on the ground of trust or otherwise.—THOMPSON *v.* DERHAM, THOMPSON *v.* GOODMAN (1842), 1 Hare, 358; 66 E. R. 1071; *subsequent proceedings, sub nom. Re* DERHAM, *Ex p.* THOMPSON, 2 Mont. D & De G. 761, Ct. of R.; (1844), 8 Jur. 633, L. C.

Annotations:—**Refd.** Preston *v.* Wilson (1846), 5 Hare, 185; Laycock *v.* Johnson (1847), 6 Hare, 199.

See 1914 Act, s. 69.

4363. —— —— **Lex fori applicable.**]—Bkpt., on his marriage in England, executed a settlement, by which he covenanted to pay an annuity for the benefit of his wife. Both bkpt. & his wife were domiciled in England, & the settlement was made in accordance with English law. The bkpcy. took place in the Cape of Good Hope, & by the law of that colony claims of wives under marriage settlements were postponed to the claims of other creditors:—*Held:* the law of the Cape of Good Hope governing the distribution of the assets prevailed.

The proper order & priority of distribution of assets is always a matter for the *lex fori*, & the country where the distribution takes place always claims to itself the right to regulate the course of distribution (LORD CAIRNS).—THURBURN *v.* STEWARD (1871), L. R. 3 P. C. 478; 7 Moo. P. C. C. N. S. 333; 40 L. J. P. C. 5; 19 W. R. 678, P. C.

Annotation:—**Refd.** *Re* Doetsch, Matheson *v.* Ludwig, [1896] 2 Ch. 836.

See, further, CONFLICT OF LAWS.

4364. —— —— **Bankruptcy in England & abroad—English & foreign assets & creditors.**]—Where a firm is bkpt. in England & abroad, & has English & foreign assets & English & foreign creditors, the ct. has jurisdiction to sanction an agreement between the trustee in bkpcy. in England & the official assignee abroad for pooling all the assets & distributing them ratably amongst the English & foreign creditors, notwithstanding that 1883 Act, contains no express provisions authorising such a scheme.—*Re* MACFADYEN (P.) & Co., *Ex p.*

PART XII. SECT. 2, SUB-SECT. 3.

r. *Surety with insolvent.*]—A surety, jointly & severally obliged with insolvent, cannot rank concurrently with other creditors for the amount he has had to pay, but only after the others have been paid in full.—PAQUET *v.* CANADA GUARANTEE CO. (1881), 4 L. N. 229.—**CAN.**

PART XIII. SECT. 1.

4361 i. *Jurisdiction of court—As regards distribution of estate.*]—At a meeting of creditors it was agreed between debtor's mother & the creditors present that debtor should be granted an extension of time, provided that the mother allowed a claim she had as extrix. of his father to stand over till the other creditors were paid. On the subsequent bkpcy., the official assignee rejected the extrix.'s proof, but his decision was reversed, & the proof admitted. On appeal it was contended that the proof, if admitted at all, should have been admitted only on condition that all dividends paid upon it be devoted to the payment in full of the claims of the other creditors who had given debtor time as above:—*Held:* the question as to the application of the dividends, being one between some of the creditors only & the creditor proving, could not have been entertained by the assignee when considering the admission or rejection of the proof, & could not be entertained on the application to reverse the assignee's decision.—*Re* FAIRBROTHER, *Ex p.* FAIRBROTHER (1897), 16 N. Z. L. R. 43.—**N.Z.**

Sect. 1.—*In General.* *Sect.* 2.]

VIZIANAGARAM CO., LTD., [1908] 1 K. B. 675; 77 L. J. K. B. 319; 98 L. T. 220; 24 T. L. R. 254; 52 Sol. Jo. 226; 15 Mans. 28.

4365. —— To order some of many fictitious creditors to make good dividends paid to others.]—A petitioning creditor fraudulently sued out a commission & prevailed upon twelve persons to make proofs on fictitious debts, for the purpose of carrying the choice of assignees. On the fraud being discovered the assignees were removed, & the proofs expunged. One of the assignees had absconded with part of the assets, & two of the fictitious creditors had become insolvent & were unable to repay the dividends received:—*Held:* the ct. had no jurisdiction to order the persons who had proved the fictitious debts to make good the dividends, which the two fictitious creditors were unable to repay.—*Re* SMITH, *Ex p.* BRAND (1836), 1 Deac. 308; 2 Mont. & A. 707; 5 L. J. Bcy. 57, Ct. of R.

4366. What property distributable—Property in regard to which claim of third party notified.]—Where notice is given to the assignees that property in their hands is not the property of bkpt., though the party claiming it takes no steps to establish his claim for some years, they will not be justified in distributing it amongst the creditors, & if claimant succeed in his claim, the ct. has jurisdiction to order the assignees to restore it.—*Re* STOKES, *Ex p.* PEMBERTON (1837), 6 L. J. Bcy. 83, Ct. of R.

4367. From what estates payable—Proof against several bankrupt parties to promissory note.]—A creditor of several bkpts., for the same sum, *e.g.*, on a promissory note, having proved his debt before each commission, may receive dividends under all.—*Ex p.* CLARKE, *Ex p.* MACKRELL (1758), 2 Keny. 302; 96 E. R. 1190.

See 1914 Act, Sched. II., r. 18.

4368. Whether debt liable to attachment—Deceased insolvent.]—A dividend payable, under the administration in bkpcy. of the estate of a person dying insolvent, to a creditor of the estate is not a debt liable to be attached within R. S. C. Ord. 45, r. 1.—PROUT *v.* GREGORY (1889), 24 Q. B. D. 281; 59 L. J. Q. B. 118; 61 L. T. 696; 38 W. R. 204; 7 Morr. 1, D. C.

4369. Notice to declare dividend—Whether bar to creditor claiming subsequently.]—Notice to declare a dividend had been inserted in the *Gazette*, by which July 28 was specified as the last day for claims to be sent in. On July 30 a claim was made & rejected on the ground (*inter alia*) that it was made too late:—*Held:* the notice did not preclude the creditor from making the claim.—*Re* SHEPHERD & LEECH, *Ex p.* WHITEHAVEN MUTUAL INSURANCE SOCIETY (1887), 4 Morr. 130, D. C.

See 1914 Act, s. 65.

4370. Effect of distributing funds paid in error.]—A sum paid by mistake by an assignee of one bkpcy. to assignees under another bkpcy. & divided amongst the creditors, by the latter, was directed to be paid out of future effects.—*Re* CHARLES, *Ex p.* BIGNOLD (1817), 2 Madd. 470; 56 E. R. 408.

4371. Effect of payment & receipt of dividend—Primâ facie evidence of debt—Sufficiency of evidence in rebuttal.]—The receipt of dividends under a bkpcy. will, after a great lapse of time & loss of the securities, be accepted as *primâ facie* proof of the existence of the debt, & any objection to it must rest on evidence showing some probable reason for supposing, not that it may be, but that it is bad.—*Re* GRANT, *Ex p.* GRAHAM (1863), 33 L. J. Bcy. 1; 9 L. T. 278; 10 Jur. N. S. 1; 12 W. R. 1, L. C.

See 1915 Rules, rr. 252, 269, & Bills of Exchange Act, 1882 (c. 61), s. 70.

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a. *From what funds payable—Amendment of proof after dividend declared & partly paid.*]—A creditor having proved against the joint estate of a firm, amended his proof & proved for part of the amount against the joint estate & for the remainder against the separate estate of one of the partners. A dividend on the separate estate had then been declared & partly paid:—*Held:* he was entitled as against the separate estate to a dividend only out of the funds remaining after payment of the dividend already declared.—*Re* ROBINS & DAY, *Ex p.* GALLAGHER (1884), 3 N. Z. L. R. 93.—**N.Z.**

4368 i. *Whether debt liable to attachment.*]—A dividend payable to a creditor, who has proved in the bkpcy. matter, cannot be attached under C. L. P. Act, 1856, by a judgment creditor of the person to whom such dividend is payable.—BOYSE *v.* SIMPSON (1859), 8 I. C. L. R. 523.—**IR.**

b. *Plan of distribution—Who may object to—Creditor who has proved.*]—Where a person appears as a creditor on a plan of distribution he is, whether he has or not properly proved his own debt, entitled to object to any changes or to any other creditor included in that plan.—*Re* RUTLEDGE, *Ex p.* BANK OF AUSTRALASIA (1863), 2 W. & W. 6, 41.—**AUS.**

c. —— —— *Unpaid creditor.*]—An unpaid creditor has, at all times, an interest in preventing his debtor's assets from being diverted to pay illegitimate or unlawful claims.

When in the distribution of money of debtor by the prothonotary, a party making an unlawful claim is collocated, a creditor to whom an amount is allotted in the same report as if such a claim had not been made, has nevertheless the right to contest the latter, as a reduction in the dividend allotted to the other creditors must have the effect of impairing the contestant's chances of payment out of other or future assets of debtor.—CHEVALIER *v.* BESSETTE (1906), Q. R. 15 K. B. 206.—**CAN.**

d. —— —— *Insolvent himself.*]—An insolvent has a *locus standi* to object to a plan of distribution filed in his estate.—*Re* ROBERTS (1892), 9 S. C. 188.—**S. AF.**

e. —— *How objection should be taken to.*]—Where a creditor objects to a plan of distribution, he should move under 1887 Act, s. 70, & not file objections to the account & plan being confirmed.—*Re* GARLING, *Ex p.* BRAY (1893), 14 N. S. W. B. 7.—**AUS.**

f. —— *Amendment of.*]—A claim for £7,000 & interest put in by M., a secured creditor, without valuing her security was admitted as a claim only standing for further proof. The official assignee subsequently filed a plan of distribution, in which he inserted M. as a creditor for £7,500 & entitled to a dividend of £968 15*s.*, but in a subsequent part of the plan under the head of "Unrealised Assets" inserted the following item:—"Dividend set aside for M.'s claim, for which it is supposed security is held equal in value to the amount £968":—*Held:* the plan of distribution ought to be amended by describing the dividend payable to M. not as payable absolutely, but only upon the contingency of her valuing her security & proving for the balance.—*Re* RUTLEDGE, *Ex p.* BANK OF AUSTRALASIA (1863), 2 W. & W. 6, 41.—**AUS.**

g. —— *Order to vary—Appeal from.*]—*Held:* an order of a county ct. judge dismissing an application by a claimant, under Assignments Act, R. S. O., 1897 (c. 147), s. 30, to vary the scheme of distribution made by the assignee of debtor, was made by him as *persona designata*, & there was no appeal therefrom.—*Re* SIMPSON & CLAFFERTY (1899), 18 P. R. 402.—**CAN.**

h. *Distribution account — Whether confirmation an estoppel—Amendment.*]—The confirmation of a distribution account does not estop a creditor from disputing his liability to pay a contribution specified in such account; but, in other respects, the account constitutes a judgment of the ct. until proper steps have been taken to amend it.—HORWITZ *v.* SHEFFREN'S ESTATE (1910), 20 C. T. R. 738.—**S. AF.**

k. —— ——.]—The confirmation of the distribution account in an insolvent estate operates as a judgment upon which a writ of execution can be granted against the trustee for the unpaid dividend awarded thereunder.—AFRICAN MUTUAL TRUST & ASSURANCE CO. *v.* MURRAY (1914), C. P. D. 1108.—**S. AF.**

l. —— *Application to set aside confirmation—Ignorance of creditor.*]—The ignorance of a creditor, who has proved upon an insolvent estate, that the plan of distribution lay for the inspection of the creditors, & was duly advertised & afterwards duly confirmed by the ct., is not sufficient to entitle him to have the order of confirmation set aside & a preference awarded to him in respect of his proof of a preferent debt.—STEWART'S ASSIGNEE *v.* WALL'S TRUSTEE (1885), 3 S. C. 243.—**S. AF.**

m. *Appropriation of dividend—Debt payable by instalments.*]—A creditor having drawn a dividend from the

4372. General effect of 1869 Act—Distribution of assets after close of bankruptcy.]—The scope of the above Act is that, during the period of three years after the close of the bkpcy., none of the creditors who could prove in the bkpcy. shall be able to obtain a preference over the others, & that after the expiration of the three years, the unpaid balances of the proved debts shall be enforced against the property of debtor only under the direction of the Ct. of Bkpcy., so that any property of debtor which may be thus recovered may be distributed among the creditors who have proved *pari passu*.—*Re* SMITH, GREEN *v.* SMITH, (1883), 22 Ch. D. 586; 52 L. J. Ch. 411; 48 L. T. 254; 31 W. R. 413.

Annotation:—**Mentd.** *Re* Rees, Rees *v.* Rees (1889), 60 L. T. 260.

See 1914 Act, s. 65, & 1915 Rules, r. 268.

SECT. 2.—POSITION OF TRUSTEE.

4373. Duty to distribute—Periodically as money available.]—It is the main duty of a trustee to distribute any assets which may from time to time come into his hands, &, even if he had to make a new sum in arithmetic & to send out fresh letters & fresh cheques every quarter or every month, it does not seem to be an inconvenience to be put into competition with the inconvenience which would be suffered by a creditor who is deprived of a sum of money to which he is legally, equitably & morally entitled (JAMES & BAGGALLAY, L.JJ.).—*Re* COLLIE, *Ex p.* ADAMSON (1878), 8 Ch. D. 807; 47 L. J. Bcy. 103; 38 L. T. 917; 26 W. R. 890, C. A.

Annotations:—**Refd.** Hillyer *v.* St. Bartholomew's Hospital Governors, [1909] 2 K. B. 820, C. A. **Mentd.** Couldery *v.* Bartrum (1881), 19 Ch. D. 394, C. A.; Watson *v.* Holliday (1882), 20 Ch. D. 780; *Re* Parkers, *Ex p.* Sheppard (1887), 19 Q. B. 84; *Re* Giles, *Ex p.* Stone (1889), 61 L. T. 82, D. C.; Griffith *v.* Pound (1890), 45 Ch. D. 553; *Re* Newton, *Ex p.* National Provincial Bank of England (1896), 3 Mans. 200, D. C.; Whitechurch *v.* Cavanagh, [1902] A. C. 117, H. L.; *Re* Macfadyen, *Ex p.* Vizianagaram Mining Co., [1908] 2 K. B. 817, C. A.

See 1914 Act, s. 62.

4374. Liability—Estate distributed notwithstanding notice that part not property of bankrupt.]—Where notice is given to the assignees, that property in their hands is not the property of bkpt., by a party who takes no steps to establish his

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sequestrated estate of his debtor upon the sum total of a debt payable by four instalments of which the two last were not yet due:—*Held*: the dividend was not imputable towards the total extinction of the first & second instalments, but was to be considered as a payment of so much on each pound of the whole debt.—BALMANNO *v.* M'NEE, M'NEE *v.* BALMANNO (1826), 2 Wils. & S. 7.—**SCOT.**

n. *Agreement to postpone claim—To enable debtor's business to be carried on—Effect of agreement on creditor's right to rank in distribution.*]—A merchant assigned for the benefit of creditors. Appct. having filed the particulars of her claim with the assignee, offered to stand aside for a year, in order that the other creditors might have an opportunity to realise their claims out of the business, upon condition that the creditors in the estate agreed to assign to her or to her nominee the business, stock-in-trade, book debts, or any other assets of the estate which might be in the assignee's possession, & that if any extension of a year should be necessary to pay the trade creditors in full, she was to have the option of extending the agreement or ranking with other creditors, as she might see fit. The offer was accepted, the assignee was discharged & one of pltfs. was appointed receiver & to carry on the business under an order, which directed that the receiver was, after deducting such sums as were necessary to carry on the business, to apply the remainder in payment of costs of action, claims for wages & other liabilities of insolvent payable out of the estate ratably & proportionately without preference or priority. The receiver carried on business for a year, & he paid the creditors, other than appct., a dividend of 25 per cent. upon their claims. It appearing that the carrying on of the business would not result in payment of creditors in full, the receiver sold out the stock-in-trade & held the proceeds for distribution. The receiver would only allow appct. to rank with other creditors with respect to the proceeds then in his hands & refused to allow her the dividend of 25 per cent. already paid to the other creditors:—*Held*: appct. was entitled under her agreement to rank *pro ratâ* with the other creditors, not only with respect to the proceeds of the sale, but also with respect to that portion realised by the receiver while carrying on that business.—FOWLER *v.* BARNARD, *Re* BARNARD (1908), 7 W. L. R. 624.—**CAN.**

o. *Position of indemnifying creditors.*]—"Others" in 1898 Act, s. 77, refers to all creditors who have not given an indemnity, & does not refer to those creditors only who have had a proper opportunity of joining in the indemnity & have refused to do so.

The ct. cannot under s. 77 give any advantage to creditors who have not given an indemnity, even though such creditors had no notice of proceedings to recover assets being contemplated or taken or of an indemnity having been given by certain creditors.—*Re* LANCE, *Ex p.* OFFICIAL ASSIGNEE (1900), 21 N. S. W. B. 29.—**AUS.**

PART XIII. SECT. 2.

4373 i. *Duty to distribute.*]—The disposal of bkpt.'s effects belongs to his assignee.—*Re* BAILY (1809), 2 Mol. 444.—**IR.**

4373 ii. —— *Periodically as money available.*]—*Held*: it was not the meaning of 1869 Act, s. 55, that no dividend could be declared until after the expiration of three months from the appointment of an assignee, but that a dividend might be declared at the end of one month, if the assignee had funds.—*Re* TUCKER (1871), 8 N. S. R. 300.—**CAN.**

4373 iii. —— *As regards preferential claims.*]—The funds of a bkpt. estate in the hands of the official assignee must be first applied in payment of preferential claims, & cannot be controlled by the general body of creditors for the purposes of litigation or otherwise.—*Re* HAYDON, *Ex p.* OFFICIAL ASSIGNEE (1884), 2 N. Z. L. R. 372.—**N.Z.**

4373 iv. —— *Proof wrongly admitted.*]—Where a proof was wrongly allowed as preferent, but the trustee in his distribution account only awarded the creditor a dividend as a concurrent creditor:—*Held*: the trustee had acted rightly in so proving the account, without first applying to the ct. to amend the proof.—DREYFUS & CO. *v.* ESTATE NAPIER (1907), 24 S. C. 224; 17 C. T. R. 325.—**S. AF.**

4373 v. —— *Right to reserve for expenses.*]—A special case was presented to determine the rights of creditors under a trust deed. The trust estate consisted mainly of heritage including pictures which sold for a considerable sum. Preference on the price was claimed by the heritable creditors:—*Held*: the proceedings in the special case did not constitute a contract binding the trustee on the trust estate to distribute the whole price of the pictures immediately among the creditors, but he was entitled to retain a portion to meet general expenses.—TRAILL *v.* MOUNSEY (TRAILL'S TRUSTEE) (1919), 2 S. L. T. 9.—**SCOT.**

4374 i. *Liability—Estate distributed without notice given of dividend sheet.*]—Where the curator, without giving any notice of the dividend sheet, irregularly pays away the whole available assets of the estate, he is personally liable for the costs where a contestation of such dividend sheet is maintained.—*Re* SASSEVILLE (1896), Q. R. 9 S. C. 187.—**CAN.**

4374 ii. —— *Where dividends improperly withheld.*]—Creditors proceeding against the assignee for recovery of their dividends improperly withheld, are entitled to their costs, although costs are not prayed.—*Re* STOKES, *Ex p.* GUEST (1827), 1 Mol. 60.—**IR.**

4374 iii. —— *No notice of sitting for proof of debts or that debt was disputed—Laches of creditor.*]—Where a creditor, whose debt has been returned on bkpt.'s schedule of affairs, seeks to render the official assignee personally responsible for payment of a dividend due on foot of the debt, upon the grounds (1) no notice that the debt was disputed, or of any sitting for proof of debts was given by the official assignee, (2) the debt was not returned by him to the registrar as an undisputed debt, & (3) he did not, in distributing bkpt.'s estate, allocate or pay any portion thereof in respect of such debt, the creditor will be disentitled to such relief, if he has been guilty of laches while he has had, by himself or by his agents, actual knowledge of proceedings in the bkpcy. matter, as contributing to the circumstances which have occasioned the mistake or miscarriage of which he complains.—*Re* WOODS, *Ex p.* BRAIDWATER SPINNING CO. (1876), 10 I. L. T. 24.—**IR.**

4374 iv. —— *For dividend awarded—No estate assets in hand.*]—A trustee realised certain securities held by a secured creditor, & out of the proceeds paid the costs of certain unsuccessful legal proceedings brought by the estate, & thereafter framed a distribution & contribution account. When sued by the secured creditor for the balance of dividend awarded in the plan of distribution, which had been confirmed, the trustee pleaded that he had no estate assets in hand & had so far been unable to recover the contributions owing by the unsecured creditors:—*Held*: he was liable to pay the dividend awarded in the plan

Sect. 2.—*Position of trustee. Sect.* 3: *Sub-sects.* 1 & 2.]

claim for some years, & the assignees notwithstanding distribute the property among the creditors, & are subsequently ordered to restore it, if the sum recovered exhausts the whole of the estate, the surviving assignee will have to pay the costs of resisting the claim out of his own pocket. —*Re* STOKES, *Ex p.* PEMBERTON (1837), 6 L. J. Bcy. 83, Ct. of R.

4375. —— Creditor erroneously omitted from dividend list.]—By mistake one of the debts proved was omitted in the dividend list, & the fund was distributed:—*Held:* the official assignee & the solr. to the fiat were personally liable to pay the creditor the amount which he would have received, had his debt been inserted in the list.—*Re* CAREY, *Ex p.* HALL (1847), De G. 555; 16 L. J. Bcy. 10; 9 L. T. O. S. 393; 11 Jur. 639, Ct. of R.

Annotation:—**Mentd.** *Re* Lee, *Ex p.* Laurence, Mortimore (1862), 6 L. T. 402.

See 1914 Act, s. 68.

4376. —— For overpayment of dividend—Through error in admitting proof.]—The trustee of a creditors' deed, acting on a view of the law, which subsequent decisions showed to be erroneous, allowed a creditor to prove for a larger amount than he was entitled to prove for:—*Held:* the trustee was not liable to make good to the estate the overpaid dividend.—*Re* PILLING, *Ex p.* OGLE, *Ex p.* SMITH (1873), 8 Ch. App. 711; 42 L. J. Bcy. 99; 21 W. R. 938, L. JJ.

4377. Right to sue for return of dividend overpaid—Through miscalculation as to expenses.]—A trustee in bkpcy., after setting aside a sum which he deemed adequate to cover legal expenses, paid a dividend to the creditors. The sum retained proved insufficient:—*Held:* he could not sue the creditors for a return of part of the overpaid dividend.—FIGG *v.* HEGARTY (1890), 34 Sol. Jo. 214.

Rights of creditors where trustee absconds with dividends.]—*See* No. 2044, *ante.*

SECT. 3.—PAYMENT AND SET-OFF OF DIVIDENDS.

SUB-SECT. 1.—ENFORCEMENT OF PAYMENT.

4378. How application made—Application for order to be admitted to prove—Proof by wife in regard to bankrupt husband's marriage settlement obligations.]—B. made provision in marriage articles for his wife, or, in case she should not survive him, to the use of her child or children. A commission of bkpcy. issued against B., who died on Apr. 1, 1749. On 28th of same month a dividend was made of 9*s.* in the pound. The comrs. having declined to admit the wife as a creditor without an order of the ct.:—*Held:* she should be admitted a creditor & to a dividend of 9*s.* in the pound.—*Ex p.* MICHELL (1751), 1 Atk. 120; 26 E. R. 79.

Annotations:—**Consd.** Goddard *v.* Vanderheyden (1771), 2 Bos. & P. 8, n. **Reld.** *Re* Gibbins, *Ex p.* Tindal (1832), 1 Deac. & Ch. 291.

4379. —— By motion—Opposition certain.]—*Semble:* an application for payment of a dividend may be made by motion, where it is certain to be opposed, instead of by 1870 Rules, r. 135, Form 50. —*Re* RUSSELL, *Ex p.* KEMP (1873), 42 L. J. Bcy. 26; 28 L. T. 487; 21 W. R. 450, L. J.

Annotations:—**Mentd.** *Re* Armitage, *Ex p.* Good (1877), 5 Ch. D. 46, C. A.; *Re* Tait, *Ex p.* Harper (1882), 21 Ch. D. 537, C. A.

4380. What dividends—Dividend declared many years previously—Application of Statute of Limitations.]—*Held:* a dividend declared eighteen years previously should be ordered to be paid, as Stat. Limitations did not apply to a demand for dividends.—*Re* NORRIS, *Ex p.* HEALEY (1832), 1 Deac. & Ch. 361; 3 Mont. & A. 154, n., Ct. of R.

See 1914 Act, s. 68.

4381. —— ——.]—On a petition for payment of a dividend, declared fourteen years previously:—*Held:* if the assignees had set up Stat. Limitations as a bar to the petition, it would have been an answer in the Bkpcy. Ct.—*Re* CLARKSON, *Ex p.* CLARKSON (1837), 3 Mont. & A. 154, Ct. of R.

See 1914 Act, s. 68.

See, also, No. 4476, *post.*

4382. —— Dividend declared after proof.]—A creditor cannot petition for payment of a dividend, unless the dividend was declared subsequent to the proof of his debt.—*Ex p.* LEE (1842), 2 Mont. D. & De G. 780, Ct. of R.

See 1914 Act, ss. 65, 68.

4383. —— —— Some creditors paid additional sums.]—After a dividend, creditors proving debts are ordinarily to take only future dividends *pari passu*, but if the assignees have paid other creditors, equal to those who have afterwards proved, they ought to do the same with those who apply.—*Ex p.* LONG (1786), 2 Bro. C. C. 50; 29 E. R. 26, L. C.

See 1914 Act, s. 65.

4384. When order for payment granted—Petition of one creditor—Effects allowed to accumulate thirteen years.]—Assignees of bkpt. made no dividend, but thirteen years after the bkpcy. had from the produce of the property accumulated enough to pay 15*s.* in the pound. A sale & distribution were ordered on petition of one creditor. —*Ex p.* GORING (1790), 1 Ves. 168; 30 E. R. 284.

See 1914 Act, s. 62 (2), (3).

4385. —— Assignees not prepared to state any objection.]—An order was made for payment of a dividend in bkpcy. with interest & costs on petition, under 49 Geo. 3, c. 121, s. 12, the assignees not being prepared to state their objection.—*Ex p.* ATKINSON (1814), 3 Ves. & B. 13; 35 E. R. 384.

See 1914 Act, s. 66.

4386. —— What amounts to refusal to pay.]—After a dividend had been declared, a party

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of distribution with costs *de bonis propriis*, but interest on the unpaid balance of the dividend should not be allowed.—AFRICAN MUTUAL TRUST & ASSURANCE CO. *v.* MURRAY (1914), C. P. D. 1108.—**S. AF.**

4374 v. —— *Payment to creditor of party entitled to dividend.*]—Where an amount awarded A. according to the final account, was paid to another creditor, to whom A. was indebted as a surety:—*Held:* the trustee was bound to pay the amount awarded A. —MOLIFE *v.* BARKER (1910), 27 S. C. 9.—**S. AF.**

4374 vi. —— *Surplus paid to insolvent.*]—An account & plan of distribution awarding a surplus to the insolvent having been confirmed by the ct., & no further proof of debt having been filed the trustee in good faith, paid a portion of such surplus to the insolvent:—*Held:* the trustee was not personally liable at the suit of creditors to refund the amount so paid.—UNION BANK (IN LIQUIDATION) *v.* KING'S TRUSTEE (1893), 10 S. C. 101.—**S. AF.**

q. *Trustee making advances on future dividends.*]—An assignee in insolvency, who has made advances on the strength of dividends coming due, cannot set up such advances in compensation of the claim of the assignee of the person who received the advances, & who subsequently failed.—*Re* GAREAU, *Ex p.* COURT (1878), 23 L. C. J. 64.—**CAN.**

PART XIII. SECT. 3, SUB-SECT. 1.

4380 i. *What dividends—Dividend declared between time for delivery of proof & time for rejection, expunging, or reduction thereof.*]—If a proof has not been rejected, expunged or reduced, the creditor is entitled to share in all dividends declared after his proof was delivered or sent in, as required by Insolvency Act, 1890, s. 106.—*Re* BENNESS (1890), 16 V. L. R. 691.—**AUS.**

entitled in respect of a proof requested the assignees, by letter, to send him the amount of his dividend in a post office order, promising to send a receipt by return of post. The assignees sent no answer:—*Held:* there was such refusal to pay the dividend, as entitled the creditor to an order upon petition at the costs of the assignees personally.—*Re* MOODY, *Ex p.* JACKSON (1842), 3 Mont. D. & De G. 1, L. C.

See 1914 Act, s. 68, & 1915 Rules, r. 270.

4387. Grounds for refusal of order for payment—Debt usurious.]—A. gave a note for £100 payable, two months from date, to B., who gave no consideration. B. indorsed over to C., but allowed a discount of 9 per cent. & when the note became due C. took a joint bond from A. & B. for £100. On the bkpcy. of A., C. proved for £100 but, on finding out that he had paid only £98 8*s.* 6*d.* for the note, the comrs. stopped his dividend. On petition by C. Lord Hardwicke, C., declined to direct payment of the dividend, but ordered an issue to try whether the bond was usurious.—*Ex p.* THOMPSON (1746), 1 Atk. 125; 26 E. R. 82, L. C.

4388. —— Debt wrongly admitted—Necessity for expunging proof.]—An application by a creditor to be paid his dividends, which had been ordered under the commission, was resisted by the assignees, on the ground that the debt ought not to have been admitted on the proceedings:—*Held:* the assignees could not refuse to pay the dividends, & if they objected to the debt, they ought to have presented a petition to expunge it.—*Ex p.* WHITESIDE (1813), 1 Rose, 319, L. C.

See 1914 Act, Sched. II., r. 24.

4389. —— Proof neither admitted nor rejected for two years.]—P., a creditor, proved under proceedings for the liquidation by arrangement of the affairs of R., the proof being made prior to the appointment of the trustee. Subsequently to the proof being made the trustee caused P. to be summoned for examination. The course of the examination was such as to show that the trustee was not satisfied with the proof. After a lapse of two years, the trustee having taken no further step with respect to P.'s proof, declared a dividend, which he paid to all the creditors except P. A registrar ordered the trustee to pay the dividend to P. On appeal against such order:—*Held:* two years having elapsed without notice of rejection having been given, the trustee must be taken to have admitted the proof, & the order of registrar should be affirmed.—*Re* RUSSELL, *Ex p.* KEMP (1873), 42 L. J. Bcy. 26; 28 L. T. 487; 21 W. R. 450, L. J.

Annotations:—**Consd.** *Re* Armitage, *Ex p.* Good (1877), 5 Ch. D. 46, C. A. **Expld.** *Re* Tait, *Ex p.* Harper (1882), 21 Ch. D. 537, C. A. I think that in *Ex p. Kemp*, Mellish, L.J., must be taken to have decided only that delay amounts *primâ facie* to admission of a proof (COTTON, L.J.)

4390. —— Application too late—Estate fully administered — Trustee released.] — *Semble:* a creditor, who, with full knowledge of his rights, neglects to assert them until after the estate has been fully administered & the trustee released, comes too late to prove for unliquidated damages & claim a dividend thereon.—*Re* GILL, *Ex p.* BARNARD (1882), 46 L. T. 824.

See 1914 Act, s. 67.

4391. Security proved on lost—Payment to donee of power of attorney—Form of order—Costs.]—A creditor lost a bill of exchange, which he had proved, & in respect of which he had given a power of attorney authorising the assignees to pay the dividends to the donee of the power:—*Held:* (1) assignees could not pay dividends without the production of the securities mentioned in the proof, & as they had been lost by the creditor's negligence he must pay the costs of the application; (2) the order should provide that the dividends should be paid under a proper indemnity from the donee of the power, & on an affidavit that the creditor was still alive, the costs to be deducted from the dividend.—*Re* HARTSINCK, *Ex p.* TRUST (1834), 3 Deac. & Ch. 750, Ct. of R.

See 1915 Rules, rr. 252, 269, 271.

4392. —— Special directions to official receiver.]—Where a bill of exchange exhibited by a creditor at the time of his proof is lost before a dividend is declared, the comr. should, on the application of the creditor, give special directions to the official assignee to pay the dividend, without requiring the production of the bill.—*Re* HAMBLY, *Ex p.* WALLIS (1836), 1 Deac. 496; 2 Mont. & A. 586, Ct. of R.

See 1915 Rules, r. 269.

4393. Application to vary order for payment—Debt alleged usurious.]—N. proved a debt, & dividends were declared upon the proof. The assignees refused to pay the dividends, believing the debt to be usurious. N. petitioned to have the dividends paid, & an order was made for payment thereof, not precluding the assignees from presenting a petition to expunge the proof. The assignees did not present such petition, & N. proceeded to enforce the order for payment by attachment. The assignees applied to restrain N. & to have the order varied, by inserting a direction that the dividends might be paid out of the first assets which should come into their hands:—*Held:* the application must be dismissed, & the assignees must pay the money.—*Re* MACKENZIE, *Ex p.* GRAHAM (1813), 1 Rose, 456, L. C.

4394. Suspended order for payment—Time allowed for trustee to have proof expunged.] — Where the trustee was dissatisfied with a proof but had taken no steps for two years to reject same, an order of the registrar for payment of the dividend was affirmed, but suspended for fourteen days to enable the trustee to apply to expunge.—*Re* RUSSELL, *Ex p.* KEMP (1873), 42 L. J. Bcy. 26; 28 L. T. 487; 21 W. R. 450, L. J.

Annotations:—**Consd.** *Re* Armitage, *Ex p.* Good (1877), 5 Ch. D. 46, C. A. **Mentd.** *Re* Tait, *Ex p.* Harper (1882), 21 Ch. D. 537, C. A.

See 1914 Act, Sched. II., rr. 24, 25.

SUB-SECT. 2.—TO WHOM PAYABLE.

4395. Assignee—Sufficiency of instructions from assignor to trustees.]—A creditor addressed a written request to the assignees in general terms to pay "the dividends on bkpt.'s estate" to A.:—*Held:* the assignees were justified in paying subsequent dividends to A., until they had notice from the creditor revoking the authority.—*Re* CAMPBELL, *Ex p.* BRIGHT (1832), 2 Deac. & Ch. 8, Ct. of R.

See 1915 Rules, r. 271.

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r. *By action.*]—The ct. will not permit an action to be brought for a dividend, except in particular circumstances, & subject to its control.—GARDINER *v.* SHANNON (1804), 2 Sch. & Lef. 228.—**IR.**

s. ——.]—A creditor may sue for a dividend duly collocated & not objected to, though for a debt not due & not placed in the dividend sheet.—SIMPSON *v.* NEWTON (1868), 4 C. L. J. N. S. 46.—**CAN.**

t. —— *Money had & received.*]—*Semble:* such action is sustainable against an official assignee for dividends.—EVANS *v.* STEPHEN (1882), 3 N. S. W. L. R. 154.—**AUS.**

Sect. 3.—Payment and set-off of dividends: Subsects. 2 & 3.]

4396. —— Sufficiency of assignment.]—A., for good consideration, gave B. a written undertaking to "pay over" to him all dividends that he should receive on his proof against bkpt.'s estate. A. became bkpt., & B. then gave notice of his claim to the trustees in the first bkpcy. :—*Held:* there was a good equitable assignment of the dividends, & B. was entitled as against A.'s trustee in bkpcy.—*Re* IRVING, *Ex p.* BRETT (1877), 7 Ch. D. 419; 37 L. T. 507; 26 W. R. 376; *sub nom. Re* IRVING, *Ex p.* BUSHBY, 47 L. J. Bcy. 38.

Annotation:—**Apld.** West & Wright *v.* Newing (1900), 82 L. T. 260.

4397. —— Representatives of—Assignment lost.]—A bkpcy. took place in 1783, & a person claiming under an assignment of a proof received dividends in 1820 & 1824 :—*Held:* the representatives of the assignee claiming in 1863 were entitled to the dividends subsequently declared, though the deed of assignment was not produced.—*Re* GRANT, *Ex p.* GRAHAM (1863), 33 L. J. Bcy. 1; 9 L. T. 278; 10 Jur. N. S. 1; 12 W. R. 1, L. C.

4398. Accountant general—Sum ordered to be paid into court by bankrupt.]—Bkpt. had been ordered to pay a sum into ct. in a Ch. suit against him, pending at the time of his bkpcy. :—*Held:* a claim should be entered for that sum on behalf of pltf. in the suit, & the dividends on that sum should be paid into the Ct. of Ch. & invested in the name of the Accountant General.—*Re* GILBURD, *Ex p.* HANCOCK (1833), 3 Deac. & Ch. 523; 1 Mont. & A. 220, Ct. of R.

See 1914 Act, s. 64.

4399. —— ——.]—An account was ordered in a partnership action, & debtor was ordered to pay £2,000 into ct. Before any further proceedings debtor became bkpt. The debts proved did not exceed £300 :—*Held:* a claim might be entered for the amount ordered to be paid into ct., without prejudice to the partnership suit, & the assignees should pay to the credit of the Accountant General sufficient to pay dividends on the claim, together with any future dividends that might be declared.—*Re* PETERS, *Ex p.* FARDEN (1833), 1 Mont. & A. 219; 3 Deac. & Ch. 479, Ct. of R.

Annotations:—**Consd.** *Re* M'Neill, *Ex p.* Stutely (1841), 1 Mont. D. & De G. 643, Ct. of R. **Refd.** *Re* Gilburd, *Ex p.* Hancock (1833), 3 Deac. & Ch. 523; *Re* Ingham, *Ex p.* Trustee (1884), 52 L. T. 299.

4400. Accountant in bankruptcy—Dividends on sums claimed by cestui que trust—Action of account against bankrupt pending.]—Where bkpt. & his co-trustees had been guilty of a breach of trust, & a bill in Ch. had been filed against them by the *cestuis que trust* for an account, which suit was pending at the time of the bkpcy., the *cestuis que trust* were permitted to enter a claim for the amount due to them, without prejudice to the Ch. suit, & all dividends in respect of the claim were ordered to be transferred by the accountant in bkpcy. to the credit of the bkpcy. & of the suit.—*Re* M'NEILL, *Ex p.* STUTELY (1841), 1 Mont. D. & De G. 643, Ct. of R.

4401. Executor—Proof by residuary legatee—On refusal of executor to prove.]—Where the exor. under the will of a creditor of bkpt. firm declines to make proof against the estate of bkpts., on the ground that he is ignorant of the circumstances in which the debt accrued, the ct. will allow proof by the residuary legatees under the will, subject to a direction for payment of the dividend to the exor.—*Re* STRAHAN, PAUL & BATES, *Ex p.* CALDWELL (1865), 13 W. R. 952.

4402. Parties presumed to be entitled—Marriage settlement lost.]—A marriage settlement having been lost, which declared the trusts of a fund belonging to the wife, & there being every probability that petitioners were entitled to the fund under the provisions of the settlement, they were, after being admitted to prove for the amount, allowed to receive the dividends, without a reference, as the fund was too small to bear that expense.—*Re* DORNFORD, *Ex p.* HARRISON (1837), 3 Deac. 25, Ct. of R.

4403. Crown—Creditor proving ceasing to exist—Creditor company wound up.]—A firm became bkpt. in 1847, & a corpn. created by statute proved in the bkpcy., with other creditors. In 1887 the corpn. was dissolved by an order of the ct. under Cos. Act. Afterwards it was discovered that bkpts. had been entitled to certain shares, & the official receiver recovered the value of the shares, & held the proceeds as trustee in the bkpcy. A creditor, moved to expunge the proof of the dissolved corpn., claiming that the money to which the corpn. had been entitled as a creditor, & which was then in the hands of the official receiver as trustee, was divisible among the still existing creditors :—*Held:* on the dissolution of the corpn. the dividends due to it were not divisible among the other creditors, but passed to the Crown as *bona vacantia*.—*Re* HIGGINSON & DEAN, *Ex p.* A.-G., [1899] 1 Q. B. 325; 68 L. J. Q. B. 198; 79 L. T. 673; 47 W. R. 285; 15 T. L. R. 135; 43 Sol. Jo. 153; 5 Mans. 289, D. C.

Annotations:—**Consd.** Hastings Corpn. *v.* Letton, [1908] 1 K. B. 378, D. C. **Refd.** *Re* Taylor's Agreement Trusts, [1904] 2 Ch. 737. **Mentd.** *Re* Printers & Transferrers Amalgamated Trades Protection Soc., [1899] 2 Ch. 184; *Re* Bond, Panes *v.* A.-G., [1901] 1 Ch. 15; *Re* Ruddington Land, [1909] 1 Ch. 701.

4404. Proof against bankrupt executor or trustee by—Bankrupt himself.]—A bkpt. exor. applied part of his assets to his own use. Petitioners, who were creditors of testator, having prayed to be admitted creditors under the commission for the amount of what had been misapplied :—*Held:* bkpt. should be admitted a creditor for the amount, & at the request of petitioners the dividends should be paid to bkpt., to be applied by him in course of administration.—*Re* PACK, *Ex p.* HOGG (1736), 1 Gl. & J. 161, n.

4405. —— ——.]—A bkpt. exor. was ordered

PART XIII. SECT. 3, SUB-SECT. 2.

w. *Agent—Power of attorney necessary.*]—The assignees will not be allowed to pay the amount of a bond, which bkpt. passed to a person, who afterwards left it in the hands of a third party to receive the amount for him, unless the third party has a regular power of attorney to receive, but they will be ordered to lodge it in bank to the credit of the Accountant-General, with liberty to apply for it.—*Re* COKE (1829), 2 Ir. L. Rec. 1st ser. 326.—**IR.**

y. —— *For several creditors—Separate powers of attorney not necessary.*]—Each of several creditors, residing in England, need not execute a separate power of attorney to a person in Ireland to receive the amount of their dividends.—*Re* STOKES, *Ex p.* GUEST (1827), 1 Mol. 60.—**IR.**

a. *Judgment creditor of party entitled—Assignment of right to dividend—Before attachment of debt.*]—W. was a proved creditor in the estate of B. D. a judgment creditor of W.'s lodged a writ of *fi. fa.* against him on Nov. 23, 1880. On Nov. 8, 1881, W. assigned his right to the dividends to E. S., the official assignee of B. had notice of the assignment, & agreed to pay the dividends to E. On Nov. 16 S. was served by D. with an attachment order. On Nov. 17 the dividends became payable. On Nov. 23 the attachment order was converted into a garnishee order. S. paid the amount of the order to D. & the balance into the Treasury :—*Held:* (1) the garnishee order completely protected S. for any payment thereunder; (2) payment into the Treasury protected S. as to the balance; (3) (FAUCETT, J.) the writ of *fi. fa.* bound the dividends in the hands of S.—EVANS *v.* STEPHEN (1882), 3 N. S. W. L. R. 154.—**AUS.**

to be admitted a creditor, & dividends to be paid into the bank.—*Re* WALKER, *Ex p.* BROOKS (1793), 1 Gl. & J. 161, n.

4406. ——— ———.]—A bkpt. exor. was ordered to prove against his own estate & the assignees to pay the dividends into the hands of the accountant general to the credit of a cause pending for the administration of assets.—*Re* COLMAN, *Ex p.* COLMAN (1833), 2 Deac. & Ch. 584, Ct. of R.

4407. ——— ———.]—A bkpt. trustee was allowed to prove, but not to receive trust dividends.—*Re* RAIKES, *Ex p.* STRETTELL (1839), Mont. & Ch. 165, Ct. of R.

4408. ——— **Creditor of testator.**] — A creditor of bkpt.'s testator, to whom he was exor., was admitted to prove the amount of testator's property in bkpt.'s hands, the dividend to be paid into the bank, subject to further order.—*Re* BECKETT, *Ex p.* LEEKE (1789), 2 Bro. C. C. 596; 29 E. R. 327.

Annotation:—**Consd.** *Re* Howard & Gibbs, *Ex p.* Shaw (1822), 1 Gl. & J. 127.

4409. ——— **Legatee.**] — An exor. & trustee having committed a *devastavit:*—*Held:* precluded from proving under his bkpcy., & liberty so to do given, in the first instance, & without previous application to the comrs., to a legatee on behalf of himself & others, with a direction that the dividends be paid into the bank, in trust in the matter.—*Re* WARNE, *Ex p.* MOODY (1816), 2 Rose, 413.

Annotation:—**Refd.** *Re* Howard & Gibbs, *Ex p.* Shaw (1822), 1 Gl. & J. 127.

4410. ——— **Father of infant beneficiaries.**]—Bkpt. was an exor., & had proved his testator's will & possessed himself of the property, keeping the legacies of infants in his own hands:—*Held:* the father of the infants, & not bkpt., might prove & receive the dividends for their use.—*Re* MERRYMAN, *Ex p.* ROE (1737), cited in 1 Gl. & J., at p. 160.

4411. ——— **Son of cestui que trust.**]—A bkpt. trustee suffered the trust fund to be misappropriated:—*Held:* the son of the *cestui que trust* might prove for the amount, retaining the dividends until further order.—*Re* HOOPER, *Ex p.* VINE (1832), 1 Deac. & Ch. 357, Ct. of R.

4412. ——— **Co-trustees—Loan to firm in which bankrupt partner.**]—Testator, who was possessed of a large capital in a house of trade, in which he was a partner, bequeathed the residue of his estate to trustees, of whom A. was one, upon trust to permit A. to receive the annual produce for his life, & after his death to transfer the principal to his children, directing that, if A. became a partner in the house of trade, testator's whole capital should continue therein, A. & the other partners giving to his exors. their joint bond for the amount. A. became a partner, the bond was given, & the firm became bkpt., & the trustees proved the amount due against the joint estate:—*Held:* the dividends on the proof should be invested in stock, & the interest should accumulate, until the loss occasioned by the bkpcy. was made good, & the whole of the principal sum then due was realised.—*Re* SEVERN, *Ex p.* KING (1835), 1 Deac. 143.

Annotations:—**Consd.** Woodyatt *v.* Gresley (1836), 8 Sim. 180; *Re* Last & Casey, *Ex p.* Crofts (1837), 2 Deac. 102; *Re* March, *Ex p.* Gonne (1837), 2 Deac. 278. **Follid.** *Re* Walter, *Ex p.* Walter's Assignees (1859), 32 L. T. O. S. 396.

4413. Proof in respect of bankrupt husband's marriage settlement obligations.] — Bkpt. had covenanted to pay a sum, to be invested on the trusts of his marriage settlement, for the benefit of his wife & the issue of the marriage. He became bkpt. without having done so. Proof was ordered in the usual way, the dividends to be paid into the bank, & the interest thereof to be paid to the parties entitled under the settlement.—*Re* MAY, *Ex p.* MAY (1833), 2 L. J. Bcy. 72.

4414. ———.]—A partner previous to his marriage withdrew £1,000 from the partnership funds & presented it to his intended wife. He afterwards withdrew £1,500 more to provide for the children of the marriage, the trusts of which were declared by an antenuptial settlement. The trustees in exercise of a power given by the settlement, lent the two sums to the partnership, & took the joint bond of the partners to secure repayment:—*Held:* the joint creditors of the firm were not entitled to the dividends on the proof of the trustees during the life of bkpt. partner, until the whole £2,500 was made up to satisfy the trusts of the settlement.—*Re* LAST & CASEY, *Ex p.* CROFTS (1837), 2 Deac. 102, Ct. of R.

4415. ———.]—A wife's money was settled upon her marriage in trust after her decease for her husband for life, with remainder to the children of the marriage at twenty-one or marriage. The trustees advanced the fund to the husband, under a power to that effect. On his subsequent bkpcy.:—*Held:* the dividends accruing under the proof of the trustees should be invested & allowed to accumulate during the life of the husband, for the benefit of the children who were beneficially entitled to the fund.—*Re* WALTER, *Ex p.* WALTER'S ASSIGNEES (1859), 32 L. T. O. S. 396.

4416. Jurisdiction of court—To order payment to solicitor of judgment creditor.]—Where a solr., employed to prosecute an action for the recovery of a debt, obtains judgment on behalf of his client, & the judgment debtor becomes bkpt., the Bkpcy. Ct. has no jurisdiction to order the trustee of bkpt.'s estate to pay to the solr., on account of his costs incurred in recovering the judgment, the amount payable to the judgment creditor by way of dividend.—*Re* COOK, *Ex p.* CRIPPS, [1899] 1 Q. B. 863; 68 L. J. Q. B. 597; 80 L. T. 495; 47 W. R. 524; 43 Sol. Jo. 440; 6 Mans. 185, D. C.

4417. ——— **To order payment to assignees of creditors.**]—Certain creditors, whose proofs had been admitted, assigned their debts to resp., who applied to the county ct. in which bkpt.'s estate was being administered for an order under 1883 Act, s. 63, that the trustee should pay to resp. the dividend payable in respect of the debts so assigned:—*Held:* there was no jurisdiction to make the order.—*Re* FROST, *Ex p.* OFFICIAL RECEIVER, [1899] 2 Q. B. 50; 68 L. J. Q. B. 663; 80 L. T. 496; 47 W. R. 512; 43 Sol. Jo. 440; 6 Mans. 194, D. C.

SUB-SECT. 3.—WHAT AMOUNT PAYABLE.

4418. Must not exceed debt—Proof on securities of larger amount than debt remaining due.]—D. had without consideration given a promissory note for £500 to A. & C., who were then indebted to K. in £300. A. & C. indorsed the note to K. to enable him to raise the amount due. A. & C. went bkpt.:—*Held:* K. could prove for £500,

b. ——— ——— *After attachment of debt.*]—A judgment creditor, seeking to garnish funds due to his judgment debtor by S., served an attaching order upon the assignee of S. Before S. declared a dividend, but after the service of the attaching order, the judgment debtor assigned to G. the dividends coming to him from the estate of S.:—*Held:* the judgment creditor was entitled as against G. to the dividends from the insolvent estate based upon the amount in the hands of the assignee when the attaching order was made.—PARKER *v.* HOWE (1887), 12 P. R. 351.—**CAN.**

c. ——— *Insolvency of judgment debtor.*]—*Re* FAIR & BELL, 2 A. R. 632.—**CAN.**

Sect. 3.—*Payment and set-off of dividends: Subsects.* 3 & 4.]

under D.'s commission, his dividends not to exceed £300.—*Ex p.* KING (1786), 1 Cooke's Bankrupt Laws, 7th ed., p. 168.

Annotation :—**Distd.** *Re* Gomersall, *Ex p.* Gordon (1875), 45 L. J. Bcy. 1, C. A.

4419. —— ——.]—A bill for £200 was drawn by A. on B. payable to C., who indorsed it to D. for a debt of £147 10*s.* due from C. to D. & subsequently reduced to £46 :—*Held :* D. could prove against A. & B. for £200 until £46 received on dividends.—*Ex p.* CROSSLEY (1791), 3 Bro. C. C. 237 ; 29 E. R. 510 ; *sub nom. Ex p.* CROSLEY, 1 Cooke's Bankrupt Laws, 7th ed., p. 168.

Annotation :—**Refd.** *Re* Bentley, *Ex p.* Vere (1835), 4 Deac. & Ch. 295.

4420. —— ——.]—A creditor having securities of third persons to a greater amount than the debt, may prove & receive dividends upon the full amount of the securities to the extent of 20*s.* in the pound upon the actual debt.—*Ex p.* BLOXHAM (1802), 6 Ves. 600 ; 31 E. R. 1215.

Annotations :—**Consd.** *Re* Dyer & Swayne, *Ex p.* Solarte (1834), 3 Deac. & Ch. 419. **Refd.** *Re* Bentley, *Ex p.* Vere (1835), 4 Deac. & Ch. 295. **Mentd.** *Re* Bentley, *Ex p.* Brunskill (1835), 4 Deac. & Ch. 442.

4421. —— ——.]—Where an accommodation note, & bills of exchange, are deposited with a banker as security for a loan, he may prove for the whole amount of the note, but can only receive dividends in full payment of the balance of the loan, after deducting the other securities.—*Re* BENTLEY, *Ex p.* VERE (1835), 4 Deac. & Ch. 295 ; 2 Mont. & A. 123 ; 4 L. J. Bcy. 34, Ct. of R.

4422. —— ——.]—A. owed B. £277, &, to secure the amount, deposited with him bills to the amount of £1,518 drawn by A. & accepted by C. A. & C. both became bkpt. :—*Held :* B. might prove the full amount of the bills under the fiat against C., but not to receive dividends beyond the sum of £277.—*Re* BARKER, *Ex p.* PHILIPPS (1840), 1 Mont. D. & De G. 232, Ct. of R.

4423. —— ——.]—Where a bill of exchange for a larger amount is held as security for a debt, the holder may prove for the full amount against the estate of bkpt. acceptor, though he can only receive dividends up to the amount of his debt. —*Re* MAGNUS, *Ex p.* HODGES & HART (1865), 12 L. T. 241.

4424. —— ——.]—*Qu. :* whether it was still the rule, that the holder of an accommodation bill could prove for the full amount & receive dividends to the amount of the sum advanced by him.—*Re* GOMERSALL (1875), 1 Ch. D. 137 ; 45 L. J. Bcy. 1 ; 24 W. R. 257, C. A. ; *affd., sub nom.* JONES *v.* GORDON (1877), 2 App. Cas. 616, H. L.

Annotations :—**Distd.** *Re* Aylmer, *Ex p.* Crane (1893), 1 Mans. 391. **Refd.** Tait *v.* MacLeay, [1904] 2 Ch. 631, C. A. **Mentd.** Symons *v.* Mulkern (1882), 46 L. T. 763 ; *Re* Boyse, Crofton *v.* Crofton (1886), 55 L. T. 391 ; Oakley *v.* Boulton (1888), 4 T. L. R. 379 ; Tatam *v.* Haslar (1889), 23 Q. B. D. 345 ; *Re* Building Estates Brickfields Co., Parbury's Case, [1896] 1 Ch. 100 ; Rainford *v.* Keith & Blackman Co., [1905] 2 Ch. 147, C. A. ; Whitehorn *v.* Davison, [1911] 1 K. B. 463, C. A.

4425. —— ——.]—When a bill of exchange, accepted for the accommodation of the drawer, is deposited by him as security for a debt less than the amount of the bill, the holder is entitled to prove in the bkpcy. of the acceptor for the full amount of the bill, though he cannot receive the dividends in excess of the debt due to him by the drawer.—*Re* BUNYARD, *Ex p.* NEWTON, *Ex p.* GRIFFIN (1880), 16 Ch. D. 330 ; 50 L. J. Ch. 484 ; 44 L. T. 232 ; 29 W. R. 407, C. A.

4426. —— —— **Part payment from other parties to bill of exchange.**]—J., who was indebted to J. & W. for £191 1*s.* 1*d.*, got discounted for J. & W. at the bank a bill for £853 5*s.* 8*d.*, but J. & W. did not indorse the bill. The proceeds of the bill, when discounted, were paid to J. & W. The bill was dishonoured, & G., as indorser, paid the amount to the bank :—*Held :* G. was entitled to prove against the estate of J. & W. for the amount of the bill until he received 20*s.* in the pound on the sum due to him, viz. £342 5*s.* 7*d.*, being the amount of the bill less £319 19*s.*, the dividends received in the acceptor's bkpcy., & £191 1*s.* 1*d.*, G.'s original indebtedness to J. & W., after which he should be a trustee for the estate of J. & W. as regarded any further dividends.—*Re* GOODCHILD, *Ex p.* HUSTLER (1821), 1 Gl. & J. 9, L. C.

4427. —— —— ——.]—A creditor, holding a bill of exchange, with bkpt.'s name upon it, proved a debt, upon a deposition, stating, that he held the bill as security, & subsequently received 15*s.* in the pound upon the bill from other parties, & 5*s.* in the pound upon his proof. The creditor was restrained from receiving further dividends on the amount of the bill.—*Re* WOOD, *Ex p.* RUFFORD (1821), 1 Gl. & J. 41.

Annotation :—**Dbtd.** *Re* Peirson & Sammon, *Ex p.* Sammon (1832), 1 Deac. & Ch. 564.

See 1914 Act, Sched. II., r. 18.

4428. —— **& interest thereon.**]—Where bkpt. offered to pay what was reported due to the creditors under the commission, but the creditors insisted upon interest likewise from the date of the report :—*Held :* bkpt. should pay the principal & interest in a month to all the creditors.—*Ex p.* ROOKE (1753), 1 Atk. 244 ; 26 E. R. 156.

4429. —— —— **Accommodation bill.**]—B. & Co., being largely indebted to R. & Co., indorsed to them various bills, which had been drawn or indorsed by C. & Co. for the accommodation of B. & Co. B. & Co. & C. & Co., respectively became bkpt., & R. & Co. proved the bills under each commission :—*Held :* the estate of C. & Co. was a security to make good the amount of principal & interest due to R. & Co. from B. & Co., & R. & Co. were entitled to receive dividends on their proof under C. & Co.'s commission, until not only the balance of the principal sum due from B. & Co., but all interest thereon, was fully satisfied.—*Re* CALDWELL, *Ex p.* REED (1833), 3 Deac. & Ch. 481, Ct. of R.

4430. —— **Proceeds of estate abroad received by creditor.**]—A creditor proved against A. in India & received dividends on the whole debt. By virtue of his diligence he received the proceeds of the sale of an estate belonging to A. in Java which did not pass to his assignees :—*Held :* the creditor was entitled to further dividends provided same did not amount to more than 20*s.* in the pound on the actual debt.—COCKERELL *v.* DICKENS (1840), 3 Moo. P. C. C. 98 ; 2 Moo. Ind. App. 353 ; 1 Mont. D. & De G. 45 ; 13 E. R. 45, P. C.

Annotation :—**Refd.** Banco De Portugal *v.* Waddell (1880), 42 L. T. 698, H. L.

PART XIII. SECT. 3, SUB-SECT. 3.

4428 i. *Must not exceed debt—& interest thereon—Promissory notes.*]—A., who was indebted to a bank at the date of its suspension, both on current account & upon promissory notes, assigned for the benefit of creditors, & the amount of the current account & notes was placed opposite the names of the liquidators as the sum due to them. The debts were paid as the instalments became due, & the liquidators received instalments both on the current account & the notes, & accepted such instalments as payment on the current account, but claimed they were entitled to interest on the notes.—*Held :* they were not entitled to interest.—GILLARD *v.* PITTS (1901), 8 Nfld. L. R. 471.—**NFLD.**

4431. Must not exceed amount actually advanced for premiums—Proof on capitalised value of covenant to pay premiums—Death of insured after declaration but before payment of dividend.]—By a marriage settlement a fund was impressed with a trust to pay such premiums upon policies of assurance on the husband's life, assigned by the husband to the trustees, as he should fail to pay, & the husband covenanted with the trustees to pay the premiums. In 1871 the husband filed a liquidation petition, after which the trustees paid the premiums out of the wife's life estate. The husband's covenant was valued at £2,053 8*s.* & a claim for that amount was admitted as a proof. A dividend of 10*s.* was declared, but before the amount reached the hands of the trustees the husband died. At that time the sums which had been disbursed by the trustees amounted to £766 5*s.* :—*Held :* the trustees were not entitled to receive the whole dividend which had been declared, but only the amount of their payments for premiums with such interest as the dividend had been actually making.—*Re* MILLER, *Ex p.* WARDLEY (1877), 6 Ch. D. 790 ; 37 L. T. 38 ; 25 W. R. 881.

Annotation :—**Distd.** *Re* Pannell, *Ex p.* Bates (1879), 11 Ch. D. 914, C. A.

4432. Must not exceed proper proportion of debt payable by bankrupt surety—Proof by solvent sureties against bankrupt co-surety for full amount of debt.]—One of three co-sureties executed a deed of assignment in favour of his creditors. The principal debtor, a co., went into liquidation, & the creditor claimed against the estate of bkpt. surety. The two other co-sureties paid off the principal creditor, & took an assignment of the whole debt & the benefit of the creditor's claim against bkpt. co-surety :—*Held :* the solvent co-sureties were entitled to prove against the estate of bkpt. co-surety for the whole amount of the debt, but not to receive dividends amounting to more than the proportion of the whole debt for which bkpt. co-surety was liable, namely one-third.—*Re* PARKER, MORGAN *v.* HILL, [1894] 3 Ch. 400 ; 64 L. J. Ch. 6 ; 71 L. T. 557 ; 43 W. R. 1 ; 38 Sol. Jo. 694 ; 7 R. 590, C. A.

4433. Breach of trust—Right to receive full amount from one trustee—Irrespective of sum received on compromise with co-trustee.]—Where an action has been brought by pltfs. as beneficiaries under a settlement to enforce liability against trustees for a breach of trust, & a sum has been certified to be due from the insolvent estate of a deceased trustee, & from the other trustees, pltfs. will be entitled to prove against the insolvent estate for the full amount of the sum certified to be due. The liability of all the trustees being joint & several, until pltfs. have received 20*s.* in the pound they are entitled to claim the whole debt from any one trustee, notwithstanding that another trustee has made a payment by way of compromise in respect of his several liability.—EDWARDS *v.* HOOD-BARNES, [1905] 1 Ch. 20 ; 74 L. J. Ch. 167 ; 91 L. T. 766 ; 21 T. L. R. 89.

See, also, Nos. 2677, 2683, *ante.*

SUB-SECT. 4.—POSTPONEMENT OF PAYMENT.

See, now, 1914 Act, s. 64, & 1915 Rules, r. 268.

4434. Bill of exchange transactions not adjusted.]—C., on Jan. 10, drew upon G. for £69 payable to S. or order three months after date, & G., on Mar. 24, drew on T. for £200 payable to C. or order two months after date, & T. accepted. On the same day C. & G. settled accounts, & G. charged C. with the £69 & £200, making in all a balance of £515 against C., who drew two drafts on H. & Co. for £300 & £215, payable in six months to C. or order, who immediately discounted them with S. & Co. On Apr. 17 G. failed, not having paid the £69 bill. T. also failed, & refused to pay the £200 bill. C. took up the £69 bill, & never received any part of the other :—*Held :* C. was entitled to prove against G.'s estate for the £269, the dividend to be stayed, till the account in respect of the other bills was adjusted.—*Ex p.* CLANRICARDE (LORD) (1787), 1 Cooke's Bankrupt Laws, 8th ed., p. 182.

Annotations :—**Distd.** Sarratt *v.* Austin (1811), 4 Taunt. 200. **Consd.** *Re* Dyer & Swayne, *Ex p.* Solarte (1834), 3 Deac. & Ch. 419.

4435. ——.]—A. gives an accommodation bill to B., which B. gives to C. in exchange for an accommodation bill given by C. to B. A.'s bill is provable by the assignees of C. against the estate of A., but the dividend reserved.—*Re* DYER & SWAYNE, *Ex p.* SOLARTE (1834), 1 Mont. & A. 270 ; 3 Deac. & Ch. 419.

4436. —— Security for bill of exchange transferred & proved against estate.]—A. being a *bonâ fide* holder of two bills accepted by bkpt., for the payment of which he also held a security, transferred the security to B., who proved for the amount under the fiat :—*Held :* such proof did not prevent the right of A. to prove also on the bills, though it might be a question for future consideration, whether he would be entitled to receive dividends on such proof.—*Re* BARHAM, *Ex p.* —— (1840), 1 Mont. D. & De G. 179, Ct. of R.

4437. Inquiry as to bankrupt's effects.]—An acceptor for the honour of the drawer of a bill of exchange originally accepted by bkpts., having taken up the bill, ought, if bkpts. have no effects in their hands, to resort first to the drawer, & though his proof was permitted to stand, the dividend was restrained for an inquiry, whether bkpts. had effects, & if not, whether the person, who so took up the bill, had effects of the drawer at the time or since.—*Ex p.* WACKERBATH (1800), 5 Ves. 574 ; 31 E. R. 745.

4438. Creditor alien enemy.]—An alien enemy creditor's claim was admitted in bkpcy., reserving the dividend.—*Ex p.* BOUSSMAKER (1806), 13 Ves. 71 ; 33 E. R. 221.

Annotations :—**Consd.** Willison *v.* Patteson (1817), 1 Moore, C. P. 133 ; Porter *v.* Freudenberg, Kreglinger *v.* Samuel & Rosenfeld, *Re* Merten's Patents, [1915] 1 K. B. 857, C. A. ; Rodriguez *v.* Speyer (1918), 119 L. T. 409, H. L. **Refd.** Daimler Co. *v.* Continental Tyre & Rubber Co., [1916] 2 A. C. 307, H. L. ; Naylor, Benzon *v.* Krainische Industrie Gesellschaft, [1918] 1 K. B. 331. **Mentd.** Rombach *v.* Gent (1915), 31 T. L. R. 492 ; *Re* Hilckes, *Ex p.* Muhesa Rubber Plantations, [1917] 1 K. B. 48, C. A. ; Speyer *v.* Rodriguez (1917), 87 L. J. K. B. 171, C. A.

4439. Part payment of debt received in suspicious circumstances.]—Where a creditor has received payment of part of the debt, in such circumstances as to render it questionable whether he ought not to refund that payment, the proper course is to allow the proof, but to retain the dividends upon it till the question is determined.—*Re* PULLAN, *Ex p.* ACKROYD (1824), 1 Gl. & J. 391 ; 2 L. J. O. S. Ch. 158.

Annotations :—**Consd.** *Re* Champion, *Ex p.* Reay (1834), 4 Deac. & Ch. 525 ; *Re* Thompson, *Ex p.* Dobson (1834), 4 Deac. & Ch. 69. **Mentd.** *Re* Stanton (1846), 7 L. T. O. S. 119, 32 L. T. O. S. 288.—**IR.**

PART XIII. SECT. 3, SUB-SECT. 4.

d. *Debt founded on felony.*]—Where a debt is founded on a felony, the dividend will be reserved until there is time to proceed with the prosecution.—*Re* M'MASTER (1858),

e. ——.]—Where a debt arises in circumstances which would support a charge of felony, & the creditor has not first prosecuted bkpt., application may be made in the name of the Crown to stay the payment of a dividend.—*Re* WATERS, *Ex p.* CITY ADVANCE CO. (1887), 5 N. Z. L. R. 449.—**N.Z.**

f. *Sequestration in Scotland—Pending Chancery proceedings in England.*]—PHOSPHATE SEWAGE CO. *v.* MOLLESON (1876), 14 Sc. L. R. 1.—**SCOT.**

Sect. 3.—*Payment and set-off of dividends: Subsects.* 4 & 5. *Sect.* 4.]

4440. Creditor having property belonging to estate.]—The fact that a creditor has property belonging to the estate in his possession, is a ground to restrain payment of the dividends.—*Re* THOMPSON, *Ex p.* DOBSON (1834), 1 Mont. & A. 666; 4 Deac. & Ch. 69; 3 L. J. Bcy. 117, Ct. of R.

Annotations:—**Mentd.** *Re* Smith, *Ex p.* Brand (1836), 5 L. J. Bcy. 57, Ct. of R.; *Re* Stanton (1846), 7 L. T. O. S. 119; *Re* Morton, *Ex p.* Robertson (1875), L. R. 20 Eq. 733.

See, also, Nos. 4457, 4458, *post.*

4441. Proceeds of estate abroad received by creditor—Estate incapable of forming part of fund available for creditors.]—A creditor proved against the estates of A. in India & received dividends on the whole debt. He also received the proceeds of sale of an estate of the insolvent in Java, which did not pass to insolvent's assignees:—*Held:* he ought not to be prevented from receiving other dividends.—COCKERELL *v.* DICKENS (1840), 3 Moo. P. C. C. 98; 2 Moo. Ind. App. 353; 1 Mont. D. & De G. 45; 13 E. R. 45, P. C.

Annotation:—**Refd.** Banco De Portugal *v.* Waddell (1880), 42 L. T. 698, H. L.

4442. Action pending against creditor to have him declared partner of bankrupt.]—The ct. will not suspend the payment of a dividend, on the ground of a pending action against the creditor, in which it is sought to charge him as a partner with bkpt., after the very same question has been litigated by petitioner, & decided upon by the ct.—*Re* VANDERPLANK, *Ex p.* TURQUAND (1841), 2 Mont. D. & De G. 339; 11 L. J. Bcy. 1; 6 Jur. 67, Ct. of R.

4443. Rights of property requiring to be established in court of law.]—Bkpt. bought five hogsheads of sugar. Three were delivered before the bkpcy., but the other two had been stopped *in transitu*:—*Held:* proof as to the three hogsheads delivered should be received, but the right of the vendor to the property retained being questionable, the dividend should be retained until the right to the property was established in a ct. of law.—*Re* STANTON (1846), 7 L. T. O. S. 119.

4444. Creditor not having elected not to prove under insolvency abroad.]—A firm abroad drew bills of exchange on one of its own partners, trading on his own account in England, payable to an agent of the foreign govt. The bills were not paid. Process of insolvency issued against the foreign firm, & a commission against the English partner:—*Held:* the agent might prove under the commission, but would be restrained from receiving dividends, unless he elected not to prove under the insolvency abroad.—*Re* VANYELLER, *Ex p.* CHEVALIER (1834), 1 Mont. & A. 345, L. C.

Annotation:—**Apld.** *Re* Deane, *Ex p.* Goldsmid (1857), 1 De G. & J. 257.

4445. Dividends received in foreign bankruptcy—Not refunded.]—Two firms, one composed of A. & B., the other of A., B. & C., carried on business at Liverpool & Pernambuco respectively. An English adjudication of bkpcy. was made against A. & B., & the holder of a bill of exchange drawn by A., B. & C. on A. & B. proved under it & received a dividend. Afterwards A., B. & C. failed in Pernambuco, & the same creditor proved & received dividends on his bill under that liquidation:—*Held:* he ought not to receive any further English dividend without refunding the Brazilian dividends.—*Re* DEANE & YOULE, *Ex p.* MELLOR, *Ex p.* SMITH (1862), 3 De G. F. & J. 760; 31 L. J. Bcy. 60; 6 L. T. 268; 10 W. R. 276; 45 E. R. 1073, L. JJ.

4446. —— Must be brought into account in English bankruptcy.]—D., who carried on business in England under the firm of D. & Co., & in Brazil under the firm of D., L. & Co., executed a deed of assignment of all his property for the benefit of his creditors. His Brazilian assets were administered under a concordata, a proceeding analogous to bkpcy., under which, by the law of Brazil, the creditors whose debts were contracted in the name of the Brazilian firm had priority. The holders of bills of exchange drawn by D., L. & Co. upon, & accepted by, D. & Co., proved in Brazil, & received a dividend. They then claimed to prove in England:—*Held:* they could not receive a dividend in England, until all the creditors had received a dividend at the same rate as the Brazilian dividend. *Re* DOUGLAS, *Ex p.* WILSON (1872), 7 Ch. App. 490; 41 L. J. Bcy. 46; 26 L. T. 489; 20 W. R. 564, L. JJ.

Annotations:—**Folld.** *Re* Hooper, *Ex p.* Banco de Portugal (1879), 11 Ch. D. 317, C. A. **Apprvd.** Banco de Portugal *v.* Waddell (1880), 5 App. Cas. 161, H. L. **Consd.** *Re* Somes, *Ex p.* De Lemos (1896), 23 Mans. 131.

4447. —— ——.]—Where traders possess two properties, one situated abroad, & the other situated in England, & there has been a petition for adjudication there, followed immediately, in point of date, by proceedings in insolvency abroad, & the foreign ct. takes possession of the foreign property, as under a *cessio bonorum*, & employs it in paying the foreign creditors a dividend, such creditors cannot afterwards prove under the English adjudication, except on the condition of first accounting for what they have received abroad.—BANCO DE PORTUGAL *v.* WADDELL (1880), 5 App. Cas. 161; 49 L. J. Bcy. 33; 42 L. T. 698; 28 W. R. 477, H. L.; *affg.* S. C. *sub nom. Re* HOOPER, *Ex p.* BANCO DE PORTUGAL (1879), 11 Ch. D. 317, C. A.

Annotation:—**Refd.** *Re* Somes, *Ex p.* De Lemos (1896), 3 Mans. 131.

4448. —— —— Only where property abroad recovered by process.]—The rule that a creditor proving under an English bkpcy. cannot take the benefit of the English law without bringing into the common fund any part of bkpt.'s estate which he may have already received abroad, applies only to property obtained by process in the foreign country, not to property to which the proving creditor is entitled by the law of the foreign country.—*Re* SOMES, *Ex p.* DE LEMOS (1896), 3 Mans. 131.

See, also, Nos. 3523, 3923–3925, *ante.*

SUB-SECT. 5.—SET-OFF.

4449. Against debt due by creditor—To assignee personally.]—A person became bkpt. & a commission issued against him & assignees were duly appointed, & a dividend of 6*s.* 1*d.* in the pound was ordered amongst the creditors. One of the creditors, who was entitled to £61 as his proportion of the dividend, was an insolvent person & he was indebted to the assignee on account of being a co-surety with him in some bonds which the assignee had paid off with his proper money. The assignee claimed to retain the £61:—*Held:*

g. *Inquiry as to existence of alleged trust.*]—One deft. having been served as assignee of bkpt.:—*Held:* on petition in the bkpcy. without putting the party to the expense of a bill, it was competent to give construction & effect to certain acts alleged to constitute a trust, & although the order for payment out of the money could not be suspended, yet, upon a *primâ facie* case being made, a dividend might be restrained until the decision of the case, to be made by petition.—LUSCOMBE *v.* CALLAGHAN (1828), 1 Mol. 204.—IR.

the assignee was entitled to retain the £61 towards satisfying himself.—*Ex p.* NOCKOLD (1734), 1 Cooke's Bankrupt Laws, 8th ed. p. 509, L. C.

Annotations :—**Dbtd.** *Re* Henley, Thurgood, *Re* Fairhead (1863), 11 W. R. 1021.

4450. —— ——.]—An assignee cannot stop a person's share in a dividend, on account of his own private debt owing to him from that person. —*Ex p.* WHITE (1742), 1 Atk. 90 ; 26 E. R. 59, L. C.

Annotations :—**Refd.** Green *v.* Weston (1837), 3 My. & Cr. 385, L. C. ; *Re* Henley, Thurgood, *Re* Fairhead (1863), 11 W. R. 1021.

4451. —— ——.]—Inspectors under a deed framed under 1861 Act, s. 192, cannot retain & set off a dividend declared & due to a creditor against their personal demand against the creditor. —*Re* HENLEY, THURGOOD & CO., *Re* FAIRHEAD & CO. (INSPECTORSHIP) (1863), 11 W. R. 1021.

4452. —— —— **Right to dividends assigned—Before debt incurred.**]—Bkpt. was indebted to B., who, after two dividends had been declared, assigned his rights to trustees for the benefit of his creditors. The assignees claimed to deduct the costs on a bill which had been filed against them by B. & dismissed, subsequent to the assignment :—*Held :* as B. had assigned his debt before the assignees were entitled to claim the costs, the personal demand which the assignees had against B. for the costs could not be set-off against the dividends.—*Re* KIRK, *Ex p.* WHITEHEAD (1821), 1 Gl. & J. 39.

4453. —— —— ——.]—A creditor assigned for value all her claims against bkpt., & her assignees lodged a proof against bkpt.'s estate, which was admitted. A dividend became payable in respect of the proof :—*Held :* the trustee was entitled to retain the dividend against two sums of taxed costs which the creditor had been ordered to pay to him, as to one sum before, & as to the other after the assignment.—*Re* MAYNE, *Ex p.* OFFICIAL RECEIVER, [1907] 2 K. B. 899 ; 76 L. J. K. B. 1086 ; 97 L. T. 644 ; 23 T. L. R. 758 ; 51 Sol. Jo. 704 ; 14 Mans. 261.

4454. —— **To one of two assignees personally.**]—One of two assignees was not allowed to set off his own debt against the amount of dividend payable to a creditor under the fiat, although he swore that the creditor had agreed to allow such set-off.—*Re* HOWARTH, *Ex p.* BAILEY (1840), 1 Mont. D. & De G. 263.

Annotation :—**Refd.** *Re* Henley, Thurgood, *Re* Fairhead (1863), 11 W. R. 1021.

4455. —— **In respect of disbursements made by assignees—Bill of exchange transactions.**]—A. & B. were bkpts. Proof in respect of a cash balance due from A. to B. was allowed, but the dividends retained, to reimburse the estate of A. what it should overpay upon a distinct transaction, an advance of bills from A. to B., some of which were dishonoured.—*Ex p.* METCALFE (1805), 11 Ves. 404 ; 32 E. R. 1143.

Annotation :—**Distd.** *Re* Living, *Ex p.* Laforest, *Ex p.* Wetherell (1833), 2 Deac. & Ch. 199.

4456. —— —— **Repayment of mortgage on creditor's property.**]—A. & B. entered into partnership as brewers, A. bringing in his share of the capital a brewhouse & other premises, which were subject to mtges. for debts due by him. A. retired from the business, which was continued by B. alone, who agreed to take the brewhouse, etc., at a valuation, but the amount was not to be paid till the mtges. were satisfied. B. became bkpt. & the mtge. debts remaining unpaid, his assignees, before any proof made in respect of A.'s debt, paid off the mtges. :—*Held :* the assignees were entitled to deduct the sums paid by them from the dividends on the sum which was due to A. from B. at the time of his bkpcy.—ROWE *v.* ANDERSON (1831), 4 Sim. 267 ; 58 E. R. 100.

4457. Against funds of estate in hands of bankrupt creditors—Bankers under commission.]—Bankers, appointed under a commission of bkpcy., becoming bkpt., their estate cannot have any dividend on a debt previously due to them, until the whole, received by them as bankers to that estate, has been accounted for.—*Ex p.* BEBB (1812), 19 Ves. 222 ; 34 E. R. 501, L. C.

4458. —— ——.]—The banker appointed under a commission of bkpcy. becoming bkpt., his estate is not entitled to any dividend on a debt, proved by him against the other, until full reimbursement of all property of that estate, beyond the amount of his dividend.—*Ex p.* GRAHAM (1814), 3 Ves. & B. 130 ; 35 E. R. 428, L. C.

Annotation :—**Apld.** *Re* Charles, *Ex p.* Bignold (1817), 2 Madd. 470.

See, also, No. 4440, *ante*.

4459. —— **As assignee under the commission.**]—An assignee becoming bkpt. with money in his hands, his estate is not entitled to any dividend on the proof made by him under the estate of which he was assignee, until full reimbursement of the money which such assignee had in his hands.—*Re* CHARLES, *Ex p.* BIGNOLD (1817), 2 Madd. 470 ; 56 E. R. 408.

4460. Against over-payment of previous dividends —Interest on excess allowed.]—A creditor, after proving his debt, received £500 under a collateral security on property of bkpt., & was subsequently paid dividends on the full amount of his proof until application for a final dividend, when the receipt of the £500 became known :—*Held :* the dividends on the £500 must be deducted from the final dividend, & the creditor must be charged with interest at 5 per cent. on the excess of dividends actually received from time to time over what would have been receivable, if the proof had been properly reduced.—*Re* GRANT, *Ex p.* GRAHAM (1863), 33 L. J. Bcy. 1 ; 9 L. T. 278 ; 10 Jur. N. S. 1 ; 12 W. R. 1, L. C.

SECT. 4.—PROVISION OF RESERVE FOR DIVIDENDS.

4461. Claim for breach of trust—Subject of suit in equity.]—Pltfs. in equity claiming to be admitted as creditors under a fiat in bkpcy., in respect of a breach of trust by bkpts., which was the subject of the suit in equity, applied, on a dividend of bkpts.' estate being about to be declared, to be allowed to enter a claim upon the proceedings, & to have a fund reserved. The application was refused.—THOMPSON *v.* DERHAM, THOMPSON *v.* GOODMAN (1842), 1 Hare, 358 ; 66 E. R. 1071 ; *subsequent proceedings, sub nom. Re* DERHAM, *Ex p.* THOMPSON, 2 Mont. D. & De G. 761, Ct. of R. ; (1844), 8 Jur. 633, L. C.

Annotations :—**Consd.** Laycock *v.* Johnson (1847), 6 Hare, 199. **Mentd.** Preston *v.* Wilson (1846), 5 Hare, 185.

4462. Debt of secured creditor—Who has neither realised nor valued security.]—A trustee, on declaring a dividend, is not bound to make a reserve in respect of a proof by a secured creditor, who has not realised or put a value on his security In such a case the creditor has no debt provable

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PART XIII. SECT. 4.

h. *Claim to rank as creditor.*]—Where a claim is made to rank as a creditor against the estate of bkpt., the assignee ought to provide for the claim in declaring a dividend.—*Re* MACGREGOR, *Ex p.* MACGREGOR (1888), 7 N. Z. L. R. 241.—**N.Z.**

Sect. 4.—Provision of reserve for dividends. Sects. 5 & 6.]

until he has realised or valued his security.—*Re* LEE, *Ex p.* GOOD (1880), 14 Ch. D. 82 ; 49 L. J. Bcy. 49 ; 42 L. T. 450 ; 28 W. R. 553, C. A.

4463. Debt of which trustee had notice.]—G. & Co., who were entered upon debtor's statement of affairs as fully secured creditors, in Apr., 1873, commenced negotiations with the trustees in the liquidation for a joint sale of the property comprised in their securities, & a memorandum of the terms was drawn up. In Aug., 1874, the negotiations ended in a definite agreement being concluded in the terms of the memorandum. One of the terms of the agreement was to the effect that, if the securities held by G. & Co. did not realise sufficient to pay their debt & expenses, they should be entitled to prove for the balance. In May, 1874, a dividend of 2*s.* 6*d.* in the pound was paid to all the creditors who had proved their debts, but no notice of the declaration of the dividend or payment was given to G. & Co. Some of the securities having been realised, & the rest being regarded as of no value, G. & Co. in Sept., 1878, sent in a proof for £1,017 2*s.* 9*d.*, the balance of the amount due to them, & claimed to be paid a dividend of 2*s.* 6*d.* in the pound thereon :—*Held :* the trustees having had plain notice of the claim of G. & Co., ought to have set aside a reserve under 1870 Rules, r. 312, & the dividend claimed must be paid.—*Re* COLE, *Ex p.* SNELL (1880), 42 L. T. 62.

4464. Effect of failure to provide reserve—For legal expenses—Right to sue creditors for excess dividends.]—FIGG *v.* HEGARTY, No. 4488, *post.*

SECT. 5.—STAY OF DIVIDENDS.

4465. Discretion of Lord Chancellor—Inequity arising between joint & separate creditors.]—Discretion of the Lord Chancellor to stay a dividend in bkpcy. for the general benefit of the creditors. Not exerted to increase the dividend by throwing joint creditors of bkpts. & a deceased partner upon his assets in favour of creditors of the survivors only, the equity of joint creditors against the surplus of the separate estate, though the debt survives at law, being open to equitable circumstances, upon the state of the accounts, or subsequent dealing with the survivors, which may discharge the assets, & the equitable arrangement, confining creditors to one of two funds, being admitted only in favour of creditors of the same debtor, except upon some special equity, as in the case of drawer & acceptor or principal & surety.—*Ex p.* KENDALL (1811), 17 Ves. 514 ; 34 E. R. 199.

Annotations :—**Consd.** Devaynes *v.* Noble, Sleech's Case (1816), 1 Mer. 539 ; Devaynes *v.* Noble, Baring *v.* Noble (1831), 2 Russ. & M. 495, L. C. ; Wilkinson *v.* Henderson (1833), 2 L. J. Ch. 190 ; Winter *v.* Innes (1838), 4 My. & Cr. 101, L. C. **Refd.** Thorpe *v.* Jackson (1837), 2 Y. & C. Ex. 553 ; Brown *v.* Gordon (1852), 16 Beav. 302 ; Lodge *v.* Pritchard (1863), 2 New Rep. 537, L. JJ. ; Kendall *v.* Hamilton (1879), 4 App. Cas. 504 ; *Re* Stratton, *Ex p.* Salting (1883), 49 L. T. 694, C. A. **Mentd.** Lyth *v.* Ault & Wood (1852), 7 Exch. 669.

See, further, Part XI., *ante ;* PARTNERSHIP.

4466. Jurisdiction of Chancery Court—As regards distribution of estate.]—Pltfs. in equity claiming to be admitted as creditors under a fiat in bkpcy., in respect of a breach of trust by bkpts., which was the subject of the suit in equity, applied, on a dividend of bkpt.'s estate being about to be declared, to be allowed to enter a claim upon the proceedings, & to have a fund reserved. The application having been refused by the Ct. of Review, a supplemental bill was filed, praying an injunction to restrain the assignees from paying any dividend which might be declared until the cause in equity was heard, or without reserving a sufficient fund to answer pltf.'s demand :—*Held :* if the Ct. of Ch. had jurisdiction to interfere in the distribution of the estate of bkpt. the ct. ought, upon general principles, after an adjudication in bkpcy. on the subject of the distribution, to refrain from exercising such jurisdiction. *Semble :* the ct. had no jurisdiction to interfere in the mere distribution of the estate of bkpt. either on the ground of trust or otherwise.—THOMPSON *v.* DERHAM, THOMPSON *v.* GOODMAN (1842), 1 Hare, 358 ; 66 E. R. 1071 ; *subsequent proceedings, sub nom. Re* DERHAM, *Ex p.* THOMPSON, 2 Mont. D. & De G. 761, Ct. of R. ; (1844), 8 Jur. 633, L. C.

Annotations :—**Refd.** Preston *v.* Wilson (1846), 5 Hare, 185 ; Laycock *v.* Johnson (1847), 6 Hare, 199.

4467. Jurisdiction of Bankruptcy Court—Creditor prevented from proving by special circumstances.]—If, by reason of any special circumstances, a secured creditor is prevented from realising his security before a dividend is declared by the trustee, his proper course is to apply to the ct. to postpone the dividend, & the ct. has power to give such directions as may be proper to prevent any injustice being done.—*Re* LEE, *Ex p.* GOOD (1880), 14 Ch. D. 82 ; 49 L. J. Bcy. 49 ; 42 L. T. 450 ; 28 W. R. 553, C. A.

See 1915 Rules, r. 268.

4468. Granted under earlier Acts—Creditor failing to prove—Through mistake of solicitor.]—Where a creditor sent up the proper documents to prove his debt at a dividend meeting, & his solr. forgot the day, another meeting was appointed at his expense to enable him to prove his debt, the payment of the dividend being ordered to be stayed meantime, & to be calculated afresh, in case he

4463 i. *Debt of which trustee had notice.*]—A trustee of an insolvent estate should, before declaring dividend, retain in his hands a sum sufficient to meet proofs delivered or sent in, but which may or may not be established ; & if, without doing so, he divides all the proceeds of the estate that he has collected amongst the creditors whose proofs have been admitted, he acts at his own risk, & is liable to creditors whose proofs have been so delivered or sent in, & are subsequently admitted. —*Re* BENNESS (1890), 16 V. L. R. 691.—**AUS.**

4463 ii. ——.]—Debtor, being unable to pay his creditors in full, made an assignment to deft. for their benefit. Deft. advertised for all creditors to send in their claims & by his clerk sent notices to each creditor from a list furnished by the assignor to the clerk, which list he said must have contained the names of pltfs. & C. & Co., who had assigned a claim they had to pltfs. No claim was sent in under the notice by either pltfs. or C. & Co., & deft. distributed the estate without regard to pltfs. or C. & Co. Deft. had debtor's books, in which there was a credit to pltfs. & C. & Co., & debtor told him before he divided the estate that C. & Co. had sued him, & on the day of the division he received a letter from pltfs.' solr. notifying him. No proof was given of the posting of the individual notices to either pltfs. or C. & Co. :—*Held :* deft. had notice of pltfs.' claim, & he was liable to pltfs. for their & C. & Co.'s proper dividend on the estate.—CARLING BREWING & MALTING CO. *v.* BLACK (1884), 6 O. R. 441.—**CAN.**

4463 iii. ——.]—Where no claim is made to rank as a creditor against the estate of bkpt. nor proof put in, the assignee is not obliged to provide for the claim in declaring a dividend, though he has notice that a debt is alleged to exist.—*Re* MACGREGOR, *Ex p.* MACGREGOR (1888), 7 N. Z. L. R. 241.—**N.Z.**

4463 iv. ——.]—Where S., the trustee of the insolvent estate of F., with full knowledge of a judgment obtained for municipal rates, subsequently distributed all the assets in the estate without making provision for the payment of the debt, which could have been met in full out of the assets : —*Held :* S. should be ordered to pay the debt & costs *de bonis propriis.*—CAPE TOWN COUNCIL *v.* FALCONER'S TRUSTEE (1901), 18 S. C. 95.—**S. AF.**

substantiated his proof.—*Re* GRAHAM & TATE (1833), 2 Deac. & Ch. 554, Ct. of R.

4469. —— —— Through laches—Offer of indemnity for costs occasioned.]—Where the omission to prove was due to the creditor's own laches :—*Held :* the ct. would not order the payment of a dividend to be stayed so that, in the meantime, the creditor might call a meeting of the comrs. to enable him to prove, although he offered to indemnify the estate against the expenses of the order & of any additional meeting that might be necessary to enable him to prove his debt.—*Re* SMITH, *Ex p.* BREES (1833), 3 Deac. & Ch. 283, Ct. of R.

See 1914 Act, ss. 64, 65.

4470. —— —— Mislead by intended composition.]—Where a creditor delayed proving his debt, in consequence of having been misled by an intended composition of bkpt. with his creditors, the ct. allowed him to call a meeting to establish his proof, &, in the meantime, stayed the payment of a dividend.—*Re* MEYER, *Ex p.* HUNT (1837), 2 Deac. 213 ; 6 L. J. Bcy. 51, Ct. of R.

See 1915 Rules, r. 268.

4471. —— —— Fraud, accident or mistake.]—Where a creditor has been guilty of gross negligence in omitting to prove his debt, or to enter a claim upon the proceedings, the ct. will not stay the payment of a dividend, to enable him to go in & prove, although he may stand in the character of a trustee.

The only ground for staying the payment of a dividend in favour of a creditor who has not proved is where the creditor has been prevented from proving by fraud, accident, or mistake.—*Re* BOUTLAND, *Ex p.* TODD (1837), 2 Deac. 416 ; 1 Jur. 434, Ct. of R.

See 1914 Act, s. 65.

4472. —— —— At final dividend meeting.]—Where a creditor through inadvertence omits to prove at the final dividend meeting, the ct. will allow him to call a fresh meeting for that purpose at his own costs & will rescind the former dividend.—*Re* HOLLAND, *Ex p.* DILWORTH (1842), 3 Mont. D. & De G. 63 ; 7 Jur. 95, Ct. of R.

See 1914 Act, s. 67.

4473. —— —— No dividend declared in ten years.]—Dividend stayed to give opportunity of proving to creditors who had delayed proving for eleven years, no dividend having been declared for upwards of ten years after the fiat issued.—*Re* PULVERTOFT, *Ex p.* STURTON (1846), De G. 341.

See 1914 Act, s. 62.

4474. —— Appeal pending against order to admit proof—Fund set apart to meet dividend if appeal unsuccessful.]—Pending an appeal from an order directing the admission of a proof a dividend meeting was held, &, on the assignees opposing payment of the dividend upon such proof, it was withheld, a fund being set apart to answer it. The creditor then presented a petition praying that the dividend might be stayed generally & that the costs might be paid by the comrs. personally or by the assignees, or otherwise out of the estate. On the petition & a corresponding affidavit he obtained *ex parte* an order staying the dividend generally. The appeal was determined in his favour :—*Held :* the ct. would never have made the order, had it been informed of the reservation of the fund, & the petition must be dismissed, as against the comrs., with costs.—*Re* CALDECOTT, *Ex p.* DAVIDSON (1841), 2 Mont. D. & De G. 375, Ct. of R.

See 1914 Act, s. 64.

SECT. 6.—REFUND OR DISTURBANCE OF DIVIDENDS PAID.

4475. Refund—Claim by Crown against estate arising after final distribution.]—In 1710 A. for himself & others imported some wine, & by a mistake of a clerk in the custom house the Crown was defrauded in its duties of £535. On discovery of the mistake in 1715 an information was brought, & a decree was subsequently made that, though the importation & entry was only by A., yet all the partners who were so at the time of importation were liable in the whole to the Crown. A. became a bkpt. in 1715, & B., the assignee, contended, in his answer to an English information brought by the A.-G. in 1721, that he had long since made a distribution of all the effects of A. to the creditors, so that he had nothing left in his hands :—*Qu. :* whether the £535 was a debt so vested in the Crown that the assignee could come upon the effects so distributed.—A.-G. *v.* STRANYFORTH (1721), Bunb. 97 ; 145 E. R. 608.

4476. —— Dividend on improperly admitted proof—Debt proved on statute barred.]—A debt, which could not be recovered in an action against a plea of Stat. Limitations, nor in equity by analogy to it, is not provable under a commission of bkpcy., & any dividends paid on it must be refunded.—*Ex p.* DEWDNEY, *Ex p.* SEAMAN (1809), 15 Ves. 479 ; 33 E. R. 836 ; *subsequent proceedings, sub nom. Re* DEWDNEY, *Ex p.* ROFFEY (1815), 19 Ves. 468 ; 2 Rose, 245, L. C.

Annotations :—**Distd.** Jellis *v.* Mountford (1821), 4 B. & Ald. 256. **Consd.** Shewen *v.* Vanderhorst (1831), 1 L. J. Ch. 107. **Distd.** *Re* Brakenridge (1847), 10 L. T. O. S. 249. **Consd.** Fuller *v.* Redman (1859), 26 Beav. 614 ; Adams *v.* Waller (1866), 35 L. J. Ch. 727. **Apld.** *Re* Fleetwood & District Electric Light & Power Syndicate, [1915] 1 Ch. 486. **Mentd.** Burke *v.* Jones (1813), 2 Ves. & B. 275 ; Mayor *v.* Pyne (1825), 3 Bing. 285 ; Jones *v.* Scott (1830), 1 Russ. & M. 255, L. C. ; *Re* Baillie, *Ex p.* Greenwood (1834), 3 Deac. & Ch. 398 ; Briggs *v.* Wilson (1853), 5 De G. M. & G. 12, L. JJ. ; Midgley *v.* Midgley, [1893] 3 Ch. 282, C. A. ; *Re* Worsley, [1901] 1 K. B. 309, C. A.

See, also, Nos. 3114, 4381, *ante, &, generally,* LIMITATION OF ACTIONS.

4477. —— —— Effect of delay.]—A person made a double proof to which, according to a case subsequently decided, he was not entitled : —*Held :* after seven years, the ct. would not order the dividends to be refunded, but a prospective order should be made.—*Re* SALTER, *Ex p.* SOPER (1834), 2 Mont. & A. 55 ; 4 Deac. & Ch. 569 ; *subsequent proceedings* (1835), 4 L. J. Bcy. 45, Ct. of R.

Annotations :—**Consd.** *Re* Deane & Youle, *Ex p.* Goldsmid (1856), 25 L. J. Bcy. 26, n. **Refd.** *Re* Bentley, Dear & Richardson, *Ex p.* Wilson, *Ex p.* Wyman (1841), 1 Mont. D. & De G. 586, Ct. of R. ; *Re* Tait, *Ex p.* Harper (1882), 21 Ch. D. 537, C. A.

4478. —— Dividend paid in error—Debt proved on already paid.]—In 1806, P. proved a debt against the estate of B. & Co., bkpts., on a bill of exchange, & died in 1807 appointing G. his exor.

PART XIII. SECT. 6.

4475 i. *Refund—Payment to creditors without making reserve for priority creditors.*]—Trustees made payment to one class of creditors over whom another class had priority, without providing for the prior class :—*Held :* the creditors paid must repay, & the unpaid creditors entitled to a lien on the trust funds in ct. in priority to the claims of the trustees, & all subsequent creditors, for debt & costs.—WOOD *v.* BRETT (1867), 14 Gr. 72.—**CAN.**

4475 ii. —— *Overpayment by executor of deceased debtor—Estate subsequently declared insolvent—Right of trustee to sue creditor.*]—VAN WIJK'S TRUSTEE *v.* AFRICAN BANKING CORPN. (1912), T. P. D. 44.—**S. AF.**

Sect. 6.—Refund or disturbance of dividends paid. Sect. 7.]

G. became bkpt. in 1816 & obtained his certificate in 1817. In 1811, 1814, 1815, G. had, as exor., received three dividends on P.'s debt, & in 1817, 1822, & 1828, he received three other dividends. It afterwards turned out that the bill of exchange was paid by another party in 1807, so that no dividend was ever due. On petition by B. & Co.'s assignees to expunge the proof & for G. to refund the six dividends:—*Held:* as the first three dividends were paid in error & were a legal debt against G. & might have been proved under his bkpcy. the claim as to them was barred by G.'s certificate, but the other three received since his bkpcy. should be refunded.—*Re* BAILLIE, *Ex p.* BOLTON (1832), 1 Deac. & Ch. 556; 1 Mont. & A. 60; 3 L. J. Bcy. 22; *subsequent proceedings, sub nom. Re* BAILLIE, *Ex p.* GREENWOOD (1834), 1 Mont. & A. 65, Ct. of R.

4479. —— —— ——.]—Bkpts. kept a banking account, & in the course of their dealings bkpts. indorsed & paid into the bank certain bills of exchange. The bills when paid in were carried to the credit of bkpts., & cheques were drawn by them & payments made on their account from time to time. On the bills arriving at maturity bkpts. were debited with the amount of those dishonoured. The bank proved upon twenty-eight bills of exchange & promissory notes specified in a schedule to the depositions made on the proof, all of which were then in the hands of the bank & unpaid, some of them being overdue & dishonoured. Some of the bills of exchange paid in were paid in full by other parties liable, some before & some after the declaration of dividend:—*Held:* the proof ought to be reduced by the amount of the paid bills, & the dividends refunded, & the bank had no right to receive more than 20*s.* in the pound.—*Re* PRITCHARD, *Ex p.* HORNBY (1844), De G. 69, Ct. of R.

4480. —— —— **In belief that estate would pay all creditors in full.**]—An assignee, thinking the estate would pay all the creditors in full, paid one creditor at that rate. The assignee became bkpt., & the creditor became his assignee:—*Held:* he must refund the excess.—*Re* HARVEY, *Ex p.* GRIMWOOD (1836), 1 Deac. 394; 3 Mont. & A. 685, Ct. of R.

4481. —— —— **Lapse of time—Belief that security for whole amount—Evidence only of contract for limited security.**]—Where all parties acted under an impression that a security was for the whole amount of a debt & twenty-one years had elapsed since the security was given, but no evidence could be produced of any contract except one for security to a limited amount, which was exceeded by the amount received by the creditor upon his security:—*Held:* the creditor ought not to be called upon to refund.—*Re* CUTHBERT & CLARKE, *Ex p.* FOLLETT (1845), De G. 212, Ct. of R.

4482. —— —— —— **Change of circumstances.**] — Dividends paid upon an erroneous principle were ordered to be refunded after a considerable lapse of time & change of circumstances.—*Re* FLOOD, *Ex p.* LUBBOCK (1863), 4 De G. J. & Sm. 516; 2 New Rep. 207; 32 L. J. Bcy. 58; 8 L. T. 474; 9 Jur. N. S. 854; 46 E. R. 1019, L. C.

Annotations:—**Mentd.** *Re* Savin (1872), 7 Ch. App. 760, L. JJ.; *Re* Lundy, *Ex p.* Cockburn (1878), 39 L. T. 362.

4483. —— **Proof subsequently expunged.**]—It does not follow, as a necessary consequence of the comrs.' order to expunge a proof, that the party who has made it must refund the dividends he has received upon it.—*Re* BENTLEY, DEAR & RICHARDSON, *Ex p.* WILSON, *Ex p.* WYMAN (1841), 1 Mont. D. & De G. 586, Ct. of R.

Annotation:—**Refd.** *Re* Tait, *Ex p.* Harper (1882), 21 Ch. D. 537, C. A.

4484. —— ——.]—*Re* TAIT, *Ex p.* HARPER, No. 3210, *ante*.

4485. —— **Proceeds of estate abroad received by creditor—Estate incapable of forming part of fund available for creditor.**]—The principle that one creditor shall not take a part of the fund, which otherwise would have been available for the payment of all the creditors, & at the same time be allowed to come in *pari passu* with the other creditors for satisfaction out of the remainder of that fund, does not apply where that creditor obtains by his diligence something which did not, & could not, form part of that fund.

A creditor proved against the estate of A. in India, & received dividends on the whole debt. He also received the proceeds of sale of an estate of the insolvent in Java, which did not pass to the insolvent's assignees:—*Held:* he was not bound to refund the dividends.—COCKERELL *v.* DICKENS (1840), 3 Moo. P. C. C. 98; 2 Moo. Ind. App. 353; 1 Mont. D. & De G. 45; 13 E. R. 45, P. C.

Annotation:—**Mentd.** Banco de Portugal *v.* Waddell (1880), 42 L. T. 698, H. L.

4486. —— —— **Dividend in foreign bankruptcy subsequently received.**]—A firm of two persons, D. & Y., carrying on business as D., Y. & Co. at Liverpool, & of three persons, D., Y. & Y., carrying on business in Pernambuco, were adjudicated bkpts. in 1854 at Liverpool. The holder of a bill of exchange drawn by the Pernambuco firm on the Liverpool firm proved under the bkpcy., & received a dividend, after which receipt the Pernambuco firm also became bkpt., & the creditor proved the same debt against the estate there, & received a dividend in respect of it. In 1861 an order was made by the comr. in England that the proof in England should be expunged, unless the creditor paid to the assignees the dividend received by him at Pernambuco. That order was varied by the Lords Justices, who declared that the creditor was not entitled to any dividend in England, except the first which he had received, but without prejudice to any question as to that dividend, or as to any question under the foreign bkpcy. The assignees presented a petition praying that the creditor might be ordered to refund such first dividend:—*Held:* in the absence of all evidence to show that the law of Brazil would not have given the creditor the right to receive the dividend there, he was under no obligation as to that which he received in England, but, as he had rightfully received it, he was entitled to retain it.—*Re* DEANE & YOULE, *Ex p.* MELLOR, *Ex p.* SMITH (1862), 3 De G. F. & J. 760; 31 L. J. Bcy. 60; 6 L. T. 268; 10 W. R. 276; 45 E. R. 1073, L. JJ.

4487. —— **Dividends received on capitalised value of annuity—Death of annuitant before instalments accruing equalled dividends.**]—Bkpt. had covenanted to pay a life annuity to trustees for the benefit of his wife. The annuity was valued, & proof was made by the trustees for the amount thus ascertained, & a dividend was paid to them. The wife died, & the dividend which the trustees had received exceeded the amount of the payments of the annuity which bkpt. would have had to make, if he had remained solvent:—*Held:* the trustees could not be called upon to refund the excess of the dividend above the payments

of the annuity which accrued due during the wife's life.—*Re* PANNELL, *Ex p.* BATES (1879), 11 Ch. D. 914 ; 48 L. J. Bcy. 113 ; 41 L. T. 263 ; 27 W. R. 927, C. A.

Annotations :—**Refd.** Victor *v.* Victor, [1912] 1 K. B. 247, C. A. **Mentd.** *Re* Grieves, *Ex p.* Pearce (1879), 13 Ch. D. 262, C. A. ; *Re* Law Car & General Insce. Corpn., [1913] 2 Ch. 103, C. A.

4488. —— Insufficient sum retained for expenses.]—A trustee in bkpcy., after setting aside a sum which he deemed adequate to cover legal expenses, paid a dividend to the creditors. The sum so retained proved insufficient :—*Held :* he could not sue the creditors for a return of part of the overpaid dividend.—FIGG *v.* HEGARTY (1890), 34 Sol. Jo. 214.

See, also, Nos. 3527, 3529, 4009, *ante.*

4489. Right of creditor to refund dividend—& take proceedings at law.]—Creditor three years & a half after receiving a dividend, on refunding, was permitted to proceed at law against bkpt.—*Re* WHITE, *Ex p.* WHITE (1792), 2 Ves. 9 ; 4 Bro. C. C. 114 ; 30 E. R. 497.

See 1914 Act, s. 30 (3).

See, also, Nos. 4077-4080, *ante.*

4490. Admission of proof without disturbing dividends—Creditor omitting to prove in time.]—If a creditor through accident omits to prove at the final dividend, he may be permitted to prove, without disturbing any payment made by the assignees, & placing the creditors not paid in the same situation as if he had originally proved.—*Re* FENTON, *Ex p.* DAY (1831), Mont. 212, L. C.

4491. —— ——.]—Where a creditor has omitted to prove his debt, until after a dividend has been declared & is in course of payment, the ct. will not permit him to prove, so as to interfere with the amount of the dividend payable on the proof of the other creditors.—*Re* M'CHEANE, *Ex p.* M'CHEANE (1840), 1 Mont. D. & De G. 329, Ct. of R.

4492. —— —— Dividend rescinded.]—Where a creditor, through inadvertence, omits to prove at the final dividend meeting, the ct. will allow him to call a fresh meeting for that purpose, at his own costs, & will rescind the former dividend, so, however, as not to disturb any payments made to the creditors who have already received it.—*Re* HOLLAND, *Ex p.* DILWORTH (1842), 3 Mont. D. & De G. 63 ; 7 Jur. 95, Ct. of R.

See 1914 Act, s. 67.

See, also, No. 4072, *ante,* &, *generally,* Part VIII., Sect. 5, *ante.*

4493. —— After previous order expunging proof.]—A. on his marriage gave to trustees a bond conditioned for payment of £1,000 with interest. By a settlement of even date it was declared that the trustees should, during his life or until he should become bkpt. or insolvent, allow him to retain in his hands the £1,000 or such parts of it as he should think fit. In 1826 A. became bkpt. The trustees in 1827 proved for the whole £1,000, but the comrs. expunged the proof, & the trustees did not take any steps to have a value set upon the bond as for a sum payable on bkpt.'s death, & to be allowed to prove for the amount of the valuation. In 1860, bkpt. being dead, & fresh assets having come in, the trustees applied again to prove for the whole amount :—*Held :* (1) although the provision for calling in the money on bkpcy. was void, the debt was valid as a debt payable upon the death of bkpt., & proof of it ought to be allowed, not disturbing former dividends ; (2) the decision in 1827 was not a judgment against the claim, the debt not being then payable, & no attempt having been made to prove for it on the footing of its being payable *in futuro.*—*Re* TAYLOR, *Ex p.* BODDAM (1860), 2 De G. F. & J. 625 ; 29 L. J. Bcy. 20 ; 2 L. T. 343 ; 6 Jur. N. S. 570 ; 8 W. R. 457 ; 45 E. R. 763, L. JJ.

Annotation :—**Refd.** *Re* Westby, *Ex p.* Lancaster Banking Corpn. (1879), 10 Ch. D. 776.

SECT. 7.—UNCLAIMED DIVIDENDS.

4494. Definition.]—Unclaimed dividend means dividend which has been declared upon admitted & existing proofs, but which the persons entitled to it neglect to claim ; it supposes the existence of some one who could claim & who omits to claim (WRIGHT, J.).—*Re* HIGGINSON & DEAN, *Ex p.* A.-G., [1899] 1 Q. B. 325 ; 68 L. J. Q. B. 198 ; 79 L. T. 673 ; 47 W. R. 285 ; 15 T. L. R. 135 ; 43 Sol. Jo. 153 ; 5 Mans. 289, D. C.

Annotations :—**Mentd.** *Re* Printers & Transferrers Amalgamated Trades Protection Soc., [1899] 2 Ch. 184 ; *Re* Bond, Panes *v.* A.-G., [1901] 1 Ch. 15 ; *Re* Taylor's Agreement Trusts, [1904] 2 Ch. 737 ; Hastings Corpn. *v.* Letton, [1908] 1 K. B. 378 ; *Re* Ruddington Land, [1909] 1 Ch. 701 ; *Re* Gurwicz, *Ex p.* Trustee (1919), 88 L. J. K. B. 740.

4495. Distribution of—When order granted—Reference to registrar.]—The ct. will order the distribution of unclaimed dividends only after a reference to the registrar.—*Re* COOKE (1835), 4 L. J. Bcy. 41, Ct. of R.

4496. —— Amongst whom—Right to inquiry.]—Debtor executed a deed of assignment for the benefit of his creditors in 1800. In 1866 the personal representative of the trustee under the deed had in his hands a fund representing unclaimed dividends. The representative of a creditor, who had assented to the deed, & had executed a release to the trustee in respect of the dividends paid by him, & who had authorised the trustee to retain a balance to meet unclaimed dividends, claimed an inquiry as to the persons who had a right to the fund :—*Held :* he was entitled to the inquiry, &, in the absence of any stipulation to the contrary, those creditors who had received dividends out of the assigned property were entitled to the unclaimed dividends in preference to the trustee, &, *semble :* to the original debtor.—WILD *v.* BANNING (1866), L. R. 2 Eq. 577 ; 35 L. J. Ch. 594 ; 14 L. T. 845 ; 12 Jur. N. S. 464.

Annotation :—**Consd.** Ashley *v.* Ashley (1877), 4 Ch. D. 757, C. A.

4497. Interest on—Who entitled to.]—Interest earned by the investment of unclaimed dividends belongs to the creditors claiming the dividends.—*Re* WILD, *Ex p.* RENSHAW (1834), 4 Deac. & Ch. 483 ; 3 L. J. Bcy. 112, Ct. of R.

Annotation :—**Refd.** *Re* Wilcocks, *Ex p.* Woodford (1850), 19 L. J. Bcy. 8.

4498. —— ——.]—The interest on unclaimed dividends follows the principal.—*Re* WALMISLEY, *Ex p.* GREGG (1838), 3 Mont. & A. 622, Ct. of R.

4499. —— ——.]—Dividends were declared in a bkpcy. amounting to 20*s.* in the pound on the

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4490 i. *Admission of proof without disturbing dividends—Creditor omitting to prove in time.*]—A creditor coming in to prove his debt after a dividend made, provided the delay was not fraudulent, but owing to accident or unavoidable circumstances, shall be put on a footing with the other creditors before any other dividend is made.—*Re* WHEELER 1803), 1 Sch. & Lef. 242.—**IR.**

PART XIII. SECT. 7.

4496 i. *Distribution of—Amongst whom—Jurisdiction of court.*]—In an old bkpcy. a portion of the estate was unexpectedly realised. Dividends were struck, but a number of creditors did not claim them. Two years later a creditor who had claimed, applied for a distribution of the unclaimed dividends :—*Held :* (1) the right to such dividends remained in the non-claiming creditors or their representatives ; (2) the ct. had not, since 20 & 21 Vict., c. 60, jurisdiction to order redistribution & would not order redistribution if it had jurisdiction.—*Re* FRENCH, *Ex p.* WILLIS (1859), 9 I. Ch. R. 1. —**IR.**

Sect. 7.—*Unclaimed dividends.* *Sect.* 8. *Part XIV. Sect.* 1: *sub-sect.* 1.]

debts proved against bkpt.'s estate, & a release of the surplus of his estate was made to bkpt. The dividends payable to creditors were carried to an account kept by the assignees, called "the separate account," out of which the creditors were paid. Money consisting of unclaimed dividends & interest allowed by the bankers was paid over to the official assignee:—*Held:* such money belonged to the creditors who had not been paid & not to the bkpt.—*Re* WILCOCKS, *Ex p.* WOODFORD (1850), 3 De G. & Sm. 666; 19 L. J. Bcy. 8; 15 L. T. O. S. 164; 14 Jur. 948; 64 E. R. 652.

SECT. 8.—DISPOSAL OF SURPLUS.

4500. Jurisdiction of court—To order payment to debtor.]—Where a trustee has been appointed under 1870 Rules, r. 279, for receipt & distribution of a composition, & after all the creditors have been paid a balance remains in the trustee's hands, the Ct. of Bkpcy. has jurisdiction to order the surplus after it is ascertained to be paid over to debtor.—*Re* CAREW, *Ex p.* CAREW (1875), 10 Ch. App. 308; 44 L. J. Bcy. 67; 32 L. T. 318; 23 W. R. 459, L. JJ.

Annotations:—**Consd.** Breslauer *v.* Brown (1878), 3 App. Cas. 672, H. L.; *Re* Lacey, *Ex p.* Lacey (1880), 16 Ch. D. 131, C. A. **Mentd.** Oppenheim *v.* Jackson & Till (1879), 41 L. T. 193.

4501. Nature of debtor's right to—Whether debt due by official receiver subject to attachment.]—The surplus due to bkpt. out of his estate, after payment of 20*s.* in the pound to the creditors under the bkpcy., is not a "debt" due to bkpt. from the official assignee, though bkpt.'s estate remains vested in him, which can be attached under the garnishee clauses of C. L. P. A., 1854 (c. 125), by a judgment creditor of the bkpt.—*Re* GREENSILL (1872), L. R. 8 C. P. 24; *sub nom.* HUNTER *v.* GREENSILL, 42 L. J. C. P. 55; 27 L. T. 827; 37 J. P. 215; 21 W. R 263.

4502. —— Assignment—So as to give assignee right to interfere in administration.]—Bkpt., while undischarged, has no interest in the surplus beyond a mere hope or expectation, & he cannot, by assigning the surplus by way of security, give to his assignee any right to interfere in the administration of the estate, as, for instance, by examining an alleged creditor with respect to his claim.—*Re* AUSTIN, *Ex p.* SHEFFIELD (1879), 10 Ch. D. 434; 40 L. T. 15; 27 W. R. 622, C. A.

Annotations:—**Consd.** Bird *v.* Philpott, [1900] 1 Ch. 822. **Refd.** *Re* A Debtor, *Ex p.* Peak Hill Goldfield, [1909] 1 K. B. 430, C. A. **Mentd.** *Re* Evelyn, *Ex p.* General Public Works & Assets Co. (1894), 1 Mans. 195, D. C.

4503. —— —— Rights of mortgagee to sell—So as to defeat or divest title of trustee.]—Where an undischarged bkpt. has mortgaged a possible surplus, the mtgee. will not be restrained from exercising his ordinary right of sale, provided he does not defeat or divest the title of the trustee.—*Re* EVELYN, *Ex p.* GENERAL PUBLIC WORKS & ASSETS CO., LTD., [1894] 2 Q. B. 302; 63 L. J. Q. B. 658; 70 L. T. 692; 42 W. R. 512; 10 T. L. R. 456; 38 Sol. Jo. 479; 1 Mans. 195; 10 R. 238, D. C.

Annotation:—**Refd.** Bird *v.* Philpott (1900), 82 L. T. 110.

4504. —— Before surplus ascertained.]—An undischarged bkpt. has power to dispose of any part of his assets that may remain after payment of his liabilities before that surplus is ascertained.—BIRD *v.* PHILPOTT, [1900] 1 Ch. 822; 69 L. J. Ch. 487; 82 L. T. 110; 16 T. L. R. 173; 44 Sol. Jo. 246; 7 Mans. 251.

Annotations:—**Mentd.** London & County Contracts *v.* Tallack (1903), 51 W. R. 408; Preston's Trustee *v.* Cooke (1906), 75 L. J. Ch. 757; *Re* Connolly, Wood *v.* The Co. (1912), 106 L. T. 738, C. A.

4505. Who entitled to on death of bankrupt—Heir at law—Surplus real estate of bankrupt sold after his death.]—The assignees sold real estate belonging to bkpt. Part was sold during his life, & part was contracted to be sold but not sold at the time of his death, & the remainder was sold after his death, & a surplus remained in the hands of the assignees:—*Held:* the surplus to the amount of the produce of the estate sold after death belonged to the heir at law, as the bkpcy. laws had no purpose to alter the character of surplus property between the real & personal representative of bkpt.—BANKS *v.* SCOTT (1821), 5 Madd. 493; 56 E. R. 984.

Annotation:—**Folld.** *Re* Stidolph, *Ex p.* Stidolph (1865), 12 L. T. 800.

4506. How payment enforced—Devisee of insolvent debtor—Bill in equity—Order for revesting property—Property conveyed away by official assignee.]—The devisee of an insolvent debtor, who had taken the benefit of 5 & 6 Vict. c. 116, & who had obtained a release in full from all his creditors:—*Held:* entitled to sustain a bill in equity in respect of surplus real property, which had been conveyed by the official assignee, without going through the process of applying to the Insolvent Ct. for an order re-vesting the property in the assignee of the insolvent.—WEARING *v.* ELLIS (1856), 6 De G. M. & G. 596; 26 L. J. Ch. 15; 28 L. T. O. S. 113; 2 Jur. N. S. 1149; 5 W. R. 40; 43 E. R. 1365, L. C.

Annotations:—**Consd.** Martin *v.* Powning (1868), 38 L. J. Ch. 212, L. JJ.; Motion *v.* Moojen (1872), L. R. 14 Eq. 202. **Refd.** Troup *v.* Ricardo (1864), 4 De G. J. & Sm. 489, L. C.; Martin *v.* Powning (1869), 4 Ch. App. 356, L. JJ.; Payne *v.* Dicker (1871), 24 L. T. 492; Luddy's Trustee *v.* Peard (1886), 33 Ch. D. 500; Bird *v.* Philpott, [1900] 1 Ch. 822.

4507. Payment of interest out of surplus—Method of accounting in applying dividends.]—One of two obligors in a joint & several bond became bkpt. The obligee having by several dividends in the bkpcy. been paid 20*s.* in the pound upon the amount of principal & interest due at the date

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PART XIII. SECT. 8.

4501 i. *Nature of debtor's right to—Before discharge.*]—The insolvent is not entitled to receive any surplus awarded to him in the plan of distribution until he has received his discharge, & in the meantime it is competent for the creditors to prove their claims.—UNION BANK (IN LIQUIDATION) *v.* KING'S TRUSTEE (1893), 10 S. C. 191.—**S. AF.**

4501 ii. —— *Whether in priority to creditor—Certificate of discharge.*]—An insolvent is not entitled to any surplus in priority to a creditor who proves prior to distribution, & the fact that a certificate of discharge had been granted makes no difference.—*Re* BREALEY (1900), 26 V. L. R. 209.—**AUS.**

4501 iii. —— *Where trusts of assignment satisfied.*]—An assignee for the benefit of creditors may be ordered to pay any surplus to the assignor after the trusts of the assignment are satisfied.—THIBIDEAU *v.* LE BLANC (1907), 3 E. L. R. 422; 3 N. B. Eq. Rep. 436.—**CAN.**

4507 i. *Payment of interest out of surplus—Method of accounting in applying dividends.*]—Under a trust-deed for creditors the trustees paid certain dividends, of which the last was made as in payment of the balance of interest on the amount of the creditors' respective debts from the date of the deed. After paying these dividends there was still a surplus. One of the creditors claimed payment, out of the surplus, of a balance of interest still due, which he brought out by attributing the dividends as an extinction *primo loco* of the interest due at the respective dates of payment:—*Held:* the claim must be sustained.—WILSON'S TRUSTEES *v.* WATSON & CO. (1900), 2 F. (Ct. of Sess.) 761; 37 Sc. L. R. 545.—**SCOT.**

of the commission, also carried in a claim in respect of the same bond under a decree in a suit for the administration of the estate of the co-obligor, who had died :—*Held :* the amount due to the obligee in respect of such claim was to be computed by treating the dividends as ordinary payments on account, *i.e.*, by applying each dividend in the first place to the payment of the interest due at the date of such dividend, & the surplus, if any, in reduction of the principal. *Semble :* the same principle of computation was applicable in bkpcy. as between bkpt. & the creditors, where there was a surplus of the estate after payment of 20*s.* in the pound upon all the debts proved.—BOWER *v.* MARRIS (1841), Cr. & Ph. 351 ; 10 L. J. Ch. 356 ; 41 E. R. 525, L. C.

Annotations :—**Distd.** Smith *v.* Law Guarantee & Trust Soc., [1904] 2 Ch. 569, C. A. ; *Re* Calgary & Medicine Hat Land Co., Pigeon *v.* Calgary & Medicine Hat Land Co. (1908), 78 L. J. Ch. 97, C. A. **Refd.** Toft *v.* Stevenson (1848), 7 Hare, 1 ; *Re* Humber Ironworks & Shipbuilding Co., Warrant Finance Co.'s Case (1869), 4 Ch. App. 643, L. JJ. ; Whittingstall *v.* Grover (1886), 55 L. T. 213.

4508. —— ——.]—*Held :* that where there is a surplus on which creditors prove for interest, the dividends received ought to be accounted for in ascertaining the amount of interest due in manner following, viz., by treating the dividends as ordinary payments on account & applying each dividend first in the payment of interest calculated to the day of such dividend & the surplus if any to the reduction of the capital.—WHITTINGSTALL *v.* GROVER (1886), 55 L. T. 213 ; 35 W. R. 4.

Part XIV.—Administration in Bankruptcy of Estates of deceased Insolvents.

See, now, 1914 Act, s. 130.

SECT. 1.—HOW ORDER OBTAINED.

SUB-SECT. 1.—BY PETITION.

See, now, 1914 Act, s. 130 (1), (2).

4509. Discretion of court.]—A creditor is not entitled to an administration order *ex debito justitiæ* upon proof of the statutory conditions precedent, but the ct. has discretion to dismiss the petition whenever it deems that sufficient cause is shown.—*Re* OUTRAM, *Ex p.* ASHWORTH & OUTRAM (1893), 63 L. J. Q. B. 308 ; 69 L. T. 767 ; 10 T. L. R. 54 ; 10 Morr. 288 ; 10 R. 64, D. C.

4510. Presentation of petition—To what court—Deceased residing & dying out of jurisdiction.]—A creditor's petition for the administration of the estate of a deceased insolvent, who has not resided or carried on business in England for six months immediately prior to his decease & has died out of England, ought to be presented to the High Ct. of Justice, *i.e.* to the London Bkpcy. Ct.—*Re* EVANS, *Ex p.* EVANS, [1891] 1 Q. B. 143 ; 60 L. J. Q. B. 143 ; 64 L. T. 242 ; 39 W. R. 98 ; 7 Morr. 297, C. A.

4511. —— **By whom—Creditor for debt incurred after death of bankrupt.**]—Applts., creditors of a deceased person, took out an originating summons for the administration of his estate in the Ch. Div., & had incurred costs. On the same day resps., who claimed to be creditors of the estate of deceased in respect of goods supplied by them after his death for the purpose of his business, which was being carried on by his extrix., presented a petition under 1883 Act, s. 125, praying for the administration of the estate of deceased in bkpcy. An order for administration in bkpcy. having been made :—*Held :* resps. were not creditors "of a deceased debtor" within s. 125, & there was no jurisdiction to make an order for administration in bkpcy. on their petition.—*Re* KITSON, *Ex p.* SUGDEN (THOMAS) & SON, LTD., [1911] 2 K. B. 109 ; 80 L. J. K. B. 1147 ; 55 Sol. Jo. 443 ; 18 Mans. 224, D. C.

4512. Service of petition—Before grant of probate or letters of administration—Personal representative before court at time of order.]—An order for the administration in bkpcy. of the estate of a deceased debtor may be made upon a petition served before the grant of probate of letters of administration, if at the time of the making of the order there is a duly constituted legal personal representative of deceased before the ct.—*Re* SLEET, *Ex p.* SLEET, [1894] 2 Q. B. 797 ; 63 L. J. Q. B. 750 ; 71 L. T. 381 ; 1 Mans. 394 ; 9 R. 786, C. A.

4513. Grounds for refusing—Judgment recovered against surviving partners—Debt insufficient to support bankruptcy petition.]—Where a creditor of a partnership firm sues the surviving partners & recovers judgment against them, he is not thereby precluded from obtaining an order for the administration of the estate of the deceased partner, on the ground that the debt would not have been sufficient to support a bkpcy. petition against the deceased partner had he been alive.—*Re* OUTRAM, *Ex p.* ASHWORTH & OUTRAM (1893), 63 L. J. Q. B. 308 ; 69 L. T. 767 ; 10 T. L. R. 54 ; 10 Morr. 288 ; 10 R. 64, D. C.

4514. —— **Apparent absence of assets.**]—The apparent absence of any available assets is not of necessity a ground for refusing administration in bkpcy. under 1883 Act, s. 125.—*Re* HOSKING, *Ex p.* HOSKING *v.* DAVIES (1912), 106 L. T. 640, D. C.

4507 ii. —— *How enforced—By petition.*]—After payment by an insolvent's estate of 100 cents in the dollar the creditors claimed interest on their claims out of a surplus in the hands of the assignee :—*Held :* a claim to interest is properly brought before the ct. on petition filed by the inspectors, who, under a resolution of creditors, had requested the assignee to pay such interest.—*Re* MCDOUGALL (1883), 8 A. R. 309.—**CAN.**

4507 iii. —— *For what period.*]—Where a debt carries interest at the date of the sequestration of a bkpt.'s estate, interest must be paid on the debt for the period between the sequestration & the payment of the debt, before any surplus assets can be paid to bkpt. —*In the estate of* LOW, *Ex p.* LOW (1899), 20 N. S. W. B. 17.—**AUS.**

4507 iv. —— ——.]—Interest out of a surplus was given to secured creditors from the date of the commission to the time when the principal sums were paid, notwithstanding their securities were then delivered to the assignees, with receipts in full indorsed on them. —*Ex p.* DEEY (1812), 2 Ball & B. 77.—**IR.**

4507 v. —— *Interest payable by contract—Whether payable as damages.*]—After payment in full of all claims the creditors claimed interest thereon out of a surplus in the hands of the assignee :—*Held :* interest was payable on all debts, originally bearing interest by contract or otherwise, but not where it was claimable by law as damages only.—*Re* MCDOUGALL (1883), 8 A. R. 309.—**CAN.**

PART XIV. SECT. 1, SUB-SECT. 1.

4511 i. *Presentation of petition—By whom—Official manager of company in liquidation.*]—Deceased owed money as a contributory to a co. which some years after his death was wound up. The official manager under Winding-Up Acts petitioned for sequestration of deceased's estate under 2 & 3 Vict. c. 41 :—*Held :* the petition must be refused, the relation of creditor & debtor not subsisting between deceased & the official manager as required by the above Act.—WRYGHT *v.* LINDSAY (1860), 3 Macq. 772.—**SCOT.**

SUB-SECT. 2.—BY TRANSFER OF ADMINISTRATION ACTION.

See, now, 1914 Act, s. 130 (3).

4515. Jurisdiction of court—Debtor dying in asylum in Scotland—Having traded within jurisdiction.]—Testator, having previously carried on business in England, was for more than six months previous to his death an inmate of a lunatic asylum in Scotland, & died insolvent. An administration action having been commenced by a creditor, & an administration order made:—*Held:* the ct. had jurisdiction to make an order transferring the proceedings to the county ct., within the jurisdiction of which testator formerly carried on his business.—SENHOUSE *v.* MAWSON (1885), 52 L. T. 745.

Annotation:—**Apld.** *Re* York, Atkinson *v.* Powell (1887), 36 Ch. D. 233.

4516. —— When exercisable—After judgment.]—The ct. has jurisdiction to order that the proceedings in an action for the administration of a deceased debtor's estate be transferred to the ct. exercising jurisdiction in bkpcy., notwithstanding that judgment has been given in the action.—*Re* YORK, ATKINSON *v.* POWELL (1887), 36 Ch. D. 233; 56 L. J. Ch. 552; 56 L. T. 704; 35 W. R. 609; *sub nom. Re* NEAL, ATKINSON *v.* POWELL, 3 T. L. R. 548.

Annotations:—**Distd.** *Re* Hay, Gibbons *v.* Hay, [1915] 2 Ch. 198. **Refd.** *Re* Baker, Nichols *v.* Baker (1890), 44 Ch. D. 262, C. A.; *Re* Briggs, Earp *v.* Briggs (1891), 7 T. L. R. 572, C. A.

4517. —— —— ——.]—The jurisdiction to transfer administration proceedings from the Ch. Div. to the Bkpcy. Ct. under 1883 Act, s. 125, may be exercised at any stage of the proceedings, &, therefore, after judgment.—*Re* TARR, DARLEY & CUMBERLAND *v.* TARR (1912), 134 L. T. Jo. 6; 57 Sol. Jo. 60.

4518. —— —— ——.]—*Qu.:* whether an order for transfer under 1914 Act, s. 130 (3), can be made after judgment in an administration action.—*Re* HAY, GIBBONS, LTD. *v.* HAY, [1915] 2 Ch. 198; 84 L. J. Ch. 821; 113 L. T. 923; 59 Sol. Jo. 680; [1915] H. B. R. 165.

4519. Who may apply—Creditor who has proved debt.]—*Semble:* an application for transfer can only be made by a creditor, who has absolutely proved his debt.—*Re* WEAVER, HIGGS *v.* WEAVER (1885), 29 Ch. D. 236; 54 L. J. Ch. 749; 52 L. T. 512; 33 W. R. 874.

Annotations:—**Mentd.** *Re* York, Atkinson *v.* Powell (1887), 36 Ch. D. 233; *Re* Baker, Nichols *v.* Baker (1890), 44 Ch. D. 262, C. A.

4520. —— Procedure where doubt as to qualification.]—In a case where it was uncertain whether appcts. had fulfilled the conditions required by 1883 Act, s. 125 (4):—*Held:* they should have an opportunity of supplying the deficiency, & the order of transfer would be drawn up, if it were ascertained in chambers that appcts. were creditors for the statutable amount.—*Re* YORK, ATKINSON *v.* POWELL (1887), 36 Ch. D. 233; 56 L. J. Ch. 552; 56 L. T. 704; 35 W. R. 609; *sub nom. Re* NEAL, ATKINSON *v.* POWELL, 3 T. L. R. 548.

Annotations:—**Refd.** *Re* Hay, Gibbons *v.* Hay, [1915] 2 Ch. 198. **Mentd.** *Re* Baker, Nichols *v.* Baker (1890), 44 Ch. D. 262, C. A.; *Re* Briggs, Earp *v.* Briggs (1891), 7 T. L. R. 572, C. A.

4521. At what time—Not until two months after grant of probate or letters of administration—Ex parte application.]—An application to the "ct. having jurisdiction in bkpcy.," to which a creditor's administration suit in the Ch. Div. has been transferred, under 1883 Act, s. 125 (4), for an order for the administration of the estate of deceased debtor according to the law of bkpcy., may be made *ex p.*, but not until the expiration of two months from the date of the grant of probate or letters of administration.—*Re* MAY, *Ex p.* MAY (1884), 13 Q. B. D. 552; 53 L. J. Q. B. 571; 1 Morr. 232, D. C.

Annotations:—**Distd.** *Re* Andrews, *Ex p.* Andrews (1885), 15 Q. B. D. 335. **Refd.** *Re* Weaver, Higgs *v.* Weaver (1885), 29 Ch. D. 236.

4522. —— As soon as insolvency disclosed.]—Appct. applied for a transfer as soon as the proceedings in chambers indicated that the estate was insolvent:—*Held:* they had not come to the ct. too late.—*Re* YORK, ATKINSON *v.* POWELL (1887), 36 Ch. D. 233; 56 L. J. Ch. 552; 56 L. T. 704; 35 W. R. 609; *sub nom. Re* NEAL, ATKINSON *v.* POWELL, 3 T. L. R. 548.

Annotations:—**Mentd.** *Re* Baker, Nichols *v.* Baker (1890), 44 Ch. D. 262, C. A.; *Re* Briggs, Earp *v.* Briggs (1891), 7 T. L. R. 572, C. A.; *Re* Hay, Gibbons *v.* Hay, [1915] 2 Ch. 198.

4523. Discretion of court—Court not bound to grant application.]—The power to transfer the administration of an insolvent estate from the Ch. Div. to the Ct. of Bkpcy. is a discretionary power, & not a power which the judge is bound to exercise whenever the estate is shown to be insolvent.—*Re* BAKER, NICHOLS *v.* BAKER (1890), 44 Ch. D. 262; 59 L. J. Ch. 661; 62 L. T. 817; 38 W. R. 417; 6 T. L. R. 237, C. A.

Annotations:—**Folld.** *Re* Briggs, Earp *v.* Briggs (1891), 7 T. L. R. 494. **Mentd.** *Re* Evans, *Ex p.* Evans, [1891] 1 Q. B. 143, C. A.; *Re* Johannisberg Land & Gold Trust Co., [1892] 1 Ch. 583; *Re* Leng, Tarn *v.* Emmerson, [1895] 1 Ch. 652, C. A.; *Re* Whitaker, Whitaker *v.* Palmer (1900), 83 L. T. 342; *Re* Kenward, Hammond *v.* Eade (1906), 94 L. T. 277; R. *v.* Mitchell, *Ex p.* Livesey, [1913] 1 K. B. 561.

4524. —— General principles governing exercise—Convenience, delay & expense—Wishes of creditor applying.]—The exercise of the jurisdiction to transfer is discretionary, & the predominating considerations are convenience, delay & expense. The ct. should have regard to the convenience of the creditors at large, & too great weight ought not to be attached to steps taken by the particular creditor who applies for the transfer.—*Re* YORK, ATKINSON *v.* POWELL (1887), 36 Ch. D. 233; 56 L. J. Ch. 552; 56 L. T. 704; 35 W. R. 609; *sub nom. Re* NEAL, ATKINSON *v.* POWELL, 3 T. L. R. 548.

Annotations:—**Distd.** *Re* Hay, Gibbons *v.* Hay, [1915] 2 Ch. 198. **Refd.** *Re* Baker, Nichols *v.* Baker (1890), 44 Ch. D. 262, C. A.; *Re* Briggs, Earp *v.* Briggs (1891), 7 T. L. R. 572, C. A.

4525. —— —— No ground to the contrary—Wishes of creditor commencing proceedings.]—As a general rule an action for the administration of the estate of a debtor, who has died insolvent, will be transferred to the Bkpcy. Ct., unless there is a good reason to the contrary. The wishes of the creditor, who commenced the proceedings, are immaterial.—*Re* KENWARD, HAMMOND *v.* EADE (1906), 94 L. T. 277; *sub nom. Re* EADE, 22 T. L. R. 239.

Annotation:—**Distd.** *Re* Hay, Gibbons *v.* Hay, [1915] 2 Ch. 198.

4526. —— Grounds for exercising—Situation of assets & residence of creditors.]—The fact that the greater part of the assets are situated within the jurisdiction of the local bkpcy. ct., & that the majority of the creditors are local people, is a good reason for making an order of transfer to such local bkpcy. ct.—*Re* KENWARD, HAMMOND *v.* EADE (1906), 94 L. T. 277; *sub nom. Re* EADE, 22 T. L. R. 239.

Annotation:—**Distd.** *Re* Hay, Gibbons *v.* Hay, [1915] 2 Ch. 198.

4527. —— —— Principal question outside administration.]—An order for transfer will be

made where the principal question arising will be outside the administration action.—*Re* TARR, DARLEY & CUMBERLAND *v.* TARR (1912), 134 L. T. Jo. 6; 57 Sol. Jo. 60.

4528. —— —— Existence of right of retainer.]—The existence of a right of retainer of the legal personal representative ought not to be made a ground for ordering a transfer.—*Re* YORK, ATKINSON *v.* POWELL (1887), 36 Ch. D. 233; 56 L. J. Ch. 552; 56 L. T. 704; 35 W. R. 609; *sub nom. Re* NEAL, ATKINSON *v.* POWELL, 3 T. L. R. 548.

Annotations:—**Consd.** *Re* Baker, Nichols *v.* Baker (1890), 44 Ch. D. 262, C. A. **Mentd.** *Re* Briggs, Earp *v.* Briggs (1891), 7 T. L. R. 572, C. A.; *Re* Hay, Gibbons *v.* Hay, [1915] 2 Ch. 198.

4529. —— —— —— Liberty not to plead Statute of Limitations.]—The circumstance that the exor. has a right of retainer & a liberty not to plead Stat. Limitations to a debt, which rights would be recognised in the Ch. Div. but might be taken away by a transfer to the Ct. of Bkpcy., is not a ground for transfer.—*Re* BAKER, NICHOLS *v.* BAKER (1890), 44 Ch. D. 262; 59 L. J. Ch. 661; 62 L. T. 817; 38 W. R. 417; 6 T. L. R. 237, C. A.

Annotations:—**Folld.** *Re* Briggs, Earp *v.* Briggs (1891), 7 T. L. R. 494. **Mentd.** *Re* Evans, *Ex p.* Evans, [1891] 1 Q. B. 143, C. A.; *Re* Johannisberg Land & Gold Trust Co., [1892] 1 Ch. 583; *Re* Leng, Tarn *v.* Emmerson, [1895] 1 Ch. 652, C. A.; *Re* Whitaker, Whitaker *v.* Palmer (1900), 83 L. T. 342; R. *v.* Mitchell, *Ex p.* Livesey, [1913] 1 K. B. 561.

4530. —— Grounds for refusing to exercise—Right of retainer—Transfer for benefit of creditors.]—If the transfer appears to be for the benefit of the general body of creditors, the existence of a right of retainer of the legal personal representative ought not to stand in the way of the transfer.—*Re* YORK, ATKINSON *v.* POWELL (1887), 36 Ch. D. 233; 56 L. J. Ch. 552; 56 L. T. 704; 35 W. R. 609; *sub nom. Re* NEAL, ATKINSON *v.* POWELL, 3 T. L. R. 548.

Annotations:—**Consd.** *Re* Baker, Nichols *v.* Baker (1890), 44 Ch. D. 262, C. A. **Distd.** *Re* Hay, Gibbons *v.* Hay, [1915] 2 Ch. 198; **Refd.** *Re* Briggs, Earp *v.* Briggs (1891), 7 T. L. R. 572, C. A. **Mentd.** *Re* Kenward, Hammond *v.* Eade (1906), 94 L. T. 277.

4531. —— —— —— Application made for purpose of avoiding.]—The transfer of an administration action to the Bkpcy. Ct. was refused, on the ground that the application was made for the purpose of preventing an exor. from exercising his right of retainer.—*Re* BRIGGS, EARP *v.* BRIGGS (1891), 7 T. L. R. 572, C. A.

4532. —— —— Estate small—Considerable expense already incurred.]—The power to transfer the proceedings in an action brought for the administration of an insolvent estate to the Ct. of Bkpcy., is discretionary, & it will not be exercised where the estate is small, the number of creditors is small, & considerable expense has been already incurred in chambers in the proceedings under an administration judgment.—*Re* WEAVER, HIGGS *v.* WEAVER (1885), 29 Ch. D. 236; 54 L. J. Ch. 749; 52 L. T. 512; 33 W. R. 874.

Annotations:—**Refd.** *Re* Baker, Nichols *v.* Baker (1890), 44 Ch. D. 262, C. A. **Mentd** *Re* York, Atkinson *v.* Powell (1887), 36 Ch. D. 233.

4533. —— —— Considerations of convenience & expense.]—B. died in Apr., 1904, & his estate, which was insolvent, was being administered in the Ch. Div. under an administration decree made in Nov., 1904. Progress had been made with the administration, & the chief things remaining to be done related to the bill of costs presented by the solr. of deceased, which extended over many years, & in regard to some of the items in which Stat. Limitations would probably be set up. A creditor moved for an order transferring the administration proceedings to the county ct. in bkpcy. of the provincial district in which deceased had resided. A large number of creditors & one exor. supported the application, the other exor. opposing it:—*Held:* in the circumstances of the case, considerations of convenience & expense rendered it desirable to continue the administration proceedings in London, & the transfer ought to be refused.—*Re* BOSWELL (1905), 118 L. T. Jo. 478.

4534. —— —— Difficult questions arising—Proceedings far advanced.]—In cases where questions of difficulty will arise necessitating a reference to the judge from time to time, or where the proceedings are far advanced, the ct. will consider it better to retain the case & not to transfer it.—*Re* KENWARD, HAMMOND *v.* EADE (1906), 94 L. T. 277; *sub nom. Re* EADE, 22 T. L. R. 239.

Annotation:—**Mentd.** *Re* Hay, Gibbons *v.* Hay, [1915] 2 Ch. 198.

4535. —— —— No strict proof that estate insolvent—Expense of appointing trustee.]—Where it was not strictly proved that an estate was insolvent, & the parties applying for a transfer had procured the appointment of a receiver immediately after debtor's death:—*Held:* the proceedings should not be transferred into bkpcy., as the transfer would cause the expense of appointing a trustee.—*Re* GOLDBERG (1911), 132 L. T. Jo. 60.

4536. —— —— —— No justification for removal.]—In an action in the Ch. Div. for the administration of the estate of a deceased person, an order for administration was made on Feb. 22, 1915, the summons to proceed on accounts & inquiries was issued on May 5, & the advertisements for creditors required their claims to be sent in by July 19 & fixed July 23 as the date for adjudicating on them. An applicant asking that the proceedings might be ordered to be transferred to the Ct. of Bkpcy. produced correspondence from the extrix.'s solrs., stating that so many claims had reached them that they did not know whether there would be sufficient to pay the creditors in full:—*Held:* there was not evidence sufficient to satisfy the ct. that the estate was insufficient to pay its debts, &, however that might be, there was no such circumstance of convenience, delay, or expense as justified the ct. in making the order for transfer.—*Re* HAY, GIBBONS, LTD. *v.* HAY, [1915] 2 Ch. 198; 84 L. J. Ch. 821; 113 L. T. 923; 59 Sol. Jo. 680; [1915] H. B. R. 165.

SECT. 2.—POSITION OF COURT AND PARTIES AFTER ORDER GRANTED.

See, now, 1914 Act, s. 130 (4)–(11).

4537. Position of court—At what stage proceedings taken over.]—If an order for transfer be made, the proceedings will be taken up by the county ct. as nearly as may be at the point at which they were left off by the ct. granting the transfer.—*Re* YORK, ATKINSON *v.* POWELL (1887), 36 Ch. D. 233; 56 L. J. Ch. 552; 56 L. T. 704; 35 W. R. 609; *sub nom. Re* NEAL, ATKINSON *v.* POWELL, 3 T. L. R. 548.

Annotations:—**Mentd.** *Re* Baker, Nichols *v.* Baker (1890), 44 Ch. D. 262, C. A.; *Re* Briggs, Earp *v.* Briggs (1891), 71 L. R. 572, C. A.; *Re* Hay, Gibbons *v.* Hay, [1915] 2 Ch. 198.

4538. —— Court must follow Chancery practice.]—Unless there is some provision to the contrary the ct. in acting under 1883 Act, s. 125, must follow the practice of the Ch. Div. of the High Ct. of Justice with regard to the administration of the estates of deceased persons.—*Re* CROWTHER,

Sect. 2.—Position of court and parties after order granted.]

Ex p. ELLIS (1887), 20 Q. B. D. 38 ; 57 L. J. Q. B. 57 ; 58 L. T. 115 ; 36 W. R. 189 ; 4 Morr. 305, D. C.

4539. —— Jurisdiction to direct consolidation.]—When a member of a partnership dies insolvent & an order is made under 1883 Act, s. 125, for the administration of his estate in bkpcy., & afterwards the surviving partner becomes bkpt., the ct. has jurisdiction to direct the proceedings in the two estates to be consolidated.—*Re* GREAVES, *Re* GREAVES, *Ex p.* OFFICIAL RECEIVER, [1904] 2 K. B. 493 ; 73 L. J. K. B. 975 ; 91 L. T. 80 ; 52 W. R. 633 ; 20 T. L. R. 564 ; 48 Sol. Jo. 546 ; 11 Mans. 270.

4540. —— Power to summon witnesses for examination—Discovery of property.]—Where an order has been made for the administration of the estate of deceased person in bkpcy. the ct. has no power to order the attendance of witnesses for examination for the purpose of discovery of deceased's property.—*Re* HEWITT, *Ex p.* HEWITT (1885), 15 Q. B. D. 159 ; 54 L. J. Q. B. 402 ; 53 L. T. 156 ; 2 Morr. 184, D. C.

Annotation :—**Distd.** *Re* Bradbrook, *Ex p.* Hawkins (1889), 23 Q. B. D. 226, C. A.

See, further, Part XIX., *post.*

4541. Position of grantee of voluntary settlement.]—*Held :* 1883 Act, s. 47, which avoided certain voluntary settlements executed by a bkpt., did not apply to the administration of the estate of a deceased insolvent by the Ct. of Bkpcy. —*Re* GOULD, *Ex p.* OFFICIAL RECEIVER (1887), 19 Q. B. D. 92 ; 56 L. J. Q. B. 333 ; 56 L. T. 806 ; 35 W. R. 569 ; 3 T. L. R. 605 ; 4 Morr. 202, C. A.

Annotations :—**Consd.** Watkins *v.* Barnard, [1897] 2 Q. B. 521. **Apld.** Hasluck *v.* Clark, [1899] 1 Q. B. 699, C. A. **Refd.** *Re* Mellison, *Ex p.* Day, [1906] 2 K. B. 68.

See, now, 1914 Act, s. 42.

4542. Position of creditors—Under garnishee order.]—A county ct. judge sitting in bkpcy. has no jurisdiction, unless by consent, to order payment to the official receiver of money received under a garnishee order attaching a debt due to the estate of a deceased debtor, which is being administered according to the law of bkpcy. under 1883 Act, s. 125.—*Re* CROWTHER, *Ex p.* ELLIS (1887), 20 Q. B. D. 38 ; 57 L. J. Q. B. 57 ; 58 L. T. 115 ; 36 W. R. 189 ; 4 Morr. 305, D. C.

4543. —— Under distress—Not equivalent to order of adjudication.]—An order obtained in the Ch. Div. by a creditor for administration of a deceased debtor's estate, not followed by any proceedings in bkpcy., is not equivalent to or included in the term "order of adjudication," so as to limit the power of the landlord, or other person to whom rent is due from the deceased person's estate, to recover by distress.—*Re* FRYMAN'S ESTATE, FRYMAN *v.* FRYMAN (1888), 38 Ch. D. 468 ; 57 L. J. Ch. 862 ; 58 L. T. 872 ; 36 W. R. 631.

See, now, 1914 Act, s. 35.

4544. —— Under execution or attachment—Not restricted by 1883 Act, s. 45.]—The above sect. restricting the rights of creditors under execution or attachment, is not made applicable to the administration of insolvent estates in the Ch. Div. by Jud. Act, 1875 (c. 77), s. 10.—PRATT *v.* INMAN (1889), 43 Ch. D. 175 ; 59 L. J. Ch. 274 ; 61 L. T. 760 ; 38 W. R. 200 ; 6 T. L. R. 91.

Annotations :—**Apld.** *Re* National United Investment Corpn., [1901] 1 Ch. 950. **Refd.** *Re* Leng, Tarn *v.* Emmerson, [1895] 1 Ch. 652, C. A. ; *Re* Whitaker, Whitaker *v.* Palmer (1900), 83 L. T. 342. **Mentd.** *Re* Hastings, *Ex p.* Brown (1892), 61 L. J. Q. B. 654.

See, further, EXECUTORS & ADMINISTRATORS.

4545. —— —— Seizure by sheriff—Before death.]—Under an execution for a sum exceeding £20 the sheriff seized & sold the goods of the judgment debtor. Before the expiration of fourteen days the sheriff received notice of a bkpcy. petition presented against debtor. Debtor shortly afterwards died. After the expiration of the fourteen days the sheriff received notice of a petition for an administration order, upon which an order was ultimately made :—*Held :* the money in the hands of the sheriff was not part of deceased debtor's estate, but belonged to the execution creditor.—WATKINS *v.* BARNARD, [1897] 2 Q. B. 521 ; 66 L. J. Q. B. 771 ; 46 W. R. 156 ; 41 Sol. Jo. 663 ; 4 Mans. 221.

Annotation :—**Refd.** Hasluck *v.* Clark, [1899] 1 Q. B. 699, C. A.

4546. —— —— —— After death.] — The goods of a judgment debtor were seized under a *fi. fa.* While the sheriff was in possession, the judgment debtor, without the knowledge of the sheriff, placed a sum of money in a drawer. He died, & his widow having found the money, deposited it with her solrs., the sheriff remaining in ignorance of its existence. Subsequently an order was made for the administration of the judgment debtor's estate in bkpcy. The sheriff, having learned of the existence of the money, claimed it from the solrs. :—*Held :* as there was no seizure before the death of the judgment debtor, after his death the sheriff could not seize the money, & it belonged to the trustee as against the execution creditor.—JOHNSON *v.* PICKERING, [1908] 1 K. B. 1 ; 77 L. J. K. B. 13 ; 98 L. T. 68 ; 24 T. L. R. 1 ; 51 Sol. Jo. 810 ; 14 Mans. 263, C. A.

4547. —— —— Not equivalent to receiving order.]—An order for the administration of the estate of a deceased debtor is not equivalent to a receiving order, so as to disentitle an execution creditor of deceased debtor to retain, as against the trustee of debtor's estate, the benefit of an execution not completed before the date of the administration order.—HASLUCK *v.* CLARK, [1899] 1 Q. B. 699 ; 68 L. J. Q. B. 486 ; 80 L. T. 454 ; 47 W. R. 471 ; 15 T. L. R. 277 ; 43 Sol. Jo. 352 ; 6 Mans. 146, C. A.

Annotations :—**Apprvd.** *Re* Rhoades, *Ex p.* Rhoades, [1899] 2 Q. B. 347, C. A. **Apld.** Johnson *v.* Pickering, [1908] 1 K. B. 1, C. A. **Refd.** *Re* National United Investment Corpn., [1901] 1 Ch. 950 ; *Re* Mellison, *Ex p.* Day, [1906] 2 K. B. 68.

See, further, EXECUTORS & ADMINISTRATORS.

4548. —— Executor's right of retainer—Exercised before notice of petition.]—An exor.'s right of retainer is not affected by an administration order, where it has been exercised before he has received the prescribed notice of the petition for administration in bkpcy.—*Re* WILLIAMS, *Ex p.* LEWIS & EVANS (1891), 8 Morr. 65.

PART XIV. SECT. 2.

4544 i. *Position of creditors—Under execution or attachment—Seizure & sale before administration order.*]—Where an execution is issued & the goods sold before presentation of a petition under Administration Act, 1879, Amendment Act, 1888, the execution is not void against the official assignee, nor do the proceeds of the sale form part of the estate vested in the assignee. —*Re* HUTCHINSON (1890), 9 N. Z. L. R. 301.—**N.Z.**

4544 ii. —— —— *Seizure before but sale after administration order.*]—Where a creditor has attached property in execution of a decree, but an administration order is made before the property is sold, the property vests in the official assignee, & the attaching creditor is relegated to the same position as the other creditors & the sale-proceeds are distributable ratably.—*Re* PREMLAL DHAR, *Ex p.* OFFICIAL ASSIGNEE (1917), I. L. R. 44 Calc. 1016.—**IND.**

Annotation :—**Consd.** *Re* Rhoades, *Ex p.* Rhoades, [1899] 1 Q. B. 905.

4549. —— —— Assets paid away by mistake recoverable.]—When an order has been made for the administration of the estate of an insolvent testator, thus vesting the estate in the official receiver, such order does not deprive an exor. creditor of right to retainer out of the assets which he has got in, even though by mistake & in ignorance of his rights he has paid over the assets to the official receiver under the administration order, nor is he deprived of that right by proving for his debts in the bkpcy., if on discovering his error he withdraws his proof. In that case he is entitled to be repaid the sum he would have been entitled to retain had the assets been still in his possession.—*Re* RHOADES, *Ex p.* RHOADES, [1899] 2 Q. B. 347; 68 L. J. Q. B. 804; 80 L. T. 742; 15 T. L. R. 407; 6 Mans. 277; *sub nom. Re* RHOADES, *Ex p.* OFFICIAL RECEIVER, 47 W. R. 561; 43 Sol. Jo. 571, C. A.

Annotations :—**Consd.** *Re* Thellusson, *Ex p.* Abdy, [1919] 2 K. B. 735, C. A. **Refd.** *In the Goods of* Belham, Richardes *v.* Yates (1901), 84 L. T. 300; *Re* Mellison, *Ex p.* Day (1906), 94 L. T. 679, D. C.; *Re* Broad, *Ex p.* Official Receiver (1911), 105 L. T. 719. **Mentd.** Pulman *v.* Meadows, [1901] 1 Ch. 233; *Re* Kenward, Hammond *v.* Eade (1906), 94 L. T. 277; Wilson *v.* Wilson, [1911] 1 K. B. 327.

4550. —— —— What right includes—Only funds actually or constructively in possession.]—The insolvent estate of a deceased person, the subject of an old administration suit, became entitled to a fund in ct., to the credit of another suit. The fund was transferred to the credit of the administration suit, & outstanding costs paid out of it :—*Held :* the administrator of deceased, a creditor, had no right of retainer against the balance in ct.—PULMAN *v.* MEADOWS, [1901] 1 Ch. 233; 70 L. J. Ch. 97; 84 L. T. 26; 45 Sol. Jo. 151.

4551. —— —— How right exercised—Whether bound to convert into money.]—When the debt due to the exor. of an insolvent testator exceeds the value of testator's assets, the exor. is not bound to realise the assets, *i.e.* convert them into money, before exercising his right of retainer, but is entitled to retain the assets in specie other than outstanding book debts, in satisfaction of his debt. —*Re* GILBERT, *Ex p.* GILBERT, [1898] 1 Q. B. 282; 67 L. J. Q. B. 229; 77 L. T. 775; 46 W. R. 351; 14 T. L. R. 125; 42 Sol. Jo. 118; 4 Mans. 337.

Annotations :—**Apprvd.** *Re* Rhoades, *Ex p.* Rhoades, [1899] 2 Q. B. 347, C. A.; *Re* Broad, *Ex p.* Official Receiver (1911), 105 L. T. 719, D. C. **Refd.** Wilson *v.* Wilson, [1911] 1 K. B. 327.

4552. —— —— —— Appropriation of chattels.]—The exercise of the right of retainer by an exor., after an administration order of chattels in his possession before the making of the order, to which he has not signified his election, is not forbidden.—*Re* BROAD, *Ex p.* OFFICIAL RECEIVER (1911), 105 L. T. 719; 56 Sol. Jo. 35, D. C.

See, further, EXECUTORS & ADMINISTRATORS.

4553. —— Executor carrying on business—Whether entitled to indemnity.]—A sole extrix. of a testator, who was also sole legatee, carried on his business. No authority to carry on the business was contained in the will, but the creditors assented. An order was made that the estate should be administered in bkpcy. :—*Held :* the extrix. was not entitled to an indemnity for debts incurred by her in carrying on the business, as the business was carried on, not for the purpose of winding up the estate, but for her own benefit, & there was no evidence of such a consent by the creditors of testator as would make her their agent in carrying on the business.—*Re* MILLARD, *Ex p.* YATES (1895), 72 L. T. 823; 2 Mans. 56, C. A.

4554. —— In respect of "testamentary expenses"—What is included.]—"Testamentary expenses incurred in & about debtor's estate" include the costs, charges & expenses of the legal personal representative properly incurred in an administration action.—*Re* YORK, ATKINSON *v.* POWELL (1887), 36 Ch. D. 233; 56 L. J. Ch. 552; 56 L. T. 704; 35 W. R. 609; *sub nom. Re* NEAL, ATKINSON *v.* POWELL, 3 T. L. R. 548.

Annotations :—**Mentd.** *Re* Baker, Nichols *v.* Baker (1890), 44 Ch. D. 262, C. A.; *Re* Briggs, Earp *v.* Briggs (1891), 7 T. L. R. 572, C. A.; *Re* Kenward, Hammond *v.* Eade (1906), 94 L. T. 277; *Re* Mellison, *Ex p.* Day (1906), 94 L. T. 679, D. C.; *Re* Hay, Gibbons *v.* Hay, [1915] 2 Ch. 198.

4555. —— —— ——.]—The words "testamentary expenses" include the costs incurred by an exor. in connection with an action brought to administer deceased's estate by creditors, & are payable in full out of the estate. The exor. is entitled to have the costs taxed as between solr. & client.—*Re* CHAPMAN, *Ex p.* CLARK (1894), 71 L. T. 778; 11 T. L. R. 94; 1 Mans. 413; 15 R. 231.

4556. —— In respect of rates & wages.]—*Held :* the priority as to rates & wages conferred by Preferential Payments in Bkpcy. Act, 1888 (c. 62), applied in the case of a deceased insolvent, whose estate was being administered in the Ch. Div., where the date of his death occurred after the commencement of the Act.—*Re* HEYWOOD, PARKINGTON *v.* HEYWOOD, [1897] 2 Ch. 593; 67 L. J. Ch. 25; 77 L. T. 423; 46 W. R. 72; 42 Sol. Jo. 33; 4 Mans. 321.

Annotations :—**Apld.** *Re* Whitaker, Whitaker *v.* Palmer, [1900] 2 Ch. 676. **Expld. & Distd.** *Re* Laycock, Laycock *v.* Income Tax Special Comrs., [1919] 1 Ch. 241.

See, further, EXECUTORS & ADMINISTRATORS.

4557. —— Right of set-off.]—Where there have been mutual dealings between a creditor & a debtor, the creditor is entitled, in the administration of an insolvent debtor's estate, to set off a debt due to him from the insolvent, although it has only ripened into a debt after the insolvent's death.—WATKINS *v.* LINDSAY & CO. (1898), 67 L. J. Q. B. 362; 42 Sol. Jo. 319; 5 Mans. 25.

4558. —— —— Estate must be insolvent.]—The mutual credit clause (1869 Act, s. 29) will not be applied in the administration of the estate of a deceased person, until it is shown that the estate is insolvent, but the ct. may direct that a debt claimed on behalf of the estate from a creditor shall be paid into ct. to a separate account, with liberty to the creditor to apply, in case the estate shall prove to be insolvent.—*Re* SMITH, GREEN *v.* SMITH (1883), 22 Ch. D. 586; 48 L. T. 254; 31 W. R. 413.

Annotation :—**Mentd.** *Re* Rees, Rees *v.* Rees (1889), 60 L. T. 260.

—— **Right of proof.**]—*See* Part VIII., *ante.*

Position of trustee—Powers generally.]—*See* Part VII., *ante.*

4559. —— To disclaim onerous property.]—1883 Act, s. 55, which gives the trustee power to disclaim onerous property of a bkpt., applies to an administration in bkpcy. of the estate of a deceased insolvent under s. 125 of the Act.—*Re* MELLISON, *Ex p.* DAY, [1906] 2 K. B. 68; 75 L. J. K. B. 595; 94 L. T. 679; 54 W. R. 444; 50 Sol. Jo. 378; 13 Mans. 201, D. C.

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w. *Whether doctrine of reputed ownership applicable under Administration Act, 1879, Amendment Act, 1888.*]—*Held :* it was more than doubtful whether 1883 Act, s. 81, as to property in the possession, order, or disposition of bkpt., was applicable in the administration of insolvent estates under Administration Act, 1879, Amendment Act, 1888.—*Re* LOWTHER BROAD, *Ex p.* WELDON (1893), 12 N. Z. L. R. 666.—**N.Z.**

Sect. 2.—*Position of court and parties after order granted. Sect.* 3. *Parts XV. & XVI. Sect.* 1.]

See, generally, Part XX., Sect. 16, *post.*

—— **In regard to collection & realisation.**]—*See* Part XX., *post.*

Position of official receiver—On grant of administration.]—*See* Part VI., Sect. 1, *ante.*

SECT. 3.—APPEALS.

4560. Who may appeal—"Person aggrieved"—Parties losing advantages of action.]—Applts., creditors of a deceased person, took out an originating summons for the administration of his estate in the Ch. Div., & had incurred costs. On the same day resps., who claimed to be creditors of the estate of deceased in respect of goods supplied by them after his death for the purpose of his business, which was being carried on by his extrix., presented a petition under 1883 Act, s. 125, praying for the administration of the estate of deceased in bkpcy. An order for administration in bkpcy. having been made:—*Held:* applts. were persons "aggrieved" by the order, because they would lose the advantages of their action & would be put to proof, & were entitled to appeal against it.—*Re* KITSON, *Ex p.* SUGDEN (THOMAS) & SON, LTD., [1911] 2 K. B. 109; 80 L. J. K. B. 1147; 55 Sol. Jo. 443; 18 Mans. 224, D. C.

4561. —— —— Administratrix put to expense.]—An administratrix, who will be put to expense in complying with an order for administration in bkpcy. under 1883 Act, s. 125, is a "person aggrieved" within s. 104.—*Re* HOSKING, *Ex p.* HOSKING *v.* DAVIES (1912), 106 L. T. 640, D. C.

Part XV.—Summary Administration of Small Estates.

See 1914 Act, s. 129.

4562. Jurisdiction of court—Claim not arising out of bankruptcy.]—An order for summary administration having been made under 1883 Act, s. 121, the official receiver applied to the county ct. judge for an order against a third party to pay him £343 14*s.* The claim did not arise out of the bkpcy.:—*Held:* (1) the county ct. had no jurisdiction; (2) the jurisdiction was the same in summary as in ordinary bkpcies., & 1886 Rules, r. 273, did not affect the right of third parties to claim the protection given by 1883 Act, s. 102.—*Re* BILLING, *Ex p.* OFFICIAL RECEIVER *v.* BLAKELY (1902), 86 L. T. 689, D. C.

4563. —— To allow execution to issue—After order for summary administration made.]—While an order for summary administration under 1883 Act, s. 122, is in force, the county ct. has no power under s. 122 (5) of that sect. to allow execution to issue.—*Re* FRANK, [1894] 1 Q. B. 9; 69 L. T. 762; 42 W. R. 253; 1 Mans. 23; 10 R. 80, D. C.

Annotation:—**Consd.** Pearson *v.* Wilcock, [1906] 2 K. B. 440, C. A.

4564. —— —— —— For debt subsequent to order.]—After an order had been made for the administration of deft.'s estate, under 1883 Act, s. 122, pltf., who had no notice of the order, obtained judgment in a county ct. against deft. in respect of a debt subsequently incurred by him. On an application by deft. the county ct. judge directed a stay of execution under s. 122 (5):—*Held:* s. 122 (5) applied to creditors of debtor who had obtained an administration order under that sect., whether their debts accrued due before or after the date of the order, & the stay of execution was rightly made.—PEARSON *v.* WILCOCK, [1906] 2 K. B. 440; 75 L. J. K. B. 717; 95 L. T. 431; 22 T. L. R. 653, C. A.

4565. —— To allow compensation—For use & occupation of premises by trustee—Disclaimer of lease.]—Where an order is made under 1883 Act, s. 121, for the summary administration of bkpt.'s estate, & the trustee, in pursuance of the power conferred on him by 1883 Rules, r. 232, disclaims, without any application to the ct., the leasehold premises of bkpt., the ct. has no jurisdiction to give any compensation to the landlord out of bkpt.'s estate for the use & occupation by the trustee of the leasehold premises for the purposes of the bkpcy., even although a benefit has thereby resulted to the estate.—*Re* SANDWELL, *Ex p.* ZERFASS (1885), 14 Q. B. D. 960; 54 L. J. Q. B. 323; 52 L. T. 692; 33 W. R. 522; 2 Morr. 95.

4566. —— To make special order as to costs—Adjournment of public examination.]—Where the assets were certified as not likely to realise £100, & the public examination of debtor had been twice adjourned at the instance of the official receiver:—*Qu.:* whether the county ct. judge had jurisdiction, under 1883 Act, s. 105, to make a special order as to the costs of the solr. for debtor.—*Re* ALISON, *Ex p.* JAYNES, [1892] 2 Q. B. 587; 66 L. T. 688; 36 Sol. Jo. 526; *sub nom. Re* ALLINSON, *Ex p.* JAYNES *v.* BOARD OF TRADE, 61 L. J. Q. B. 526; *sub nom. Re* ALLISON, *Ex p.* JAYNES, 40 W. R. 624; 9 Morr. 180.

Annotation:—**Mentd.** *Re* Beeston, *Ex p.* Board of Trade (1899), 68 L. J. Q. B. 344, C. A.

See, further, Part XIX., *post.*

4567. Duty of court—To make order for summary administration—On report of official receiver.]—*Re* HORNIBLOW, *Ex p.* OFFICIAL RECEIVER, No. 1855, *ante.*

4568. Effect of order—On power to hold office.]—A person whose total indebtedness does not exceed £50 & whose estate is being administered by an order of a county ct. under 1883 Act, s. 122, is not "adjudged bkpt." within s. 32 (1) of the Act, & is not disqualified from being elected to the office of mayor, alderman, or councillor.—LOWE *v.* LOWRIE, WAKEFIELD MUNICIPAL ELECTION PETITION (1902), 18 T. L. R. 553, D. C.

Annotation:—**Distd.** Bradfield *v.* Cheltenham Grdns., [1906] 2 Ch. 371.

See, generally, Part V., Sect. 2, sub-sect. 2, *ante.*

4569. Appointment of new trustee—After release of former trustee—On fresh assets coming in.]—In a summary bkpcy., as in an ordinary bkpcy., after the release of the trustee or of the official receiver acting as trustee, the creditors have no power to appoint a new trustee to administer further assets that may come in, but the official receiver is the trustee for that purpose, if necessary.—*Re* LEACH, *Ex p.* BARNES, [1900] 2 Q. B. 649; 69 L. J. Q. B. 931; 83 L. T. 222; 49 W. R. 76; 7 Mans. 384.

4570. Appeals—Whether leave required.]—Where notice of appeal from an order in a small bkpcy. was given without the leave of the county ct. judge, but leave was afterwards applied for & given by the county ct. judge "so far as he had power," the Div. Ct. heard the appeal.—*Re* STOCKTON & SABISTON, *Ex p.* GIBSON (1885), 2 Morr. 189, D. C.

4571. —— —— Appointment of trustee after refusal of leave.]—A county ct. judge having

refused leave to appeal from an order made in a small bkpcy., the creditors passed a resolution, under 1883 Act, s. 121, appointing a trustee :—*Held :* leave to appeal by the trustee was necessary.—*Re* RICHARDS, *Ex p.* OFFICIAL RECEIVER, *Re* RICHARDS, *Ex p.* MARCH (1887), 4 Morr. 233, D. C.

4572. —— —— Refusal to grant debtor's discharge.]—1886 Rules, r. 273 (6), does not preclude debtor from appealing, without leave, against a refusal to grant him his discharge.—*Re* RANKIN, *Ex p.* RANKIN (1887), 20 Q. B. D. 341 ; 58 L. T. 120 ; 36 W. R. 526 ; 4 Morr. 311, D. C.

See, generally, Part XVII., *post.*

4573. Costs—Of adjournments of public examination at instance of official receiver.]—Where the assets are certified as unlikely to realise £100, the allowance of £3 for costs is inclusive, & the solr. for debtor is not entitled to any extra charge for attendances at adjournments of the public examination, although such adjournments were made at the instance, & to suit the convenience, of the official receiver.—*Re* ALISON, *Ex p.* JAYNES, [1892] 2 Q. B. 587 ; 66 L. T. 688 ; 36 Sol. Jo. 526 ; *sub nom. Re* ALLINSON, *Ex p.* JAYNES *v.* BOARD OF TRADE, 61 L. J. Q. B. 526 ; *sub nom. Re* ALLISON, *Ex p.* JAYNES, 40 W. R. 624 ; 9 Morr. 180.

Annotation :—**Mentd.** *Re* Beeston, *Ex p.* Board of Trade (1899), 68 L. J. Q. B. 344, C. A.

4574. —— Of consenting to receiving order—Of preparing order for adjudication.]—Where bkpt.'s estate is under £200, debtor's solrs. cannot be allowed the costs under 1883 Act, App., Part II., of consenting to the receiving order, or of preparing the order of adjudication.—*Re* COLES, *Ex p.* BOARD OF TRADE (1895), 2 Mans. 217.

4575. —— Of obtaining grant of administration.]—Where in a small bkpcy. a solr., acting upon the instructions of the official receiver, applied to the Probate Ct. for a grant of letters of administration to the estate of bkpt.'s wife :—*Held :* in taking the costs of those proceedings as between solr. & client the scale of costs provided in the case of small bkpcies. by 1886-1890 Rules, r. 112 (2), did not apply, & the solr. was entitled to his full costs.—*Re* WEIGHILL, [1909] 1 K. B. 92 ; 78 L. J. K. B. 86 ; 100 L. T. 58 ; 25 T. L. R. 62 ; 53 Sol. Jo. 63 ; 15 Mans. 335, C. A.

4576. —— Of motions to declare payment void as fraudulent preferences.]—Motions made by the trustee in a small bkpcy. against creditors, to have payments made to them by debtor declared void as fraudulent preferences were dismissed with costs, but the trustee was allowed to recoup himself out of the estate :—*Held :* the trustee was only entitled to the lower scale of costs out of the estate, namely, three-fifths of the charges ordinarily allowed, disbursements being added, & not to his costs in full.—*Re* MARSH, *Ex p.* BOARD OF TRADE (1894), 71 L. T. 776 ; 43 W. R. 208 ; 39 Sol. Jo. 83 ; 1 Mans. 486 ; 15 R. 1.

4577. —— Of unsuccessful motion by official receiver.]—*Re* GLANVILLE, *Ex p.* JENKINS (OFFICIAL RECEIVER), HARRIS *v.* HAWKER, No. 1875, *ante.*

See, generally, Part XVI., *post.*

Part XVI.—Miscellaneous Practice & Procedure.

NOTE.—*The only cases included in this Part are cases of general application. Cases dealing with procedure in regard to particular matters, etc., are collected in the Parts in which those matters are dealt with respectively.*

SECT. 1.—NOTICE OF MOTION, APPLICATION, ETC.

4578. Notice of motion to commit—For non-compliance with order of court—Proof of service of order.]—An order was made directing trustees in a bkpcy. to pay over to the bkpcy. estates account at the Bank of England undistributed funds & dividends remaining in their hands. The order not having been complied with, an application was made for an order of committal. On the hearing of the application objection was taken on behalf of the trustees to the reading of an affidavit not mentioned in the notice of motion to prove the service of the order for payment :—*Held :* (1) it was essential that personal service should be proved, & the ct. had power to order an adjournment to enable that to be done.—*Re* PEARCE, *Ex p.* BOARD OF TRADE (1884), 1 Morr. 111 ; *subsequent proceedings,* 1 Morr. 135.

Annotation :—**Refd.** *Re* Calderwood, *Ex p.* Board of Trade (1890), 7 Morr. 251.

4579. Necessity for notice—Of application for four day order.] — If circumstances render an application to the ct. for an order to pay in four days or stand committed necessary, notice must be given to the other side.—*Re* MABERLY, *Ex p.* SOLOMONS (1833), 1 Mont. & A. 269, n. ; 2 L. J. Bcy. 67, Ct. of R.

Annotation :—**Mentd.** *Re* Bennet, *Ex p.* Malachi (1834), 3 L. J. Bcy. 86, Ct. of R.

See, further, Sect. 4, *post.*

4580. —— Of intention to read—Rule of Court of King's Bench.]—A rule of the Ct. of King's Bench, made in an action pending in that ct., cannot be read on a petition of bkpcy., without notice to the other party of the intention to read it on the hearing.—*Re* CHAMBERS, *Ex p.* CHAMBERS (1835), 1 Deac. 197 ; 2 Mont. & A. 440, L. C.

Annotations :—**Mentd.** *Re* Durrant, *Ex p.* Thirkill (1836), 5 L. J. Bcy. 40, Ct. of R. ; *Re* Newall, *Ex p.* Newall (1838), 3 Deac. 333, Ct. of R. ; *Re* Prescott, *Ex p.* Prescott (1840), 4 Jur. 852, Ct. of R. ; *Re* Bakewell, *Ex p.* Butler (1842), 2 Mont. D. & De G. 731, Ct. of R. ; *Re* Scowcroft, *Ex p.* Rees (1845), 6 L. T. O. S. 104 ; *Re* Rolls, *Ex p.* Williams (1857), 29 L. T. O. S. 25.

—— —— **Affidavits or depositions.**]—*See* Nos. 4653 *et seq., post.*

—— **Of application under 1869 Act, s. 98.**]—*See* cases in Part XIX., *post.*

4581. Service of notice—By post—Of application to continue interim injunction.]—Notice of an application to continue an *interim* injunction may be properly served by post under 1870 Rules, r. 14.—*Re* LEWIS, *Ex p.* MAUTHNER (1876), 3 Ch. D. 113 ; 45 L. J. Bcy. 125 ; 34 L. T. 662.

See 1914 Act, s. 146, & 1915 Rules, r. 90.

4582. —— —— On person not party to proceedings.]—Notice of motion was served by post

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PART XVI. SECT. 1.

y. *Necessity for notice—Of application to vary report of chief registrar.*]—Objections to the report of the chief registrar should be made by motion on notice to vary the report.—*Re* NOLAN (1874), 8 I. L. T. Jo. 472.—**IR.**

a. *Service of notice—Application to antedate commencement of bankruptcy—On bankrupt.*]—Notice of an application to antedate the commencement of the bkpcy. should be served on bkpt.—*Re* KIDD, *Ex p.* OFFICIAL ASSIGNEE (1903), 3 S. R. N. S. W. 363.—**AUS.**

b. *Service of petition—On Attorney-General.*]—The service of a petition by bkpt., on the A.-G., at his house, is irregular ; the proper service on the A.-G. is through the Crown Solr. —*Re* MULLAY, *Ex p.* MULLAY (1829), 3 Mol. 70.—**IR.**

Sect. 1.—*Notice of motion, application, etc. Sects.* 2 & 3: *sub-sect.* 1.]

on a person not party to the proceedings:—*Held:* though the service was sufficient, where possible, notice should be served personally.—*Re* BATES, *Ex p.* HOBBS (1891), 8 T. L. R. 44.

4583. —— —— Length of notice.]—A notice dated Jan. 3, of a motion for Jan. 12 was, in default of personal service, sent by registered letter on Jan. 8:—*Held:* the service was bad, & the notice must be served again.—*Re* ALDERSON, *Ex p.* KIRBY (1891), 8 Morr. 93.

4584. —— Out of jurisdiction.]—Leave was asked to serve upon a party out of the jurisdiction notice of motion by the trustee for an order to set aside a transfer of property by bkpt. to him:—*Held:* the notice could not be served on him, there being no provision in 1883 Act or rules making it possible to serve such a notice of motion out of the jurisdiction.—*Re* HUTCHINS (1887), cited 56 L. J. Q. B. at p. 504; *sub nom. Re* HUTCHINSON, cited 8 Morr. at p. 96.

Annotation:—**Distd.** *Re* Rathbone, *Ex p.* Paterson (1887), 56 L. J. Q. B. 504.

4585. —— ——.]—A notice of motion cannot be served out of the jurisdiction on a person, against whom relief is sought.—*Re* ALDERSON, *Ex p.* KIRBY (1891), 8 Morr. 95.

4586. —— —— No proceedings against person served.]—Where a notice is simply one by which certain information is given to persons interested, & is not intended to be the foundation of any proceedings against such persons, leave to serve the notice out of the jurisdiction may be given; but if the notice is a notice leading to proceedings against the person whom it is desired to serve, & bringing him into the position of deft. before the ct., service of such notice out of the jurisdiction will not be allowed.—*Re* RATHBONE, *Ex p.* PATERSON (1887), 56 L. J. Q. B. 504; 57 L. T. 420; 35 W. R. 735; 4 Morr. 270.

Annotation:—**Distd.** *Re* Alderson, *Ex p.* Kirby (1891), 8 Morr. 95.

—— **On sheriff — Within what hours.**]—*See* Part XX., Sect. 10, *post.*

4587. —— At last known address—Knowledge that party had departed.]—Notice sent to the last known address, with the knowledge that the addressee has departed therefrom, is a good notice.—*Re* FOLLICK, *Ex p.* TRUSTEE (1907), 97 L. T. 645; 52 Sol. Jo. 13.

4588. Irregularity of notice—Waiver.]—*Held:* a formal objection to a notice of motion was waived by the party appearing & requesting further time to answer it.—*Re* MORLAND, *Ex p.* MORLAND (1833), 3 Deac. & Ch. 248, Ct. of R.

4589. Effect of notice of motion to vary minutes of order—On drawing up of order.]—A notice of motion to vary the minutes does not stop the drawing up of the order.—*Re* BROWN, *Ex p.* BELL (1836), 1 Deac. 690, Ct. of R.

4590. Attestation of petition—By solicitor—Parties very numerous.]—Where the parties concerned were very numerous, attestation by the solr. for one of the parties was allowed, a party who should be responsible for the costs being thereby provided.—*Re* HOOPER, *Ex p.* VINES (1832), 1 L. J. Bcy. 44, Ct. of R.

4591. —— How authenticated.]—*Held:* the General Order of Aug. 12, 1809, was not complied with by the solr. authenticating the signature of petitioner without attesting it.—*Re* MATHER, *Ex p.* BURY (1819), Buck, 393.

See 1915 Rules, r. 148.

SECT. 2.—RIGHT OF AUDIENCE HEARING OF APPLICATIONS ETC., TRIAL BY JURY.

4592. Private hearing.]—The Ct. of Review can hear causes in private, if the nature of the case require secrecy.—*Re* CHAMBERS, *Ex p.* CHAMBERS (1832), 2 Deac. & Ch. 395; 1 L. J. Bcy. 96, Ct. of R.

4593. Right of audience—Solicitor not directly retained by party.]—Comrs. in bkpcy. cannot recognise in the advocacy or proceedings before them the professional interference of any legal practitioners, not being members of the Bar, except solrs. directly retained by the parties themselves.—*Re* BULL (1852), 20 L. T. O. S. 24.

4594. —— Solicitor's clerk—Duly qualified.]—A comr. in bkpcy. is not bound to hear a person who, although a duly admitted solr., does not appear as the solr. of the party for whom he appears, but only as the clerk of such solr.—*Re* BROADHOUSE, *Ex p.* BROADHOUSE (1867), 2 Ch. App. 655; 36 L. J. Bcy. 29; 17 L. T. 126; 15 W. R. 1154, L. JJ.

Annotation:—**Consd.** *R. v.* Oxfordshire County Court Judge, [1894] 2 Q. B. 440. The test put by LORD CAIRNS was, Is the person who claims audience the solr. of a particular client? (COLLINS, J.).

See, further, Part XVII., Sect. 8, *post,* &, *generally,* SOLICITORS.

4595. —— Whether counsel have exclusive right—Insolvent court.]—*Held:* the rule in the Insolvent Ct., giving to counsel the privilege of sole audience, extended to all cases under 5 & 6 Vict. c. 116, & Execution Act, 1844 (c. 96), transferred to that ct.—*Re* NEWBURN (1847), 10 L. T. O. S. 68.

4596. —— —— Bankruptcy court—Right of precedence.]—The Bar is not entitled to exclusive audience in any proceedings in the Cts. of Bkpcy., but only to precedence.—ANON. (1852), 20 L. T. O. S. 55; 1 W. R. 12.

See, further, BARRISTERS, Vol. III., p. 319.

4597. Grounds for refusing hearing—Bankrupt systematically disobeying orders of court.]—The ct. refused to hear an application by bkpt. who had systematically disobeyed the order of the ct., until he had complied with those orders.—*Re* M'HENRY, *Ex p.* BROWN & WHIFFEN (TRUSTEES) (1887), 3 T. L. R. 701, C. A.

4598. Who entitled to begin—Petition set down for further directions—By way of exceptions to registrar's report.]—Where a petition is set down for further directions, & comes on also by way of exceptions to the registrar's report, petitioner's counsel is entitled to begin.—*Re* BAKEWELL, *Ex p.* BUTLER (1842), 2 Mont. D. & De G. 731; 11 L. J. Bcy. 51; 6 Jur. 957, Ct. of R.

Annotations:—**Mentd.** Morgan *v.* Knight (1864), 15 C. B. N. S. 669; Engelback *v.* Nixon (1875), L. R. 10 C. P. 645.

4599. Who entitled to conduct—Proceedings up to choice of assignees.]—*Held:* the conduct of proceedings in bkpcy. up to the choice of assignees, would be given to the solr. for the opposing creditor in preference to bkpt's. solr., who had acted as his solr. under a petition for arrangement,

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PART XVI. SECT. 2.

4594 i. *Right of audience—Solicitor's clerk—Duly qualified.*]—Attorney's apprentices & conducting clerks, even if the latter are themselves attorneys, cannot act as advocates in the Ct. of Bkpcy.—*Re* A. B. (1867), 1 I. L. T. Jo. 460.—**IR.**

c. —— *Creditor — Majority of creditors represented by trustee.*]—A creditor will be heard by the ct., though the general body of creditors is represented by the assignee.—*Re* MOELLER, *Ex p.* JOSEPH (1884), 3 N. Z. L. R. 164.—**N.Z.**

4598 i. *Who entitled to begin—Motion.*]—On motions in bkpcy. the party moving has the right to begin.—*Re* KINLEY, *Ex p.* OFFICIAL ASSIGNEE (1886), 4 N. Z. L. R. 385.—**N.Z**

from which the bkpcy. proceeded.—*Re* SMITH (1858), 31 L. T. O. S. 15.

4600. Attendance of bankrupt—When in custody.]—Upon the application of deft., who was a bkpt., & who had been committed to the custody of the Warden of the Fleet for a contempt incurred in the suit:—*Held:* he should be taken to the Ct. of Review to be present at the hearing of a petition in the bkpcy.—LANGSTONE *v.* COOKE, *Ex p.* COOKE (1842), 6 Jur. 544, Ct. of R.

4601. Trial by jury—In what cases.]—It is the practice of the ct. to take the assistance of a jury, when there is so much of doubt that such assistance is felt to be necessary to the right determination of the case. But it is not the practice for the ct. to put the parties to the expense of trial by jury, without first hearing all the evidence read & the case fully argued, unless counsel on both sides agree in stating that such must necessarily be the result, if the matter were gone into.—*Re* HUMBLE, *Ex p.* HEYGATE (1819), Buck, 442, L. C.

See 1915 Rules, rr. 92–95.

4602. —— Discretion to grant—Waiver of irregular order for trial.]—Under 1869 Act, s. 72, one party cannot demand a jury as a matter of right. The judge is bound to exercise a judicial discretion whether the case ought to be tried by a jury. But if an irregular order for trial by jury is made, the irregularity is one which may be waived by the parties, & appearance at the trial without objection will amount to a waiver.—*Re* SIMPSON, *Ex p.* MORGAN (1876), 2 Ch. D. 72; 45 L. J. Ch. 36; 34 L. T. 329; 24 W. R. 414, C. A.

Annotations:—**Mentd.** Sugden *v.* St. Leonards (1876), 34 L. T. 369, C. A.; Brandon Hill *v.* Lane, [1915] 1 K. B. 250, D. C.

4603. —— Discretion to disregard findings of jury—Without directing new trial.]—The ct. may disregard the finding of a jury, if it sees that it is inconsistent with the evidence, & need not direct a new trial to take place.—*Re* GOLDEN, *Ex p.* NORTON (1873), L. R. 16 Eq. 397; 21 W. R. 402.

Annotation:—**Dbtd.** *Re* Simpson, *Ex p.* Morgan (1876), 2 Ch. D. 72, C. A. I cannot but think that the case of *Ex p. Norton* is in conflict with decisions in the House of Lords, & that it cannot be supported (BRETT, J.).

4604. —— —— ——.]—In the Ct. of Bkpcy. the verdict of a jury on a question of fact will not be set aside, merely on the ground that it was against the weight of the evidence. In such a case a new trial should be ordered. The verdict may, however, be disregarded, if there was no evidence to be left to the jury, or if the finding has become immaterial to the decision of the case by reason of some principle of law or of some new facts.—*Re* SIMPSON, *Ex p.* MORGAN (1876), 2 Ch. D. 72; 45 L. J. Ch. 36; 34 L. T. 329; 24 W. R. 414, C. A.

Annotations:—**Refd.** Sugden *v.* St. Leonards (1876), 34 L. T. 369, C. A. **Mentd.** Brandon Hill *v.* Lane, [1915] 1 K. B. 250, D. C.

4605. Master requiring to examine witnesses—Certificate to court—Order.]—If a matter in bkpcy. is referred to a master, & he finds it necessary to examine witnesses, a certificate to the ct. must be made by him of the necessity of such examination, & the ct. will thereupon make an order accordingly. —ANON. (1819), 4 Madd. 379; 56 E. R. 744.

SECT. 3.—**EVIDENCE.**

SUB-SECT. 1.—IN GENERAL.

4606. Part of examination.]—Part of an examination cannot be received in evidence in support of a petition, unless the whole is produced.—*Re* CLARKE, *Ex p.* SMITH (1841), 2 Mont. D. & De G. 113, Ct. of R.

See, further, Part XIX., *post.*

4607. Fresh evidence in matter remitted back to district court—Witnesses residing in London.]—When fresh evidence in a matter sent back to a district ct. for further consideration has been permitted, & it appears that the witnesses reside in London, the Ct. of Appeal will order such fresh evidence to be taken before one of the comrs. in London.—*Re* CARDIFF PRESERVED COAL & COKE CO., LTD., *Ex p.* HILL (1863), 7 L. T. 659, L. JJ.

See, now, 1914 Act, s. 122.

4608. Evidence of fact of bankruptcy—London Gazette—On indictment for offences under bankruptcy laws.]—On an indictment against bkpt & other persons for an offence under the bkpcy. laws, the *Gazette* is evidence of the bkpcy. & fiat only as against bkpt. himself, & not as against the persons indicted with him.—R. *v.* HARRIS (1849), 4 Cox, C. C. 140, N. P.

Annotation:—**Refd.** R. *v.* Levi (1865), 6 New Rep. 131, C. C. R.

4609. —— —— ——.]—In order to prove an adjudication of bkpcy. under 1849 Act, s. 240, on an indictment for offences under the bkpcy. laws, it is enough to produce a copy of the *London Gazette* purporting to be printed by authority, & containing an announcement of the list of bkpts.—R. *v.* RAUDNITZ (1869), 21 L. T. 621; 34 J. P. 86; 11 Cox, C. C. 360, C. C. R.

4610. —— —— —— Where bankrupt has not appealed.]—Where bkpt. has not disputed or sought to annul the petition for adjudication, & is subsequently indicted for an offence under the bkpcy. laws, the *Gazette* is, as against him, conclusive evidence of the bkpcy., etc.—R. *v.* LEVI (1865), Le. & Ca. 597; 6 New Rep. 131; 34 L. J. M. C. 174; 12 L. T. 502; 29 J. P. 420; 11 Jur. N. S. 450; 13 W. R. 724; 10 Cox, C. C. 110, C. C. R.

Annotation:—**Folld.** R. *v.* Robinson (1867), L. R. 1 C. C. R. 80, C. C. R.

4611. —— —— Cutting not sufficient.]—A petition in bkpcy. was presented against prisoner in the cty. ct., & an order made that the publication of a notice of the petition in the *London Gazette* should be deemed service of the petition on prisoner. Prisoner was adjudicated bkpt. in his absence, & was subsequently indicted under Debtors Act, 1869 (c. 62), s. 11. At the trial there was produced the file of bkpcy. proceedings under the seal of the cty. ct., & on such file was an entire page of a printed document, headed *London Gazette*, in which an advertisement occurred addressed to prisoner, giving him notice of the petition:—*Held:* such cutting from the *London Gazette* was not properly receivable as evidence of the publication of the notice in the *London Gazette*.—R. *v.* LOWE (1883), 52 L. J. M. C. 122; 48 L. T. 768; 47 J. P. 535; 15 Cox, C. C. 286, C. C. R.

4602 i. *Trial by jury—Discretion to grant.*]—*Held:* 1883 Act, s. 11, did not make it obligatory on the ct., or a registrar acting for a judge, to order a trial by jury when either party desired it.—*Re* BLOOMFIELD (1885), 3 N. Z. L. R. C. A. 177.—**N.Z.**

PART XVI. SECT. 3, SUB-SECT. 1.

d. *Witnesses—Attendance of.*]—The Insolvent Debtors Ct. at Bombay can order the examination of a witness at Shanghai, but cannot direct a witness to come to Bombay to be examined, there being no machinery for that purpose.—*Re* NAOROJI SORABJI TALATI (1908), I. L. R. 33 Bom. 462.—**IND.**

e. —— ——.]—The Ct. of Bkpcy. has no jurisdiction to compel the attendance at a trial before it of a material witness who is in gaol under a sentence of imprisonment.—*Re* SMITH (1874), 8 I. L. T. Jo. 564.—**IR.**

f. —— *Expenses of.*]—When a witness examined in the Bkpcy. Ct. had anything to do with the removal of the goods of bkpt., the ct. will not give him his expenses.—*Re* HEALLY (1867), 1 I. L. T. Jo. 505.—**IR.**

Sect. 3.—*Evidence: Sub-sects.* 1, 2 & 3.]

4612. —— Adjudication under seal of court—In proceedings under Debtors Act, 1869 (c. 62), s. 11 (15).]—On a prosecution under Debtors Act, 1869, s. 11 (15), the production of the adjudication under the seal of the ct. is sufficient evidence of prisoner's bkpcy.—R. *v.* THOMAS (1870), 22 L. T. 138; 11 Cox, C. C. 535.

SUB-SECT. 2.—VIVÂ VOCE EVIDENCE.

4613. When leave necessary—Agreement of parties—Notice to clerk of court.]—Where parties agree to take the evidence on a motion *vivâ voce*, they need not obtain the leave of the judge, but must give written notice to the clerk of the ct., who will enter the motion on a special list, & an application can then be made to the ct. to fix a day for the hearing. Otherwise a motion for that purpose must be made in the usual way.—*Re* UNDERHILL (1886), 18 Q. B. D. 115; 35 W. R. 336; 3 Morr. 282.

See, also, No 3157, *ante*.

4614. To whom application made—Judge.]—Where in a case to be heard before the Judge in Bkpcy. it is desired to use *vivâ voce* evidence, the application for leave to give such *vivâ voce* evidence must be made beforehand to the judge, & not to the registrar.—*Re* HAGAN & Co., *Ex p.* ADAMSON (1886), 3 Morr. 117.

4615. When application made—Whether beforehand or at hearing.]—Leave to use *vivâ voce* evidence upon the hearing of a motion before the ct. should be asked for beforehand, & not at the hearing of the motion.—*Re* GENESE, *Ex p.* KEARSLEY (1886), 17 Q. B. D. 1; 55 L. J. Q. B. 325; 34 W. R. 474; 3 Morr. 57.

Annotations:—**Expld.** *Re* Wilson, *Ex p.* Watkinson (1887), 35 W. R. 668, D. C. **Mentd.** *Re* Malden, Gibson, *Ex p.* James (1886), 3 Morr. 185; The Lord of the Isles, [1894] P. 342.

4616. —— —— In county court.]—The rule laid down in *Re Genese, Ex p. Kearsley*, No. 4615, *supra*, does not apply to county cts.—*Re* WILSON, *Ex p.* WATKINS (1887), 57 L. T. 201; 35 W. R. 668; 4 Morr. 238, D. C.

4617. When granted—Whether case must first be heard on affidavits.]—On a motion that process might issue, to compel the attendance of parties, for the purpose of examining them *vivâ voce*:—*Held:* the ct. would hear the petition first on the affidavits, in order to decide whether a *vivâ voce* examination was necessary for the purpose of forming the judgment of the ct.—*Re* LORD, *Ex p.* ARMSLEY (1832), 2 Deac. & Ch. 119; 2 L. J. Bcy. 17, Ct. of R.

Annotation:—**Consd.** *Re* Smith, *Ex p.* Baldwin (1834), 3 L. J. Bcy. 80, Ct. of R.

4618. —— ——.]—*Semble:* the ct. will not consider itself bound in all cases, to hear a case on the affidavits, before it goes to a *vivâ voce* examination.

Although, in general, the ct. will wish to satisfy itself from the affidavits, of the necessity for granting a *vivâ voce* examination, it would not consider itself bound so strictly as the short note of the report in *Ex p. Armsby, Re Lord*, No. 4617, *supra*, would imply (ERSKINE, C.J.).—*Re* SMITH, *Ex p.* BALDWIN (1834), 3 L. J. Bcy. 80, Ct. of R.

4619. —— Preliminary question likely to render evidence immaterial.]—Where, upon an application on the part of resps., assignees, for an examination of witnesses *vivâ voce*, petitioners objected that there was a preliminary question, which might render the matter of fact in dispute immaterial:—*Held:* in all the circumstances of the case, resps. ought to be at liberty to examine their own witnesses *vivâ voce*, undertaking to abide personally, & otherwise, by the order of the ct. as to costs, petitioners being at liberty to produce evidence, either by affidavit or *vivâ voce*.—*Re* HUTTON, *Ex p.* MELVILLE (1843), 3 Mont. D. & De G. 474, Ct. of R.

Evidence in actions by trustee.]—*See* Part XXI., Sect. 2, sub-sect. 5, *post*.

See, also, No. 4924, *post*.

SUB-SECT. 3.—ADMISSIBILITY IN OTHER PROCEEDINGS OF BANKRUPT'S ADMISSIONS ETC.

4620. Declaration of bankrupt—As to acts of bankruptcy.]—The declarations of bkpt. as to any particular matter or deed which may constitute an act of bkpcy., if made after the deed done, are not evidence.—ROBSON *v.* KEMP (1803), 4 Esp. 233, N. P.

Annotation:—**Consd.** Smallcombe *v.* Bruges (1824), M'Cle. 45.

4621. Declaration of insolvent—To show knowledge of insolvency—Insolvency proved aliunde.]—Declarations of a person in insolvent circumstances, tending to show that he knew of his insolvency, are admissible in evidence to prove such knowledge, provided the fact of his insolvency be proved *aliunde*. *Semble:* the fact of insolvency should be proved before the declarations are offered in evidence.—THOMAS *v.* CONNELL (1838), 4 M. & W. 267; 1 Horn & H. 189; 7 L. J. Ex. 306; 150 E. R. 1429.

4622. Admission of debt due to testator—In balance sheet & examination of bankrupt legatee—To show whether advances, loans or gifts.]—It being admitted, or proved, that advances had been made by testator to the legatee:—*Held:* an admission of a debt to testator, made by the legatee, in his balance sheet, & examination under his bkpcy., though it did not charge him so as to take the debt out of Stat. Limitations, was evidence of the character of the advances which had been made, on the question whether such advances were loans or gifts.—COURTENAY *v.* WILLIAMS (1844), 3 Hare, 539; 13 L. J. Ch. 461; 8 Jur. 844; 67 E. R. 494; *affd.* (1846), 15 L. J. Ch. 204, L. C.

Annotations:—**Refd.** *Re* Watson, Turner *v.* Watson, [1896] 1 Ch. 925; *Re* Bruce, Lawford *v.* Bruce, [1908] 2 Ch. 682, C. A.; *Re* Sewell, White *v.* Sewell, [1909] 1 Ch. 806. **Mentd.** Harvey *v.* Palmer (1851), 4 De G. & Sm. 425; Coates *v.* Coates (1864), 33 Beav. 249; *Re* Morley, Morley *v.* Saunders (1869), L. R. 8 Eq. 594; Poole *v.* Poole (1871), 7 Ch. App. 17, L. JJ.; *Re* Stead's Settlmt. Trusts (1876), 24 W. R. 698; *Re* Milnes, Milnes *v.* Sherwin (1885), 53 L. T. 534; *Re* Akerman, Akerman *v.* Akerman, [1891] 3 Ch. 212; *Re* Taylor, Taylor *v.* Wade (1894), 8 R. 186; *Re* Langham, Otway *v.* Langham (1896), 74 L. T. 611; Dingle *v.* Coppen, Coppen *v.* Dingle, [1899] 1 Ch. 726; *Re* Lloyd, Lloyd *v.* Lloyd, [1903] 1 Ch. 385, C. A.; *Re* Rhodesia Goldfield, Partridge *v.* Rhodesia Goldfield, [1910] 1 Ch. 239; *Re* National Live Stock Insce., *Re* National General Insce., [1917] 1 Ch. 628.

4623. Answers in examination—In criminal proceedings.]—Bkpt. was examined before a comr. in bkpcy., touching a matter not relating to his trade dealings or estate. Bkpt. did not refuse to

g. *Deed of assignment—To what extent evidence.*]—1875 Act, s. 144, makes a deed of assignment evidence of the regularity of the proceedings taken with a view to its being made, & nothing more.—CREIGHTON *v.* CHITTICK (1881), 2 R. & G. 90; 1 C. L. T. 568; *affd.* on appeal, 7 S. C. R. 348; 2 C. L. T. 248. —CAN.

PART XVI. SECT. 3, SUB-SECT. 3.

4623 i. *Answers in examination—In criminal proceedings.*]—Under Insolvency Amendment Act, 1855 (No. 33), s. 3, no statement made by an insolvent on his examination in the Insolvent Ct. is admissible in evidence against him, on the trial of any indictment other than an indictment for perjury. —R. *v.* HARRIS (1866), 5 N. S. W. S. C. R. 66.—AUS.

4623 ii. —— ——.]—An insolvent's answers to questions put to him under examination under Insolvency Act, 1874, s. 114, which tend to criminate him of a felony, may be given in evidence against him on a subsequent indictment for felony under s. 207 of

answer on the ground that the answer would tend to criminate him, but answered without objection:—*Held:* his answers were voluntary & his examination was admissible against him on a subsequent criminal charge:—*Qu.:* whether, if the examination had been confined to matters relating to his trade dealings or estate, such examination would not then have been compulsory & inadmissible.—R. *v.* SLOGGETT (1856), Dears. C. C. 656; 25 L. J. M. C. 93; 27 L. T. O. S. 142; 20 J. P. 293; 2 Jur. N. S. 476; 4 W. R. 487; 7 Cox, C. C. 139, C. C. R.

Annotations:—**Distd.** R. *v.* Scott (1856), Dears. & B. 47 C. C. R. **Consd.** R. *v.* Coote (1873), L. R. 4 P. C. 599, P. C. **Distd.** *Re* Firth, *Ex p.* Scholefield (1877), 37 L. T. 281, C. A.

4624. ——— ———.]—The enforced answers of bkpt., under examination of a bkpcy. comr., to questions relating to matters specified in 1849 Act, s. 117, may be given in evidence by the prosecution on any criminal proceeding against bkpt.—R. *v.* SCOTT (1856), Dears. & B. 47; 25 L. J. M. C. 128; 27 L. T. O. S. 254; 20 J. P. 435; 2 Jur. N. S. 1096; 4 W. R. 777; 7 Cox, C. C. 164, C. C. R.

Annotations:—**Folld.** R. *v.* Cross & Leyland (1856), Dears. & B. 68, C. C. R. **Consd.** R. *v.* Skeen & Freeman (1859), 28 L. J. M. C. 91, C. C. R. **Folld.** R. *v.* Robinson (1867), L. R. 1 C. C. R. 80; R. *v.* Widdop (1872), L. R. 2 C. C. R. 3. **Apld.** R. *v.* Hillam (1872), 12 Cox, C. C. 174; R. *v.* Coote (1873), 9 Moo. P. C. C. N. S. 463. **Consd.** *Re* A Solicitor (1890), 25 Q. B. D. 17, C. A. **Folld.** R. *v.* Erdheim, [1896] 2 Q. B. 260, C. C. R. **Refd.** *Re* Firth, *Ex p.* Schofield (1877), 6 Ch. D. 230, C. A.; *Re* Atherton, [1912] 2 K. B. 251. **Mentd.** Goode *v.* Job (1858), 5 Jur. N. S. 145; *Re* Sankey, *Re* Solicitors Act, 1888 (1890), 59 L. J. Q. B. 238, C. A.

4625. ——— ———.]—Examinations in bkpcy. are admissible as evidence against the persons examined upon a criminal charge.—R. *v.* ROBINSON (1867), L. R. 1 C. C. R. 80; 36 L. J. M. C. 78; 16 L. T. 605; 31 J. P. 469; 15 W. R. 966; 10 Cox, C. C. 467, C. C. R.

Annotation:—**Refd.** R. *v.* Widdop (1872), L. R. 2 C. C. R. 3.

4626. ——— ——— **Notwithstanding promise that they should not be so used.**]—An examination of bkpt. before the registrar of the Bkpcy. Ct. is admissible in criminal proceedings against him, notwithstanding a promise made to him before examination that it should not be filed or used against him.—R. *v.* CHERRY (1871), 12 Cox, C. C. 32.

4627. ——— ——— **Under Factors Act, 1842 (c. 39).**]—Defts. were charged before a magistrate with an offence, for which they were afterwards tried under s. 6 of the above Act. By the depositions of witnesses on oath the charge was then proved against them, & all the circumstances fully explained. They had previously been adjudged bkpts., & subsequently, while the prosecution was pending against them, being examined in the Bkpcy. Ct. at the instance of a creditor, they made a statement to the same effect as the depositions before the magistrate, & amounting to a confession of their guilt. Soon afterwards an indictment for the offence was preferred & found against them, upon which they were tried & convicted on exactly the same evidence which had been given before the magistrate. They had pleaded not guilty:—*Held:* (1) the depositions in the Bkpcy. Ct. were properly received in evidence at the close of the case for the prosecution, under the plea of "not guilty"; (2) such depositions were not a disclosure of the offence charged, within the proviso in the above sect., & defts. were not entitled to be acquitted.—R. *v.* SKEEN (1859), Bell, C. C. 97; 28 L. J. M. C. 91; 23 J. P. 101; 5 Jur. N. S. 151; 7 W. R. 255; 8 Cox, C. C. 143, C. C. R.

Annotations:—**Refd.** R. *v.* Robinson (1867), L. R. 1 C. C. R. 80; R. *v.* Gunnell (1886), 55 L. T. 786, C. C. R. **Mentd.** Conway *v.* Wade, [1908] 2 K. B. 844, C. A.; Sadler *v.* Whiteman, [1910] 1 K. B. 868, C. A.

4628. ——— ——— **Summons irregular.**]—A summons to examine debtor having issued, & he having appeared thereto & been examined, his examination is admissible in evidence on a criminal charge against him, whether the summons was regularly issued or not.—R. *v.* WIDDOP (1872), L. R. 2 C. C. R. 3; 42 L. J. M. C. 9; 27 L. T. 693; 37 J. P. 131; 21 W. R. 176; 12 Cox, C. C. 251, C. C. R.

4629. ——— ——— **Effect of 1883 Act, s. 17 (8).**]—The statements which bkpt. makes in the course of his examination in bkpcy. are not, although he is examined under compulsion, to be regarded as induced by undue influence, & they are admissible in evidence against him, & are not excluded by 1883 Act, s. 17 (8), which provides merely a convenient method of proof.—R. *v.* ERDHEIM, [1896] 2 Q. B. 260; 65 L. J. M. C. 176; 74 L. T. 734; 44 W. R. 607; 12 T. L. R. 445; 40 Sol. Jo. 569; 18 Cox, C. C. 355; 3 Mans. 142, C. C. R.

Annotations:—**Refd.** R. *v.* Bird (1898), 79 L. T. 359, C. C. R.; *Re* Atherton, [1912] 2 K. B. 251.

4630. ——— **Against parties other than bankrupt—In subsequent motions.**]—The answers of bkpt. on his public examination are not admissible in subsequent motions in the same bkpcy. against parties other than bkpt., nor against creditors in a motion to set aside a transfer as a fraudulent transfer.—*Re* BRUNNER (1887), 19 Q. B. D. 572; 56 L. J. Q. B. 606; 57 L. T. 418; 35 W. R. 719; 4 Morr. 255.

4631. ——— **In application under Solicitors Act, 1888 (c. 65), s. 13.**]—On an application under the above sect., against a solr. who has been adjudicated bkpt., the notes of his public examination in bkpcy. signed by him may be used in evidence against him.—*Re* A SOLICITOR (1890), 25 Q. B. D.

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the Act.—R. *v.* KING (1876), Q. L. R. (Beor) 73.—**AUS.**

4623 iii. ——— ———.]—Upon the trial of insolvent for an offence under Insolvency Stat. 1871 (No. 379) his deposition taken at a compulsory examination under ss. 132, 134 of that Act is admissible as evidence against him, notwithstanding Transfer of Land Stat. (No. 301), s. 157.—R. *v.* MCCOOEY, R. *v.* JOHNSON & SMITH (1879), 5 V. L. R. 38.—**AUS.**

4623 iv. ——— ———.]—Statements of insolvent on his examination before the assignee at a creditors' meeting, are evidence against him on a criminal trial.—R. *v.* MCLEAN (1877), 1 P. & B. 377.—**CAN.**

4623 v. ——— ———.]—The deposition of insolvent examined under Presidency Towns Insolvency Act (111 of 1909), s. 36, is admissible as evidence against him in a criminal charge.—*Re* PERRY (1919), I. L. R. 46 Calc. 996.—**IND.**

4623 vi. ——— ———.]—Statements made by bkpt. in answer to questions put by the chairman at a meeting of creditors are admissible in evidence in a prosecution against him.—R. *v.* O'NEILL (1880), 3 N. Z. L. R. 298.—**N.Z.**

4623 vii. ——— ——— *Shorthand writer's notes.*]—During the course of the trial of D. for an offence under the criminal Code relating to bkpcy. the prisoner's counsel raised an objection that a witness, P., a shorthand writer in the official receiver's office, should not have been allowed to read as evidence a transcript of her shorthand notes of the examination of the accused taken at his public examination before the registrar in bkpcy., but should only have been allowed to read from her original notes, which were in ct.:—*Held:* the evidence of P. was rightly admitted.—R. *v.* DUNCAN (1907), 9 W. A. L. R. 119.—**AUS.**

k. ——— *In subsequent action—Production of original proceedings in bankruptcy.*]—It is not competent to prove on the cross-examination of a witness, that he has made a different statement relative to the subject-matter of the suit in his examination in bkpcy. in England, without producing the original proceedings in bkpcy.—CAMPBELL *v.* GILBERT (1862), 5 All. 420.—**CAN.**

l. ——— ——— *For undue preference.*]—In an action for undue preference the minutes of insolvent's examination at a meeting of creditors are not admissible on evidence, even though deft. in such action was present at the examination of the insolvent.—ROUSSEAU'S ESTATE *v.* OOSTHUIZEN (1914), C. P. D. 962; W. R. 805.—**S. AF.**

Sect. 3.—*Evidence: Sub-sects.* 3 & 4.]

17; 62 L. T. 567; 38 W. R. 507; *sub nom. Re* SANKEY, 59 L. J. Q. B. 238; 6 T. L. R. 279, D. C.; *affd.* without reference to this point, 25 Q. B. D. 26, C. A.

Annotations:—**Mentd.** *Re* Barton & Blinkhorn, [1903] 2 K. B. 300; *Re* Atherton, [1912] 2 K. B. 251.

See, generally, Part XIX., *post.*

4632. —— To invalidate deed granted by bankrupt.]—Pltf. in an action to redeem a mtge. had been examined in a bkpcy., & deft., who contested the validity of the mtge., in his answer referred to the examination as inconsistent with the bill of pltf., who gave evidence in the suit, but was not cross-examined. Statement in bkpcy., which was neither an admission nor a confession, admitted as evidence at the hearing.—DAVISON *v.* ROBINSON (1858), 6 W. R. 673, L. C.

4633. —— —— Making good breaches of trust.]—Bkpt., two days before his bkpcy., executed a deed, by which he conveyed an estate to a person upon trust to raise thereout by sale or mtge. £4,200, & therewith to make good breaches of trust, which he had committed in respect of certain scheduled trust estates of which he was trustee. By the deed he charged the property conveyed with the payment of the £4,200, & conferred on the grantee, his exors. or administrators, a power to appoint new trustees. The deed was not communicated to any of the beneficiaries:—*Held:* answers made by bkpt. on his public examination ought not to be given effect to as evidence to invalidate the deed against the beneficiaries.— NEW, PRANCE & GARRARD'S TRUSTEE *v.* HUNTING, [1897] 2 Q. B. 19; 66 L. J. Q. B. 554; 76 L. T. 742; 45 W. R. 577; 13 T. L. R. 397; 41 Sol. Jo. 511; 4 Mans. 103, C. A.; *affd.* without touching this point, *sub nom.* SHARP *v.* JACKSON, [1899] A. C. 419, H. L.

Annotations:—**Mentd.** Hermoux *v.* Harbord (1898), 14 T. L. R. 243; *Re* Blackburn, Buckley's Case, [1899] 2 Ch. 725; *Re* Vautin, *Ex p.* Saffery, [1900] 2 Q. B. 325; *Re* Blackpool Motor Car Co., Hamilton *v.* Blackpool Motor Car Co., [1901] 1 Ch. 77; *Re* Lake, *Ex p.* Dyer, [1901] 1 K. B. 710, C. A.; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231, C. A.; *Re* Pidcock, Perry *v.* Pidcock (1907), 51 Sol. Jo. 514; Wigan *v.* English & Scottish Law Life Assce. Assocn., [1909] 1 Ch. 291; *Re* Cozens, Green *v.* Brusley, [1913] 2 Ch. 478; Radcliffe *v.* Abbey Road & St. John's Wood Permanent Bldg. Soc. (1918), 87 L. J. Ch. 557.

4634. —— Against trustee in bankruptcy.]—The public examination of bkpt. is not evidence against his trustee in bkpcy., at all events so far as it consists of statements as to what bkpt. says or does after the commencement of the bkpcy.—*Re* BOTTOMLEY, *Ex p.* BROUGHAM (1915), 84 L. J. K. B. 1020; 59 Sol. Jo. 366; [1915] H. B. R. 75.

See, also, Nos. 3205-3207, *ante.*

4635. Balance sheet signed by debtor—To prove petitioning creditor's debt—In criminal proceedings.]—Prisoner, a bkpt., was indicted for non-disclosure etc., of his effects. After endeavouring to prove petitioning creditor's debt by other means, counsel for the prosecution offered in evidence deft.'s balance sheet on the file of proceedings signed by him:—*Held:* the balance sheet of bkpt., given on oath under his commission, was not admissible against him on a criminal charge.—R. *v.* BRITTON (1833), 1 Mood. & R. 297, N. P.

Annotations:—**Refd.** R. *v.* Wheater (1838), 2 Mood. C. C. 45, C. C. R.; R. *v.* Scott (1856), 7 Cox, C. C. 164, C. C. R.

4636. Admission in statement of affairs—After death of bankrupt.]—An admission made by bkpt. in his statement of affairs, that a debt is due from him, is not after his death admissible evidence as against his assignee in bkpcy. of the existence of the debt, merely because it might turn outt hat there was a surplus after paying the creditors.—*Re* TOLLEMACHE, *Ex p.* EDWARDS (1884), 14 Q. B. D. 415, C. A.

Annotation:—**Apld.** Ward *v.* Pitt, [1913] 2 K. B. 130, C. A.

See, also, Nos. 3071, 3072, *ante.*

4637. —— On criminal charge of misappropriating funds—Under Larceny Act, 1861 (c. 96), s. 80.]—A statement of affairs prepared by debtor in the course of his bkpcy. is not a "compulsory examination or deposition before any ct. on the hearing of any matter in bkpcy. within 1890 Act, s. 27 (2)," & is admissible in evidence against him on a charge, under the above sect., of misappropriation of money of which he was a trustee.—R. *v.* PIKE, [1902] 1 K. B. 552; 71 L. J. K. B. 287; 86 L. T. 205; 66 J. P. 296; 50 W. R. 672; 18 T. L. R. 285; 46 Sol. Jo. 268; 20 Cox, C. C. 164; 9 Mans. 121, C. C. R.

4638. Notes of bankrupt's evidence at examination—In action against bankrupt in representative capacity.]—The notes of the evidence of bkpt. taken at his public examination are not evidence against him in an action to which he is a party in a representative capacity.—NEW, PRANCE & GARRARD'S TRUSTEE *v.* HUNTING, [1897] 2 Q. B. 19; 66 L. J. Q. B. 554; 76 L. T. 742, C. A.; *affd.* without touching this point, *sub. nom.* SHARP *v.* JACKSON, [1899] A. C. 419, H. L.

Annotations:—**Mentd.** Hermoux *v.* Harbord (1898), 14 T. L. R. 243; *Re* Blackburn, Buckley's Case, [1899] 2 Ch. 725; *Re* Vautin, *Ex p.* Saffery, [1900] 2 Q. B. 325; *Re* Blackpool Motor Car Co., Hamilton *v.* Blackpool Motor Car Co., [1901] 1 Ch. 77; *Re* Lake, *Ex p.* Dyer, [1901] 1 K. B. 710; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231, C. A.; *Re* Pidcock, Penny *v.* Pidcock (1907), 51 Sol. Jo. 514; Wigan *v.* English & Scottish Law Life Assce. Assocn., [1909] 1 Ch. 291; *Re* Cozens, Green *v.* Brisley, [1913] 2 Ch. 478; Radcliffe *v.* Abbey Road & St. John's Wood Bldg. Soc. (1918), 87 L. J. Ch. 557.

See, generally, Part XIX., *post.*

Evidence in actions by trustee.]—*See* Part XXI., Sect. 2, sub-sect. 5, *post.*

SUB-SECT. 4.—AFFIDAVITS, DEPOSITIONS, ETC.

4639. Necessity for affidavit—To verify rule of court of King's Bench.]—A rule of the Ct. of King's Bench, made in an action pending in that ct., cannot be read on a petition of bkpcy. without being verified by affidavit.—*Re* CHAMBERS, *Ex p.* CHAMBERS (1835), 1 Deac. 197; 2 Mont. & A. 440, L. C.

Annotations:—**Mentd.** *Re* Durrant, *Ex p.* Thirkill (1836), 5 L. J. Bcy. 40, Ct. of R.; *Re* Newall, *Ex p.* Newall (1838), 3 Deac. 333, Ct. of R.; *Re* Prescott, *Ex p.* Prescott (1840), 4 Jur. 852, Ct. of R.; *Re* Bakewell, *Ex p.* Butler (1842), 2 Mont. D. & De G. 731, Ct. of R.; *Re* Scowcroft, *Ex p.* Rees (1845), 6 L. T. O. S. 104, Ct. of R.; *Re* Rolls, *Ex p.* Williams (1857), 29 L. T. O. S. 25.

4632 i. —— *To invalidate deed granted by bankrupt.*]—In a creditors' action to set aside a transfer of property by bkpt. as made in fraud of creditors, the evidence of bkpt. given in bkpcy. proceedings in a foreign ct. is not admissible.—MINOT GROCERY CO. *v.* DURICK (1913), 23 W. L. R. 270; 3 W. W. R. 904; 10 D. L. R. 126.—**CAN.**

m. *Attested copies of petition, vesting order & assignment—In ejectment by assignee.*]—Ejectment by civil bill against the insolvent, by the assignee of the insolvent:—*Held:* attested copies of the petition, vesting order, assignment & schedule, under the seal of the Insolvent Ct., & which purported to be signed by the proper officer, might be given in evidence, without further proof thereof.—M'DONNELL *v.* MONAGHAN (1841), 2 Craw. & D. 137; Ir. Cir. Rep. 311.—**IR.**

n. *Certified copies — Orders of adjudication & of reference—In action to set aside deed.*]—A creditors' action was brought to set aside transfers of land by deft. as fraudulent & void. Deft. had been adjudged bkpt. in N. Dakota & an order of reference made in the bkpcy. proceedings. Under the law of N. Dakota such orders were forwarded by the clerk of the ct. to the referee in bkpcy., in whose custody they remained during the bkpcy. proceedings:—*Held:* certified copies of the order of adjudication & order of reference under the hand of the referee were admissible in evidence.—MINOT GROCERY CO. *v.* DURICK (1913), 23 W. L. R. 270; 10 D. L. R. 126.—**CAN.**

4640. How affidavit authenticated.]—An affidavit sworn at New York before a magistrate, with the attestation of a notary annexed, certifying that there was such a person who was a magistrate of that city, received in evidence under 1849 Act, s. 243.—*Re* CARNE, *Ex p.* REID (1852), 22 L. J. Bcy. 4, L. JJ.

See 1914 Act, s. 140.

4641. Affidavit of debt sworn in Scotland—For what purpose available.]—A docket may be struck on an affidavit of debt sworn in Scotland.—*Ex p.* RUMSAY (1841), 6 Jur. 747.

See, now, 1914 Act, s. 140.

4642. What may be sworn to—Contents of examination.]—An affidavit may be made of the contents of an examination of a party before the comrs.—*Re* BUDD, *Ex p.* BUDD (1841), 1 Mont. D. & De G. 436, Ct. of R.

Annotations :—**Mentd.** *Re* Johnson, *Ex p.* Johnson (1842), 2 Mont. D. & De G. 678, Ct. of R.; *Re* Kelday, *Ex p.* Meston (1888), 36 W. R. 585, C. A.

4643. Filing affidavit—What is.]—The filing of an affidavit in bkpcy. is the swearing & carrying of it into the office; it is there within the reach of the Lord Chancellor, should the purposes of justice at any time require the production of it.—*Ex p.* NEWTON (1813), 2 Rose, 19, L. C.

4644. —— Waiver of irregularity in filing—Answering—With knowledge of irregularity.]—If resp. knowing that the affidavits in support of the petition are filed after the petition day, answer them, he thereby waives the objection to the irregularity.—*Re* MATHER, *Ex p.* BURY (1819), Buck, 393.

4645. —— —— —— Without knowledge of irregularity.]—Where affidavits in support of a petition are irregularly filed, resp. answering them does not waive objection to their being read, if he have not notice of the irregularity.—*Re* DANNEK, *Ex p.* SMITH (1819), Buck, 395.

4646. —— —— —— Objection that affidavits filed before petition presented.]—Filing affidavits in answer is a waiver of the objection to the affidavits in support of the petition, that they were filed before the petition was presented.—*Re* SMITH, *Ex p.* GILPIN (1822), 1 Gl. & J. 183.

4647. —— How evidenced.]—An office copy is the only evidence the ct. will admit of the filing of an affidavit.—*Re* COLMAN, *Ex p.* NORTH (1819), Buck, 396; *sub nom. Re* COLEMAN, *Ex p.* NORTH, 4 Madd. 395; 56 E. R. 750.

4648. —— Effect of—Affidavit entered as read—Unless reason to contrary.]—Unless some special exceptions are taken at the hearing of a petition, all affidavits that have been duly filed are entered as read.—*Re* OLDHAM, *Ex p.* LUCAS (1834), 3 Deac. & Ch. 664; 1 Mont. & A. 405, Ct. of R.

Annotations :—**Apprvd.** *Re* Bonington, *Ex p.* Bonington (1835), 4 L. J. Bcy. 57, Ct. of R. **Mentd.** *Re* Brettell, *Ex p.* Goren (1838), 7 L. J. Ch. 187, L. C.

4649. Form of—Not headed in matter of bankruptcy in which used.]—It is no objection to an affidavit, that it was not headed in the matter of the bkpcy. in which it was used, if from the accompanying circumstances it is manifest that it was judically used in the bkpcy.—*Re* MARSH, DEAN & CO., *Ex p.* SIMONDS (1825), 2 Gl. & J. 44; 3 L. J. O. S. Ch. 99.

4650. —— Motion for substituted service.]—The affidavit on a motion for substituted service must state that the party wilfully keeps out of the way to avoid service, & is not to be found.—*Re* FORSTER, *Ex p.* BLANDY (1834), 2 Mont. & A. 24, Ct. of R.

4651. Reading affidavits or deposition—On undertaking to file.]—An affidavit, though not filed, may be read upon an undertaking to file it.—*Re* SILL, *Ex p.* BAKER (1832), 2 Deac. & Ch. 362, Ct. of R.

4652. —— On offer of copy to other side.]—A party has no right to read an examination in evidence, merely because he has offered the other side a copy of it, nor can his counsel, on the hearing of the petition, do hypothetically what he cannot do directly.—*Re* CHAMBERS, *Ex p.* CHAMBERS (1835), 2 Mont. & A. 440; 1 Deac. 197, L. C.

Annotations :—**Dbtd.** *Re* Newall, *Ex p.* Newall (1838), 3 Deac. 333, Ct. of R. **Consd.** *Re* Scowcroft, *Ex p.* Rees (1845), 6 L. T. O. S. 104, Ct. of R. **Refd.** *Re* Durrant, *Ex p.* Thirkill (1836), 5 L. J. Bcy. 40, Ct. of R.; *Re* Prescott, *Ex p.* Prescott (1840), 4 Jur. 852, Ct. of R. **Mentd.** *Re* Bakewell, *Ex p.* Butler (1842), 2 Mont. D. & De G. 731, Ct. of R.; *Re* Rolls, *Ex p.* Williams (1857), 29 L. T. O. S. 25.

See, also, Nos. 4753, 4754, *post.*

4653. —— Notice of intention to read.]—A party using affidavits already filed in support of a petition to the Lord Chancellor, which is transferred to the Ct. of Review, must give notice to the other party.—*Re* WRIGHT, *Ex p.* DONALDSON (1832), 1 Deac. & Ch. 36, Ct. of R.

4654. —— ——.]—The examinations of bkpt. & other persons before the comrs. may be read in evidence, after notice has been given to the other side of the intention to read them, & may then in all respects be treated as affidavits.—*Re* KIDDER, *Ex p.* CROSBIE (1835), 2 Mont. & A. 393; 1 Deac. 107; 5 L. J. Bcy. 7, Ct. of R.

4655. —— ——.]—Where it is the intention of a party to read depositions he must give notice; otherwise the ct. will not permit them to be read.—

PART XVI. SECT. 3, SUB-SECT. 4.

4640 i. *How affidavit authenticated.*]—Deft., arrested in P. E. Island for a debt contracted there, applied to be discharged, on the ground that he had been duly declared bkpt. in England, & was not liable to arrest until the time granted to him to finish his examination had expired :—*Held :* the summons in bkpcy. & indorsement thereon were not properly authenticated, so as to prove them to be really documents under the hand of an English comr., not being verified by an affidavit made before an officer of the P. E. Island ct.— —— *v.* IRVING (1851), 1 P. E. I. 38.—**CAN.**

4649 i. *Form of—Not entitled in any court.*]—Affidavits on an appeal from a county ct. judge in insolvency, not intituled in any ct., were not allowed to be read.—*Re* SHARPE (1866), 2 Ch. Ch. 67.—**CAN.**

4649 ii. —— *Entitled in name of only one defendant.*]—In an application by one of two defts. for relief under 1 Will. 4, c. 43, the affidavit was entitled in the name only of one of defts. :—*Held :* the entitling was sufficient.—WILMOT *v.* CORNWELL (1835), 2 Ber. 31; 2 N. B. R. 31.—**CAN.**

4649 iii. —— *Omission of description of party in entitling.*]—*Semble :* the omission to describe the parties in the intituling of an affidavit under Insolvent Act, 1875, ss. 9, 14, 18, is not a fatal objection, if the description appears in the body of the affidavit.—MCDONALD *v.* CLELAND (1876), 6 P. R. 289.—**CAN.**

o. —— *Objection to—When to be raised.*]—Objection was taken that the requisition upon a debtor to assign was informally made, the affidavit on which it was based being liable to a technical objection. No objection having been made to it in the Insolvent Ct., which had proceeded to settle the estate :—*Held :* it was not for a third party in a different ct. to call in question the regularity of its proceedings. —LONGWORTH *v.* MERCHANTS' BANK OF HALIFAX, R. E. D. 255.—**CAN.**

4653 i. *Reading affidavits or deposition—Notice of intention to read—Affidavit not filed when notice given.*]—Where a notice of motion is grounded on "an affidavit to be filed, a copy of which will be furnished," the affidavit cannot be opened, if it has not been filed, & the copy furnished on the day of serving the notice.—*Re* COCHRANE (1875), 9 I. L. T. 192.—**IR.**

p. *Right to copies of deposition—Creditor sued by trustees.*]—The assignees in bkpcy. having brought an action against a scheduled creditor, who had not proved his debt, deft. applied for copies of the depositions in the bkpcy. matter, to enable him to prepare his defence :—*Held :* he was not entitled to get them, he not having proved his debt, & no special grounds being established for such order.—*Re* WALSH, *Ex p.* WALSH (1860), 10 I. Ch. R. 115.—**IR.**

Sect. 3.—*Evidence: Sub-sect.* 4. *Sect.* 4.]

Re DURRANT, *Ex p.* THIRKILL (1836), 5 L. J. Bcy. 40, Ct. of R.

4656. —— ——.]—*Semble:* an examination of a party before the comrs. cannot be read; even against himself, unless notice has been given of the intention to read it.—*Re* BUDD, *Ex p.* BUDD (1841), 1 Mont. D. & De G. 436, Ct. of R.

Annotations:—**Mentd.** *Re* Johnson, *Ex p.* Johnson (1842), 2 Mont. D. & De G. 678, Ct. of R.; *Re* Kelday, *Ex p.* Meston (1888), 36 W. R. 585, C. A.

4657. —— ——.]—Where petitioner was summoned & examined by the adverse party before the comr., & stated a part of his examination in an affidavit in support of the petition:—*Held:* it was not receivable in evidence because no notice had been given to read the examination on the hearing of the petition.—*Re* CLARKE, *Ex p.* SMITH & BUTCHER (1841), 2 Mont. D. & De G. 113, Ct. of R.

4658. —— —— **Whether other side should be furnished with copy.**]—Where notice of an intention to read an examination is served, the party on whom the notice is served may have copies on paying the expenses.—*Re* KIDDER, *Ex p.* CROSBIE (1835), 1 Deac. 107; 2 Mont. & A. 393; 5 L. J. Bcy. 7, Ct. of R.

4659. —— —— ——.]—Where it is the intention of a party to read the depositions, he must tender copies of such depositions; otherwise the ct. will not permit them to be read.—*Re* DURRANT, *Ex p.* THIRKILL (1836), 5 L. J. Bcy. 40, Ct. of R.

4660. —— —— ——.]—*Semble:* the deposition of a party before the comrs. may be read in contradiction of a subsequent affidavit made by him, if notice has been given to the other side of the intention to read it, & they have been furnished with a copy.—*Re* RUMSEY, *Ex p.* GEM & POWLEY (1841), 2 Mont. D. & De G. 99; 10 L. J. Bcy. 41; 5 Jur. 683, Ct. of R.

4661. —— —— ——.]—When a party to an application gives notice of his intention to use as evidence a deposition which is on the file, he ought not to serve his opponent with a copy of it.—*Re* COOPER, *Ex p.* HALL (1882), 19 Ch. D. 580; 51 L. J. Ch. 556; 46 L. T. 549, C. A.

Annotation:—**Refd.** *Re* Carill-Worsley, [1915] 2 K. B. 534.

4662. —— —— **Where party objecting has referred to examination in affidavit.**]—The examination of one of the parties to a cause before a comr. in bkpcy., in connection with the transactions impeached in the cause, will not, if objected to, be allowed to be read as evidence in the cause, without notice by the party wishing to read same, although the party objecting has referred generally to the fact of the examination in an affidavit read & used at the hearing of the cause.—DAVISON *v.* ROBINSON (1857), 3 Jur. N. S. 791; *revsd.* on other points (1858), 6 W. R. 673, L. C.

4663. —— **What affidavits.**]—An affidavit deposing to facts on information & belief, may be read, *valeat quantum.*—*Re* JERMYN, *Ex p.* ELLIOTT (1837), 2 Deac. 179; *subsequent proceedings* (1838), 3 Deac. 343, Ct. of R.

Annotation:—**Mentd.** The Princess Royal (1870), L. R. 3 A. & E. 41.

4664. —— —— **Sworn before clerk to solicitor to commission—Liberty to reswear.**]—The affidavits in support of a petition were sworn before the clerk of the solr. to the commission:—*Held:* (1) the affidavits could not be read; (2) the petition should be permitted to stand over with liberty to reswear the affidavits.—*Re* HARRIS, *Ex p.* GREEN (1822), 1 Gl. & J. 16.

4665. —— **Necessary before cross-examination.**]—In bkpcy., where an affidavit has been filed in support of or in opposition to an application, the opposite party is not entitled to cross-examine the deponent on his affidavit until it has been read.—*Re* OTTAWAY, *Ex p.* CHILD (1882), 20 Ch. D. 126; 51 L. J. Ch. 494; 46 L. T. 118; 30 W. R. 282, C. A.

Annotation:—**Refd.** *Re* Bottomley, *Ex p.* Brougham (1915), 84 L. J. K. B. 1020.

4666. —— **Notice given of intention to cross-examine—Absence of deponent.**]—Where notice is given of intention to cross-examine on an affidavit, that affidavit cannot be read in the absence of the deponent.—*Re* BOTTOMLEY, *Ex p.* BROUGHAM (1915), 84 L. J. K. B. 1020; [1915] H. B. R. 75.

4667. Service of affidavit—With notice of motion.]—The copy affidavits in support of an application in bkpcy. should be served with the notice of motion.—*Re* WELLS, *Ex p.* COLLINS (1892), 66 L. T. 688; 36 Sol. Jo. 525; 9 Morr. 191.

4668. —— **With exhibits.**]—The exhibits to an affidavit ought to be served with it.—*Re* BOTTOMLEY, *Ex p.* BROUGHAM (1915), 84 L. J. K. B. 1020; [1915] H. B. R. 75.

4669. Amendment of affidavit—When permissible.]—A petition, & the affidavits in support of it, were wrongly intituled. The petition having been amended under an order:—*Held:* the affidavits might be taken off the file to be amended.—*Re* FORD, *Re* HARVEY, *Ex p.* BURTON (1849), 3 De G. & Sm. 578; 18 L. J. Bcy. 17; 13 Jur. 297; 64 E. R. 614.

See 1915 Rules, r. 12.

4670. Withdrawal of affidavit—After filing.]—An affidavit after being filed cannot be withdrawn, so as to prevent the other side from making use of it on the hearing of a petition.—*Re* WILKS, *Ex p.* LABREY (1833), 3 Deac. & Ch. 232, Ct. of R.

4671. —— —— **Right to call deponent.**]—Where an affidavit has been filed in support of, or in opposition to, an application, the party by whom the affidavit has been filed may, if he does not wish to use it, withdraw it, but the opposite party may call the deponent as his own witness.—*Re* OTTAWAY, *Ex p.* CHILD (1882), 20 Ch. D. 126; 51 L. J. Ch. 494; 46 L. T. 118; 30 W. R. 282, C. A.

Annotation:—**Refd.** *Re* Bottomley, *Ex p.* Brougham (1915), 84 L. J. K. B. 1020.

4672. How answered—Affidavit or application for vivâ voce examination.]—Where notice of an intention to read an examination is served, the party on whom the notice is served may answer it by an affidavit, if necessary, or apply for a *vivâ voce* examination of the party.—*Re* KIDDER, *Ex p.* CROSBIE (1835), 1 Deac. 107; 2 Mont. & A. 393; 5 L. J. Bcy. 7, Ct. of R.

4673. Scandalous & impertinent affidavits—Procedure generally.]—Mode of proceeding upon an irrelevant or scandalous affidavit, considered.—*Re* RODEL, *Ex p.* CHISMAN (1828), 2 Gl. & J. 315.

See 1915 Rules, r. 53.

4674. —— **Removal from file—Costs.**]—An affidavit in bkpcy. was ordered to be taken off the file, as irrelevant & scandalous, with costs as between attorney & client.—*Ex p.* SIMPSON (1809), 15 Ves. 476; 33 E. R. 834, L. C.

4667 i. *Service of affidavit.*]—*Held:* an affidavit served on Feb. 24 could be read on Mar. 19, notwithstanding the return day named in the notice of motion was Feb. 17.—*Re* RICHARDS, *Ex p.* MALONEY (1902), 2 S. R. N. S. W. 3.—**AUS.**

r. *Right to inspect file of proceedings—Party claiming adversely.*]—A party claiming adversely to the creditors will not be allowed to inspect the file of proceedings in bkpcy.—*Re* PEPPER (1836), L. & G. *temp.* Plunk. 390.—**IR.**

Annotations :—**Consd.** *Ex p.* Le Heup (1811), 18 Ves. 221, L. C. **Follid.** *Re* Robinson, *Ex p.* Porter (1835), 2 Mont. & A. 220, Ct. of R.; *Re* Burkill, *Ex p.* Hampson (1842), 2 Mont. D. & De G. 462, Ct. of R. **Consd.** Andrews *v.* Barnes (1888), 39 Ch. D. 133, C. A.

4675. ——— ——— ———.]—A scandalous affidavit in bkpcy. was taken off the file, with costs.—ANON. (1814), 3 Ves. & B. 93 ; 35 E. R. 414, L. C.

4676. ——— ——— ———.]—A scandalous affidavit having been filed by the London agent of a country solr., was ordered to be taken off the file, & the agent was ordered to pay the costs.—*Re* BOOTH, *Ex p.* WAKE (1833), 3 Deac. & Ch. 246 ; Mont. & B. 259, Ct. of R.

4677. ——— **Reference—Waiver of right to refer—Formal objection on former occasion.**]—A formal objection successfully urged on one occasion, is not a waiver of resp.'s right to refer for impertinence, when the same petition is again called for hearing.—*Re* CAVENAGH, *Ex p.* CUNNINGHAM (1829), 1 Mont. & M. 193 ; 7 L. J. O. S. Ch. 139.

4678. ——— ——— **Effect of reference.**]—Where the ct. orders a reference to the registrar to inquire & state whether any & what portions of certain affidavits are impertinent & scandalous, it does not intend that he should inquire & state what portions are simply impertinent.—*Re* INNES & BRACHER, *Ex p.* SAUNDERS (1841), 6 Jur. 20, Ct. of R.

4679. Custody of depositions—On which commissioners have founded report.]—Depositions, upon which comrs. have founded a report upon a reference to them, are proceedings in the bkpcy. & as such to be left in the custody of the assignees.—*Ex p.* NEWTON (1813), 2 Rose, 19, L. C.

Evidence in actions by trustee.]—*See* Part XXI., Sect. 2, sub-sect. 5, *post.*

SECT. 4.—ORDERS.

4680. Four day order.]—Where, under an order in bkpcy., money is directed to be paid, the next order is to pay within four days or stand committed.—*Re* HARPER, *Ex p.* DAVISON (1822), 1 Gl. & J. 227.

4681. ———.]—After an order to pay within a specified time the next order is to pay within four days or stand committed.—*Re* MABERLY, *Ex p.* SOLOMONS (1833), 1 Mont. & A. 269, n. ; 2 L. J. Bcy. 67, Ct. of R.

Annotation :—**Mentd.** *Re* Bennet, *Ex p.* Malachi (1834), 3 L. J. Bcy. 86.

4682. ——— **Jurisdiction to make.**]—A petition before the Vice-Chancellor was dismissed with costs, & the Vice-Chancellor issued the usual order for payment of the costs. On an application for a four day order :—*Held :* the ct. of Review, not having made any order, resp. was not in contempt there, & as the ct. could not judicially recognise the order of the Vice-Chancellor in the matter, appct. was only entitled to the usual seven day order.—*Re* HARDWICKE, *Ex p.* FERRERS (1832), 1 Mont. 513, Ct. of R.

4683. ——— **Application by petition—On certificate from registrar.**]—The application for the four-day order, founded upon a certificate from the registrar, for non-compliance with an order of the ct., must be made upon petition, & the certificate must bear date of the day on which the application is made.—*Re* SUDELL, *Ex p.* MYERS (1835), 4 L. J. Bcy. 41, Ct. of R.

4684. ——— **Against one—Original order against two jointly.**]—Where an order for payment of costs has been made on two persons jointly, the four-day order will not be granted against one, unless the other has been also brought into contempt.—*Re* BATTEN, *Ex p.* BATTEN (1840), 1 Mont. D. & De G. 82, Ct. of R.

See, also, No. 4579, *ante,* Nos. 4711, 4713, *post.*

4685. Order for allowance to bankrupt—To meet expenses of trying validity of commission.]—The ct. will not make any order for an allowance to bkpt., for the purpose of meeting the expenses of an issue to try the validity of the commission, unless the assignees consent.—*Re* CHAMBERS, *Ex p.* CHAMBERS (1835), 1 Deac. 197 ; 2 Mont. & A. 440, L. C.

Annotations :—**Mentd.** *Re* Durrant, *Ex p.* Thirkill (1836), 5 L. J. Bcy. 40, Ct. of R. ; *Re* Newall, *Ex p.* Newall (1838), 3 Deac. 333, Ct. of R. ; *Re* Prescott, *Ex p.* Prescott (1840), 4 Jur. 852, Ct. of R. ; *Re* Bakewell, *Ex p.* Butler (1842), 2 Mont. D. & De G. 731, Ct. of R. ; *Re* Scowcroft, *Ex p.* Rees (1845), 6 L. T. O. S. 104, Ct. of R. ; *Re* Rolls, *Ex p.* Williams (1857), 29 L. T. O. S. 25.

4686. Order for copy of proceedings—When granted.]—Under an adjudication of bkpcy., a claim by S. was, with the consent of the assignees, referred to arbn., & the award was in S.'s favour. Before the debt could be proved the adjudication was regularly annulled, & the matter having become again the subject of litigation in the cts. of the United States of America, S. applied to the Ct. of Bkpcy. in England for office copies of the proceedings under the adjudication :—*Held :* the order should be made.—*Re* NEVINS, *Ex p.* SYBRANDT (1859), 3 De G. & J. 487 ; 28 L. J. Bcy. 14 ; 2 L. T. 70 ; 5 Jur. N. S. 1190, L. JJ.

4687. Consent order—Incorporating agreement for solicitor & client costs.]—The ct. will not make a consent order, by which the trustee agrees to pay costs as between solr. & client.—*Re* GUY, *Ex p.* SCANTLEBURY (1887), 4 Morr. 300.

4688. Effect of order—Conclusion if admitted or proved.]—In an action not by a person claiming under the assignees of bkpt. against a third party, the proceedings in bkpcy. must be taken as conclusive if either admitted or proved in evidence ; & the validity of an order for sale under which pltf. claims property of bkpt., or of a debt, before & as proof of which he has obtained it, cannot be disputed.—MACKLEY *v.* PATTENDER (1860), 2 F. & F. 61 ; *affd.* without touching this point (1861), 1 B. & S. 178.

4689. Alteration of order—To correct error—Power of registrar.]—An order was made by consent, withdrawing a motion before a county ct. judge. The registrar drew up the order as motion dismissed ; three months afterwards, the mistake having been discovered, the registrar altered the order as drawn up, & made it coincide with the judge's decision :—*Held :* the registrar had acted *ultra vires,* as in the circumstances the judge was the proper person to correct a mistake in the order when drawn up.—*Re* BEARD, *Ex p.* LEWIS (1893), 69 L. T. 259 ; 9 T. L. R. 523 ; 10 Morr. 178 ; 5 R. 497, D. C.

PART XVI. SECT. 4.

s. *Order of registrar—Acting in absence of judge—What it should show.*]—Where a registrar acts for a judge in the absence of the latter, any order made by him should show on the face of it the ground of the jurisdiction.—*Re* BIDGOOD, *Ex p.* BIDGOOD (1891), 9 N. Z. L. R. 725.—**N.Z.**

t. *S. P. Re* BLOOMFIELD (1885), 3 N. Z. L. R. C. A. 177.—**N.Z.**

w. *Order for new commission—Former commission lost.*]—A new commission will be ordered to be made out, the former commission having been lost in order to prove title in an ejectment brought by a party, who had purchased certain premises under the commission.—ANON., 3 Ir. L. Rec. 1st ser. 187.—**IR.**

x. *Order under* 1883 *Act, s.* 171 *—Whether record.*]—*Held :* an order under the above sect. was not a record, & evidence might be given to contradict statements appearing on the face of it, or to show that it was not made at the time bkpt. was sent to prison.—*Re* CROW (1885), 4 N. Z. L. R. 266.—**N.Z.**

y. *Order for support—Whether notice required.*]—Where the creditor's attorney was in ct. & heard the order for support made, notice of it is not required.—*Ex p.* JARDINE (1868), 1 Han. 572.—**CAN.**

SECT. 5.—COSTS AND FEES.

SUB-SECT. 1.—IN GENERAL.

See, generally, PRACTICE & PROCEDURE; SOLICITORS.

In appeals.]—*See* Part XVII., *post.*

4690. Jurisdiction—To order undischarged bankrupt to pay.]—The ct. has jurisdiction to order an undischarged bkpt. to pay costs.—*Re* PAYNE, *Ex p.* CASTLE MAIL PACKETS CO. (1886), 18 Q. B. D. 154; 56 L. J. Q. B. 625; 35 W. R. 89; 3 T. L. R. 67; 3 Morr. 270, C. A.

Annotations:—**Mentd.** *Re* Hedley, *Ex p.* Board of Trade (1895), 2 Mans. 186, D. C.; *Re* Stevens, *Ex p.* Board of Trade (1898), 67 L. J. Q. B. 932, D. C.

4691. Of appearance—Of office copy affidavits.]—Though the appearance of a party is wholly unnecessary, yet if he is served with notice of an intended application to the ct., he is entitled to his costs of appearance. But if he makes affidavits which are unnecessary (but the other side could not know whether they were material or not, without taking office copies of them), he must pay the costs occasioned thereby.—*Re* MILLS, *Ex p.* REID (1832), 1 Deac. & Ch. 322, Ct. of R.

4692. Of affidavits in answer — Petitioner declining to open.]—After a petition is ordered to be dismissed with costs, because petitioner declines to open it, the ct. will not, on a subsequent day, entertain an application from him to exclude from the allowance of costs certain affidavits of resp., on the ground that they were filed too late to be read. If the affidavits are not filed in time, petitioner should open his petition, in order to take the objection as to their disallowance.—*Re* CLARKE, *Ex p.* SIDEBOTHAM (1838), 3 Deac. 221, Ct. of R.

4693. Of parties served unnecessarily.]—On a petition to declare bkpt. a trustee & for conveyance of mortgaged premises, neither the assignees, bkpt., nor heir of mtgor. need be served. Being served petitioner must pay their costs.—*Re* PARKER, *Ex p.* SMITH (1839), 1 Mont. & Ch. 598, Ct. of R.

4694. Of assignee—On failure to disclaim.]—A married woman filed a bill against her husband, who had become bkpt., & his assignee, alleging that a sum of stock, which had fallen into possession after the bkpcy., was subject, in the circumstances stated in the bill, to the trusts of the settlement, & did not belong to the assignee. The assignee submitted the question to the ct. The ct., having decided that the fund was subject to the trusts of the settlement, refused to give the assignee his costs, as he ought to have disclaimed.—BLYTHE *v.* GRANVILLE (1842), 13 Sim. 190; 12 L. J. Ch. 82; 6 Jur. 961; 60 E. R. 74.

Annotations:—**Mentd.** Hoare *v.* Hornby (1843), 2 Y. & C. Ch. Cas. 121; Otter *v.* Melvill (1848), 2 De G. & Sm. 257; *Re* London Dock Co., *Ex p.* Blake (1853), 16 Beav. 463; Wilton *v.* Colvin (1856), 3 Drew. 617; Wilcox *v.* Smith (1857), 4 Drew. 40; McLurcan *v.* Lane, Melhuish *v.* McLurcan (1858), 32 L. T. O. S. 172; Archer *v.* Kelly (1860), 1 Drew. & Sm. 300; *Re* Hill (1863), 11 W. R. 930; *Re* Clinton's Trust, Holloway's Fund, *Re* Clinton's Trust, Wear's Fund (1872), L. R. 13 Eq. 295; *Re* Bland's Settlmt., Bland *v.* Perkin, [1905] 1 Ch. 4.

4695. Expenses arising from change of venue.]—Bkpt. was allowed his expenses arising from changing the venue of the fiat after adjudication.—*Re* FEARNLEY, *Ex p.* CHEESBOROUGH (1846), 1 De G. 333.

4696. Of application for partly successful—Applicant making improper charges—Ordered to pay all costs.]—Petitioner making improper & unjustifiable charges was ordered to pay all the costs, although he succeeded as to a part of his petition.—*Re* ROBINSON & TURLAY, *Ex p.* NORTON (1847), De G. 504, Ct. of R.; *subsequent proceedings* (1850), 15 L. T. O. S. 178, L. C.

Annotation:—**Mentd.** Stevenson *v.* Newnham (1853), 13 C. B. 285, Ex. Ch.

4697. Right of trader debtor defendant to costs—Under 1849 Act, s. 86—Not affected by agreement to submit to arbitration.]—The creditor of a trader having in pursuance of 1849 Act, filed an affidavit of debt, & the amount having been disputed, an order was made that deft. should enter into a bond with two sureties. An action was then brought to recover the amount claimed. An agreement was entered into between pltf., deft., & K., in pursuance of which the order for the bond was discharged, & the bkpcy. proceedings were terminated, K. depositing cheques for the debts & costs, if any recovered in the action, in case of a verdict for deft. the cheques to be returned to K., upon his paying £6 for the costs of the debtor's summons, & also the costs of any issue found for pltf. At the trial of the cause it was agreed that a verdict should be entered for pltf., subject to the award of an arbitrator, the costs of the cause to abide the event of the award, & the costs of the reference to be in the discretion of the arbitrator. The arbitrator awarded that the verdict should be reduced, so that the creditor recovered a sum less than that sworn to:—*Held:* deft.'s right to costs under s. 86 was not affected by the agreement or termination of the bkpcy. proceedings in pursuance of it.—FOSTER *v.* HANSON (1856), 1 H. & N. 755.

4698. Of shorthand notes—Discretion of judge.]—The costs of the transcript of a shorthand writer's notes of evidence are, like other costs, in the discretion of the judge within 1870 Rules, r. 188, notwithstanding the provisions with reference to those costs made by r. 207.—*Re* ALBEZETTE, *Ex p.*

PART XVI. SECT. 5, SUB-SECT. 1.

a. *Costs abide event.*]—If nothing is said as to costs, they will abide the event.—*Re* EDWARDS & SON, *Ex p.* TOMLINS (1885), 11 V. L. R. 304.—**AUS.**

b. *Of first & second applications—By insolvent.*]—Costs will not be given on refusing the first application of an insolvent debtor except in an extreme case; but the rule is otherwise on a second application, where the objections made to the former one are not fully answered.—MCFARLANE *v.* GORDON (1851), 2 All. 162.—**CAN.**

c. *Of bankrupt repurchasing his own estate.*]—Where bkpt. repurchases his own estate, he pays costs, as that circumstance does away with the reason of the exemption of bkpts. from costs in proceedings in their own matter.—*Ex p.* SOUTHWOOD (1828), 2 Mol. 115.—**IR.**

d. *Of application by creditor for return of goods—No declaration of ownership made.*]—A creditor moved that goods which had not already reached bkpt. before his bkpcy. should be restored to him, & that he should be allowed the costs of the application. The creditor was entitled to get back the goods, but a declaration of ownership had not been made by the creditor:—*Held:* the costs should not be allowed, the motion being unnecessary, since the judge, had a declaration been made, would have ordered the restoration.—*Re* M'TEAR (1868), 2 I. L. T. Jo. 44.—**IR.**

f. *Of English accountants — Irish accountants already appointed.*]—Where English traders sent over London accountants to take the stock of Irish traders who had failed, the ct. would not allow those accountants to be paid out of the assets, Dublin accountants having been previously appointed.—*Re* J. C. (1869), 3 I. L. T. Jo. 157, 176.—**IR.**

g. *Of former agent to commission—Dismissed by commissioners.*]—The former agent to a commission of bkpcy., though dismissed four years before by the comrs. as agent in the matter, if there be nothing in his dismissal to disentitle him, may petition & be paid his costs for prosecuting the commission, & will not be driven to an action at law.—*Re* SHAW, *Ex p.* M'CLEAN (1831), Glascock, 18.—**IR.**

h. *Order for payment of costs to be taxed.*]—*Held:* the ct. had power, notwithstanding 1883 Act, ss. 230, 231, to order payment by the unsuccessful party of costs to be thereafter taxed by the registrar.—BAYLY *v.* HUMPHRIES' OFFICIAL ASSIGNEE (1886), 5 N. Z. L. R. 213.—**N.Z.**

SMITH (1878), 8 Ch. D. 599; 1 Har. & W. 215; 48 L. J. Bcy. 13; 38 L. T. 395; 26 W. R. 513.

See 1915 Rules, rr. 67, 68, 118.

4699. —— When refused — Duty of court to take.]—On an application by successful resp., a trustee in bkpcy., for an order that the costs of certain shorthand writer's notes should be allowed to such trustee:—*Held:* (1) in the ordinary way where both parties agreed to have a shorthand writer, the loser must pay the costs; (2) in the present case applts. never consented at all, & the application being, in effect, that the costs should be paid not out of the estate, but that applts. should be compelled to pay for notes which they did not ask for, & which, primarily speaking, it was the duty of the ct. to take for itself, must be refused.—*Re* DAY, *Ex p.* STEED (1884), 33 W. R. 80; 1 Morr. 251.

4700. Of "proceedings"—Under 1886 Rules, r. 112 (2).]—*Held:* the word "proceedings" in 1886 Rules, r. 112 (2) included litigious proceedings. —*Re* MARSH, *Ex p.* BOARD OF TRADE (1894), 71 L. T. 776; 43 W. R. 208; 39 Sol. Jo. 83; 1 Mans. 486; 15 R. 1.

4701. Of copy correspondence—Jurisdiction of judge.]—A motion in bkpcy. is equivalent to an action in the K. B. Div., & when it is intended to use & put in evidence correspondence, a copy of the correspondence should be prepared & supplied for the use of the judge who has ample jurisdiction to allow the costs of the copy correspondence.—*Re* COHEN (1914), 136 L. T. Jo. 585.

4702. Order for payment of costs of various parties in succession.]—A. filed a petition for the liquidation of his affairs, but the creditors at the first meeting failed to pass the necessary resolution. Shortly afterwards two of the creditors filed a petition in bkpcy. against A., the act of bkpcy. being the above petition. Afterwards A.'s father-in-law filed a petition, upon which petition by his own consent A. was adjudicated bkpt.:—*Held:* the costs of the parties to the liquidation & bkpcy. should be paid in the following order: (1) receiver in liquidation; (2) receiver in bkpcy.; (3) the trustee & his solr.; (4) the two creditors on their petition; (5) the father-in-law on his petition. The decision was affirmed.—*Re* SPRINGALL, *Ex p.* PAGE (1871), 25 L. T. 716.

Annotations:—**Apld.** *Re* Hawes, *Ex p.* Jeffery (1873), 22 W. R. 57. **Folld.** *Re* Johnson, *Ex p.* Royle (1875), 33 L. T. 39.

4703. Rights of bankrupt's solicitor—In regard to costs of liquidation petition—Of one of two partners.]—One of two partners filed a petition for liquidation by arrangement, which was duly resolved on, & a trustee appointed. At the time of filing the petition the stock-in-trade & effects of the firm had been seized under a writ of *fi. fa.*, & were about to be sold. There was no separate estate, & an order was afterwards made with the consent of the solr. of the other partner, who was an infant, for administering the joint assets, & for payment amongst other things of the costs & expenses of the trustee:—*Held:* the costs of the solr. of petitioning debtor down to the appointment of the trustee ought to be paid out of the joint assets.—*Re* MEW, *Ex p.* PEARCE (1876), 2 Ch. D. 320; 45 L. J. Bcy. 144; 34 L. T. 705; 24 W. R. 808, C. A.

4704. Rights of solicitor employed by trustee—To apply personally to court—For payment out of estate.]—*Qu.:* whether a solr. properly employed by a trustee in bkpcy. can apply direct to the ct. for payment of his bill of costs out of the estate, or whether he must apply for leave to use the name of the trustee for that purpose.—*Re* BRIGHT, *Ex p.* WINGFIELD & BLEW, [1903] 1 K. B. 735; 72 L. J. K. B. 287; 10 Mans. 31.

4705. Charging order—Over "property recovered or preserved"—Damages recovered by undischarged bankrupt—In respect of what costs.]—An undischarged bkpt. brought an action for services rendered as an architect since his bkpcy., & for damages for wrongful dismissal. Deft. paid money into ct. with a denial of liability. Pltf. having taken out a summons that the fund in ct. might be paid out to him, his trustee intervened & claimed the fund, & was made co-pltf. in the action. Bkpt.'s solr. then took out a summons for a charging order on the fund in ct., under Solrs. 1860 Act (c. 127), s. 26, for all his costs in the action:—*Held:* the fund in ct. was property "recovered or preserved" through the instrumentality of the solr., & he was entitled to a charge thereon for his costs of the action properly incurred down to the time when the trustee intervened.—EMDEN *v.* CARTE (1881), 19 Ch. D. 311; 51 L. J. Ch. 371; 45 L. T. 328; 30 W. R. 17, C. A.

Annotations:—**Distd.** Westacott *v.* Bevan, [1891] 1 Q. B. 774. **Apld.** *Re* Meter Cabs, [1911] 2 Ch. 557. **Refd.** Charlton *v.* Charlton (1883), 49 L. T. 267; Jackson *v.* Smith (1884), 51 L. T. 72; Jackson *v.* Smith, *Ex p.* Digby (1884), 53 L. J. Ch. 972. **Mentd.** *Re* Rogers, *Ex p.* Collins & Ford (1893), 63 L. J. Q. B. 178; Coote *v.* Ford, [1899] 2 Ch. 93; Brown *v.* Feeney, [1906] 1 K. B. 563, C. A.

4706. —— —— Funds collected by receiver in partnership action—Subsequently transferred to Bankruptcy Court.]—Where in a partnership action in the Ch. Div. a receiver has been properly appointed, but a receiving order having been subsequently made against the partners, the proceedings are transferred to the Bkpcy. Ct., the ct. acting on the principles of the Ct. of Ch., will give a charge on the funds collected by the receiver in favour of the solr. of pltf. in the action. But if it appears that at the time of instituting the action the solr. was well aware that the partnership was insolvent, & nevertheless brings the action & obtains the order for the appointment of a receiver when proceedings might be taken in bkpcy. for the purpose of making costs, the ct. will hold that such costs were not *bonâ fide* incurred in preserving the assets of the partnership, & will in such case refuse to make a charging order.—*Re* NICHOLAS & PAINE, *Ex p.* LOVETT (1889), 61 L. T. 87; 37 W. R. 715; 5 T. L. R. 581; 6 Morr. 173.

4707. —— —— Must be in proceeding in court of justice—Money found on bankrupt on arrest—Handed over on power of attorney drawn by solicitors to trustee.]—To bring a case within Solrs. Act, 1860, s. 28, property must be recovered or preserved in a proceeding in a ct. of justice.

Applts. were the solrs. to the trustee of bkpt.'s estate. Bkpt. had sold his stock-in-trade, & gone with the proceeds of the sale to Australia. He was arrested there, & brought back to England on a charge of offences against Debtors Act, 1869 (c. 62), preferred by order of a ct. of bkpcy. made under s. 16 of that Act upon the application of applts. on behalf of the trustee. On bkpt.'s arrest a sum of money, the proceeds of the above sale, was found upon him, & taken possession of by the Australian police. Under a power of attorney prepared by applts., as solrs. to the trustee, that money was handed over by the police

j. *Rights of arranging debtor's solicitor —To claim money deposited with official assignee—On account of costs.*]—A solr. who, on the presentation by his client of a petition for arrangement in the Ct. of Bkpcy., deposits with the official assignee the sum of £5 required by 1899 Rules, r. 124, is not entitled, on the matter being turned into bkpcy., to be paid the sum as part of petitioner's costs, but must prove the debt as an ordinary creditor.—*Re* CRUISE (BANKRUPT) (1905), 39 I. L. T. 237.—IR.

Sect. 5.—Costs and fees: sub-sects. 1 & 2, A.]

& remitted to applts. :—*Held :* the money was not "property recovered or preserved" in the bkpcy. proceedings or any other legal proceeding within Solrs. Act, 1860, s. 28, & an order could not be made under that sect., charging applts.' costs upon it. *Semble :* the cases in which the power given by the sect. ought to be exercised by a ct. of bkpcy. must be rare.—*Re* HUMPHREYS, *Ex p.* LLOYD-GEORGE & GEORGE, [1898] 1 Q. B. 520 ; 67 L. J. Q. B. 412 ; 78 L. T. 182 ; 46 W. R. 322 ; 14 T. L. R. 263 ; 42 Sol. Jo. 328 ; 5 Mans. 11, C. A.

Annotations :—**Consd.** *Re* Turner, Wood *v.* Turner, [1907] 2 Ch. 126, C. A. **Refd.** *Re* Cook, *Ex p.* Cripps (1899), 68 L. J. Q. B. 597.

4708. —— Jurisdiction to make.]—The judge of the High Ct. in Bkpcy. has power as a judge of the High Ct., though not under his bkpcy. jurisdiction, to make charging orders under Solr.'s Act, 1860, s. 28, & inasmuch as it is a power to be exercised in chambers, he can delegate that power to the registrar in bkpcy.—*Re* WOOD, *Ex p.* FANSHAWE, [1897] 1 Q. B. 314 ; 66 L. J. Q. B. 69 ; 75 L. T. 387 ; 3 Mans. 299.

Annotations :—**Consd.** *Re* Deakin, *Ex p.* Daniell, [1900] 2 Q. B. 489, C. A. **Refd.** *Re* Humphreys, *Ex p.* Lloyd-George (1898), 67 L. J. Q. B. 412, D. C.

4709. —— ——.]—Any judge of the High Ct., whether sitting in bkpcy. or not, can make a charging order under Solrs. Act, 1860, s. 28. *Semble :* so also can a judge who is a judge of the Ct. of Bkpcy. alone, where in the course of bkpcy. proceedings property has been "recovered or preserved."—*Re* DEAKIN, *Ex p.* DANIELL, [1900] 2 K. B. 489 ; 69 L. J. Q. B. 725 ; 82 L. T. 776 ; 48 W. R. 678 ; 44 Sol. Jo. 553 ; 7 Mans. 302, C. A.

4710. —— Application to discharge—Time for making.]—An application to discharge a charging order under Solrs. Act, 1860, s. 28, as in all cases in which it is sought to set aside *ex p.* proceedings, must be made promptly, & an application made after the lapse of two months from the service of the order, without sufficient cause shown for the delay, is too late.—*Re* DEAKIN, *Ex p.* DANIELL, [1900] 2 K. B. 489 ; 69 L. J. Q. B. 725 ; 82 L. T. 776 ; 48 W. R. 678 ; 44 Sol. Jo. 553 ; 7 Mans. 302, C. A.

4711. Attachment for disregard of four day order for costs—When issued.]—An attachment for payment of the costs is of course, after disregard of the four day order, but, unless *ex necessitate*, will not be issued in vacation.—*Re* FOX, *Ex p.* HUNT (1834), 2 Mont. & A. 18, Ct. of R.

4712. Order for committal for non-payment of costs—Suspension on appeal—Costs paid into court.]—An order of committal for non-payment of costs, under which the party is committed, will not be suspended on the ground of an appeal, unless the costs are paid into ct.—*Re* FOX, *Ex p.* FOX (1834), 2 Mont. & A. 18, Ct. of R.

4713. Four day order for costs—Made on old affidavit—Evidence should be brought down to date.]—In process for contempt, it is a wholesome practice to bring the evidence of disobedience down to the latest period before the application is made ; but the circumstance that a four day order for payment of costs was made upon an affidavit of non-payment some days old, does not render the order so far irregular as to entitle a party to his discharge, after he has remained in confinement under process founded upon it, for seven years, without disputing its validity.—*Re* ELGIE, *Ex p.* GREEN (1841), 1 Mont. D. & De G. 464, L. C.

See, also, Sect. 4, *ante.*

4714. Solicitor restrained from enforcing note given for costs—Indebted to estate for greater amount.]—The solr. to a commission was restrained by injunction from negotiating a promissory note that he had received from bkpt. for his bill of costs in procuring his certificate, bkpt. having purchased the debts of many of the creditors, & the solr. being indebted to the estate in such a sum, that the share of it coming to bkpt. standing in the place of the creditors, in respect of the debts so purchased by him, would exceed the amount of the promissory note.—*Re* HUNT, *Ex p.* HARDING (1817), Buck, 24, L. C.

Annotation :—**Consd.** *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169, C. A.

SUB-SECT. 2.—TAXATION OF COSTS.

See, generally, SOLICITORS.

A. Application and Order for Taxation.

4715. Jurisdiction of court.]—Independently of stat., the Ct. of Review has a general jurisdiction to refer the bill of any solr. of that ct. for taxation.

Where the amount of a bill appears, on the face of it, to be excessive, objectionable items need not be pointed out, on an application of a creditor to have it taxed.—*Re* BURNAND, *Ex p.* COPELAND (1834), 4 Deac. & Ch. 86, Ct. of R.

4716. —— Independent of Solicitors Act, 1843 (c. 73), s. 37.]—The jurisdiction of the Ct. of Bkpcy. to tax the bill of costs of the solr. to the estate is independent of the above sect., & the

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4708 i. *Charging order—Jurisdiction to make.*]—The Ct. of Bkpcy. has power to make an order charging property recovered with payment of costs, & for a sale for the purpose of raising such amount.—*Re* MONAHAN (1886), 17 L. R. Ir. 46.—**IR.**

k. *Solicitor personally liable—Facts suppressed—Petition for sale by insolvent.*]—A petition for sale, presented by one who has sought the benefit of the Acts for the relief of insolvent debtors in England, will be dismissed with costs, to be paid personally by the solr. presenting it, when the facts connected with the insolvency are suppressed from the petition, although petitioner has not been finally discharged under those Acts.—*Re* NESBITT (1850), 2 Ir. Jur. 252.—**IR.**

l. *From what fund payable.*]—Certain funds came to the hands of an official assignee, but were payable to incumbrancers under claims arising before the insolvency. The judge in insolvency under 1864 Act ordered certain costs of the insolvent to be paid thereout :—*Held :* such order must be reversed.—*Re* STEWART (1870), 3 Ch. Ch. 95.—**CAN.**

m. *Realisation of order for costs—Appointment of receiver.*]—In order to enable a certain judgment for costs on the dismissal of a debtor's summons in bkpcy. to be realised, an order was made "in bkpcy.," appointing the judgment creditor a receiver, by way of equitable execution, over money to which the judgment debtor was entitled.—*Re* DEBTOR'S SUMMONS (1898), 32 I. L. T. 180.—**IR.**

n. *On what scale—Realisation of security—How proceeds calculated in calculating assets.*]—Where mortgaged property is realised in any bkpcy. or arrangement, the surplus only, if any, remaining available for distribution amongst the unsecured creditors can be taken into account in estimating the gross proceeds.—*Re* RYAN (1907), 41 I. L. T. 78.—**IR.**

PART XVI. SECT. 5, SUB-SECT. 2. —A.

4715 i. *Jurisdiction of court—Arrangement turned into bankruptcy.*]—A trader having presented a petition for arrangement, it was resolved that a firm of accountants should investigate petitioner's affairs, & the accountants received certain sums out of the estate, paid thereout certain sums to petitioner's solr., on account of costs, & retained certain sums for their own charges. The arrangement was subsequently turned into bkpcy., & the accountants paid to the assignees the balance remaining, after deducting the sums paid & retained by them as above mentioned. Upon the application of the assignees :—*Held :* the registrar of the Bkpcy. Ct. should inquire whether any costs had been properly incurred by the solr. in relation to the estate of bkpt., or the arrangement with his creditors proposed by him, & should tax the bills of costs & charges as if the arrangement had been carried out. Form of order. —*Re* O'CALLAGHAN (1886), 19 L. R. Ir. 32.—**IR.**

o. *Who may apply—New trustee—Costs incurred under prior trustee.*]

registrar is bound to tax such bill, without special circumstances, notwithstanding the lapse of twelve months from its delivery.—*Re* MACKLE, *Ex p.* BLAIR (1870), 5 Ch. App. 482 ; 39 L. J. Bcy. 45 ; 22 L. T. 287 ; 18 W. R. 615, L. J.

See 1915 Rules, rr. 99, 102.

See, also, No. 4742, *post.*

4717. Discretion of court—Not excluded by—Table of costs.]—The table of costs for taxation of the bills of solrs. in bkpcy. settled by the comrs. & affirmed by the Lord Chancellor does not exclude in particular cases, the exercise of the discretion of the ct.—*Re* GUNDRY, *Ex p.* TEMPLER (1848), 12 L. T. O. S. 273 ; 13 Jur. 78.

4718. —— Mortgagee's solicitor's charges in realising security.]—The trustee in bkpcy. of a mtgor. has the right to an order to tax, under Solrs. Act, 1843 (c. 73), the bill of costs of the solr. of the mtgee. incurred in selling the property under a power of sale.—*Re* ALLINGHAM (1886), 32 Ch. D. 36 ; 55 L. J. Ch. 800 ; 54 L. T. 905 ; 34 W. R. 619, C. A.

Annotations :—**Distd.** *Re* Ford, *Ex p.* Official Receiver (1901), 84 L. T. 329, D. C. **Refd.** *Re* West, King, & Adams, *Ex p.* Clough, [1892] 2 Q. B. 102 ; *Re* Palace Restaurants, [1914] 1 Ch. 492, C. A.

4719. —— —— Third party taxation provided by Solicitors Act, 1843 (c. 73), s. 38.]—The grantor of a bill of sale became bkpt. & the grantee, having sold the chattels therein comprised realised a sum more than sufficient to discharge the amount secured. By an antecedent agreement the grantor was liable to pay all the expenses of the bill of sale, & the grantee claimed to deduct out of the fund in his hands his solr.'s costs in connection with the preparation & redemption of the bill. The official receiver, as trustee, having paid the costs under protest, moved in the bkpcy. for a declaration that certain heads of such costs could not be charged. The county ct. judge held that he had no jurisdiction :—*Held :* the ct. having jurisdiction in the bkpcy. had a discretionary power under 1883 Act, s. 102, to tax the costs of the grantee's solr., & the taxation provided by the above sect. did not exclude such discretionary jurisdiction.—*Re* FORD, *Ex p.* OFFICIAL RECEIVER (1901), 84 L. T. 329, D. C.

4720. Who may apply—Creditor—Neglect of duty by assignees.]—A creditor cannot apply to have the solr.'s bill taxed, except on the ground of neglect of duty by the assignees.—*Re* SYKES, *Ex p.* WALKER (1821), 1 Gl. & J. 95.

Annotation :—**Folld.** *Re* Payne, *Ex p.* Castle (1834), 3 L. J. Bcy. 121, Ct. of R.

See, now, 1914 Act, s. 80.

4721. —— —— ——.]—Where the assignees have been guilty of negligence in not filing a solr.'s bill, a creditor may petition to have it taxed, although it has been paid.—*Re* PAYNE, *Ex p.* CASTLE (1834), 3 L. J. Bcy. 121, Ct. of R.

4722. —— Bankrupt having settled with creditors —Assignees neglecting to have bill taxed.]—If the assignees neglect to have a solr.'s bill of costs taxed by the comrs., bkpt. may, after having settled with the creditors, apply to the general jurisdiction of the ct., & obtain an order to tax the bill.—*Re* BROOM, *Ex p.* BAYLEY (1830), Mont. 208, L. C.

Annotation :—**Distd.** *Re* Que, *Ex p.* Que (1832), 1 L. J. Bcy. 45.

See, now, 1914 Act, s. 80.

4723. —— Bankrupt after commission superseded.]—Bkpt. may, after his commission has been superseded, get the solr.'s bill taxed, by an officer of the ct. under the general jurisdiction in bkpcy.—*Re* QUE, *Ex p.* QUE (1832), 1 L. J. Bcy. 45.

4724. —— One of several petitioning creditors.]—One of three petitioning creditors may apply for the taxation of the solr.'s bill without the others joining in the application.—*Re* SCHELINGSER, *Ex p.* WATTS (1836), 1 Deac. 588, Ct. of R.

4725. —— Assignee of bankrupt client on undertaking to pay bill—Solicitor not proving.]—Where the client of a solr. becomes bkpt., & the solr. does not prove for the amount of his bill of costs in the bkpcy., the assignee cannot obtain an order to tax, without giving an undertaking to pay the whole amount of the bill.—*Re* ELMSLIE & Co. (1869), L. R. 9 Eq. 72.

4726. How application made—Whether by petition—Or by motion.]—An order for taxing the bill of costs of the solr. to a commission of bkpcy. cannot be made upon motion ; it must be sought by petition.—ANON. (1824), 2 L. J. O. S. Ch. 181.

See 1915 Rules, rr. 26, 115.

4727. On whom application served—Assignee of insolvent solicitor.]—If a solr. is insolvent, a petition to tax his bill must not be served on the insolvency assignee.—*Re* TERRY, *Ex p.* SIMPSON (1837), 3 Mont. & A. 223, Ct. of R.

4728. Grounds for refusing application—Petition containing allegations against solicitor.]—It is no objection to a petition to tax the solr.'s bill, that it contains allegations reflecting on the conduct of the solr.—*Re* WELLS, *Ex p.* WELLS (1835), 1 Deac. 69, Ct. of R.

4729. Order amounting to admission that unreversed decision wrong.]—On the bkpcy. of G. his father tendered a proof, which was objected to & was expunged by the county ct. judge. The proof was amended & again expunged, & an appeal was lodged. A compromise was then made, under which the trustee agreed to pay the creditor's costs as between solr. & client. The judge refused to make an order for taxation :—*Held :* the refusal was right, as the application to the judge was an invitation to him to declare that his unreversed decision was wrong.—*Re* GREEN, *Ex p.* EDMUNDS (1885), 53 L. T. 967 ; 2 Morr. 294, D. C.

4730. When granted as of course—Ex parte application.]—It is of course upon an *ex p.* application to have an order to tax a solr.'s bill.—*Re* MORRIS, *Ex p.* HEWITT (1819), Buck, 388.

4731. Order for taxation—Business done in bankruptcy & otherwise.]—An order in bkpcy.

—An assignee in insolvency employed a firm of attorneys to perform services in connection with the estate. Subsequently he resigned the position & gave the attorneys the money of the estate remaining in his hands, with instructions to pay their own costs first, & then to hand the balance to the new assignee. This they did & rendered their bill of costs :—*Held :* the second assignee was entitled to have the bill taxed.—*Re* A. & B. (1873), 6 P. R. 68.—**CAN.**

p. —— *Trustee of bankrupt client—Agreement by solicitor with client to accept certain sum.*]—A solr. agreed with his client, without furnishing any bills, to accept a certain sum in payment for professional services rendered. Some days subsequently the client was adjudicated a bkpt., & at the request of the assignees the solr. furnished bills of costs, & more than twelve months after the bills had been furnished the assignees applied that they should be referred for taxation :—*Held :* (1) the assignees were not entitled to an order calling upon the solr. to tax his costs ; (2) an allegation made in an affidavit that some of the items were not chargeable under the schedule of fees was not sufficient to raise a question of fraud.—*Re* SEALY (1911), 45 I. L. T. 1.—**IR.**

q. —— —— *Not without giving undertaking to pay bill—Solicitor not proving.*]—When a client, who has obtained an order to tax his solr.'s bill of costs, becomes bkpt., his assignees, if the solr. undertakes not to prove in the bkpcy. for the costs, cannot continue the taxation without giving an undertaking to pay the taxed amount of the bill.—*Re* MERRICK, [1911] 1 I. R. 279.—**IR.**

r. *Order for taxation — Form of —Arrangement turned into bankruptcy.*]—*Re* O'CALLAGHAN (1886), 19 L. R. Ir. 32.—**IR.**

Sect. 5.—*Costs and fees: Sub-sect.* 2, *A., B. & C.*]

was made for taxation of a solr.'s bill for business done in bkpcy. & otherwise.—*Ex p.* ARROWSMITH (1806), 13 Ves. 124 ; 33 E. R. 241, L. C.

Annotation :—**Refd.** Clarkson *v.* Parker (1838), 4 M. & W. 532.

4732. —— Several bills incurred by same person in same right—Separate orders unnecessary.]—On a petition by an assignee, who was also petitioning creditor, praying to confirm the certificate of the deputy registrar as to various solr.'s bills referred to him for taxation, under which more than a sixth part had been taken off in the gross though not of every one of the bills :—*Held :* as all the bills were incurred by the same person in the same right there was no need for a separate order of taxation for each bill.—*Re* BARRETT, *Ex p.* BARRETT (1834), 3 Deac. & Ch. 731 ; 1 Mont. & A. 447, Ct. of R.

Annotation :—**Refd.** Barton *v.* Pyne (1842), 1 Hare, 493.

4733. —— Conditional order.]—Where an application for taxation was made after an action had been commenced by the solr., the ct., to save expense, made in the first instance a conditional order that if more than a sixth were taken off the bill, the solr. should pay the costs of taxation.—*Re* SCHELINGSER, *Ex p.* WATTS (1836), 1 Deac. 588, Ct. of R.

See 1914 Act, s. 83.

4734. —— Provision for costs of taxation.]—In general, the order for the taxation of a solr.'s bill provides for the costs of taxation.—*Re* SHIRLEY, *Ex p.* RANDALL (1840), 1 Mont. D. & De G. 341 ; 10 L. J. Bcy. 4, Ct. of R.

See, further, sub-sect. 2, D., *post.*

4735. Effect of order—On hearing of subsequent petition for costs of taxation.]—Where an order has been made for the taxation of the solr.'s bill of costs :—*Semble :* a subsequent petition for the costs of the taxation cannot be heard, until the master has made his certificate, nor unless the original petition is also set down in the paper.—*Re* JOYNER, *Ex p.* ELSEE (1832), 2 Deac. & Ch. 332, Ct. of R.

4736. Modification or discharge of order—Application to court necessary.]—If a solr. wishes to modify or discharge an order for taxation, he must apply to the ct. for that purpose.—*Re* MORRIS, *Ex p.* HEWITT (1819), Buck, 388.

4737. Costs of unsuccessful application by trustee—Personal liability.]—An application to a county ct. judge for an order for taxation was refused, on the ground that it was an invitation to him to declare that his unreversed decision was wrong. On appeal by the trustee :—*Held :* the costs of the application must be paid by the trustee personally.—*Re* GREEN, *Ex p.* EDMUNDS (1885), 53 L. T. 967 ; 2 Morr. 294, D. C.

4738. Petition to tax scandalous—Reference allowed.]—If a petition to tax a solr.'s bill contains allegations reflecting on the conduct of the solr., which allegations are improper, they may be referred for scandal.—*Re* WELLS, *Ex p.* WELLS (1835), 1 Deac. 69, Ct. of R.

See 1915 Rules, r. 53.

4739. Notice of appointment to tax—On whom served.]—*Re* SMITH, *Ex p.* WILSON, No. 4763, *post.*

B. The Taxation.

4740. By whom—Commissioner—Costs directed to be paid out of estate.]—When costs are directed to be paid out of the estate, it is the practice for the comr. to tax them.—*Re* TODD, *Ex p.* WOOD (1843), 1 L. T. O. S. 338, Ct. of R.

See 1915 Rules, rr. 99, 102.

4741. What charges liable to taxation—Receiver & manager's disbursements.]—Under 1871 Rules, r. 5, the charges of a receiver & manager of a business for disbursements out of pocket, *e.g.*, travelling expenses & salaries of assistants, are liable to taxation.—*Re* BUSHELL, *Ex p.* IZARD (1883), 23 Ch. D. 75 ; 52 L. J. Ch. 678 ; 48 L. T. 751 ; 31 W. R. 418, C. A.

Annotation :—**Refd.** Strapp *v.* Bull, Shaw *v.* London School Board, [1895] 2 Ch. 1, C. A.

4742. What enactments apply—Solicitors Act, 1843 (c. 73).]—Under an ordinary reference to tax the costs of the solr. to a trustee in bkpcy. the taxation is regulated by the practice of the Ct. of Bkpcy., & the above Act has no application.—*Re* MARSH, *Ex p.* MARSH (1885), 15 Q. B. D. 340 ; 54 L. J. Q. B. 557 ; 53 L. T. 418 ; 34 W. R. 620 ; 2 Morr. 232, C. A.

Annotation :—**Distd.** *Re* Allingham (1886), 32 Ch. D. 36, C. A.

See, also, No. 4716, *ante.*

4743. —— 1886 Rules, r. 112 (2)—Trustee ordered to pay costs & recover same from estate.]—A trustee having been ordered to pay the costs of unsuccessful proceedings under 1883 Act, with power to recover them out of the estate :—*Held :* such costs were not liable to be taxed upon the lower scale mentioned in 1886 Rules, r. 112 (2).—*Re* DOWSON, *Ex p.* JAYNES (1888), 21 Q. B. D. 417 ; 57 L. J. Q. B. 522 ; 59 L. T. 446 ; 36 W. R. 864 ; 5 Morr. 240.

Annotations :—**Distd.** *Re* Procter, [1891] 2 Q. B. 433. **Consd.** *Re* Marsh, *Ex p.* Board of Trade (1894), 71 L. T. 776.

4744. —— —— Conveyancing business.]—1886 Rules, r. 112 (2) does not apply to conveyancing business, & the charges in respect of such business are regulated by the General Regulations, r. 2, in the Appendix to those Rules.—*Re* PARFITT (1889), 23 Q. B. D. 40 ; 58 L. J. Q. B. 428 ; 61 L. T. 88 ; 37 W. R. 751 ; 5 T. L. R. 506 ; 6 Morr. 166.

Annotations :—**Distd.** *Re* Procter (1891), 65 L. T. 348. **Apprvd. & Folld.** *Re* Weighell, [1909] 1 K. B. 92, C. A.

4745. Who may attend—Bankrupt—Jurisdiction of court to allow.]—The ct. has power in special circumstances, to give bkpt. leave to attend the taxation of the trustee's costs against the estate, & will exercise that power in bkpt.'s favour in a case where he has paid his debts in full & has a surplus over.—*Re* GEIGER, [1915] 1 K. B. 439 ; 84 L. J. K. B. 589 ; 112 L. T. 562 ; 59 Sol. Jo. 250 ; [1915] H. B. R. 44, C. A.

Annotations :—**Distd.** *Re* Yeatman, [1916] 1 K. B. 461. **Consd.** *Re* Yeatman, *Ex p.* Yeatman, [1916] 1 K. B. 780, C. A. **Mentd.** *Re* Salmon, *Ex p.* Official Receiver, [1916] 2 K. B. 510.

PART XVI. SECT. 5, SUB-SECT. 2. —B.

4740 i. *By whom—Appeal from local bankruptcy court—Costs of court below & of appeal.*]—Where, on the determination of an appeal from an order of a local bkpcy. ct., the taxing master is directed to tax the costs of & incidental to the proceedings in the ct. below & of the appeal, it is the duty of the taxing master to tax such items as relate to business transacted in the local bkpcy. ct., & such items as relate to the appeal, according to the scale of fees respectively applicable to such items, & it is not necessary that the former items should be referred to the local registrar for taxation.—*Re* HANAFIN, [1907] 2 I. R. 109 ; 40 I. L. T. 243.—**IR.**

4741 i. *What costs liable to taxation—Costs of necessary transfer of property to official assignee.*]—On motion made under 1887 Act, s. 130, B. was ordered to transfer property to the official assignee & to pay the costs of & incidental to the motion, & further consideration was reserved :—*Held :* the costs of the transfer should have been taxed as costs under the order, & they could not be dealt with on further consideration.—*Re* BLACK, *Ex p.* OFFICIAL ASSIGNEE (1895), 16 N. S. W. B. 9.—**AUS.**

4746. What costs allowed—All affidavits filed.]—All affidavits filed are considered as read, on the question of costs.—*Re* OLDHAM, *Ex p.* LUCAS (1834), 3 Deac. & Ch. 664; 1 Mont. & A. 405, Ct. of R.

Annotation:—**Folld.** *Re* Bonington, *Ex p.* Bonington (1835), 4 L. J. Bcy. 57, Ct. of R.

4747. —— Affidavit not read & alleged to be impertinent — Not excluded by order.] — An affidavit, although not read, if alleged to be impertinent, will be included in the taxation by the registrar, unless excluded by the order.—*Re* BONINGTON, *Ex p.* BONINGTON (1835), 4 L. J. Bcy. 57.

4748. —— Attendance—No benefit arising therefrom.]—*Semble:* an attendance should not be disallowed, merely because no benefit arose therefrom.—*Re* BARROW & GEDDES, *Ex p.* CHRISTY, *Ex p.* HADFIELD (1837), 3 Mont. & A. 88; 6 L. J. Bcy. 68, Ct. of R.

4749. —— Filing affidavits—Several filed at different times.]—Only one 6*s.* 8*d.* is allowed for filing several affidavits at the same time: if filed at different times, even on the same day, it depends on the circumstances what attendances are allowed.—*Re* BARROW & GEDDES, *Ex p.* CHRISTY, *Ex p.* HADFIELD (1837), 3 Mont. & A. 88; 6 L. J. Bcy. 68, Ct. of R.

4750. —— Fee for settling special petitions.]—*Semble:* a fee is payable to counsel on settling special petitions in bkpcy.—*Re* BARROW & GEDDES, *Ex p.* CHRISTY, *Ex p.* HADFIELD (1837), 3 Mont. & A. 88; 6 L. J. Bcy. 68, Ct. of R.

4751. —— Advertisements in provincial papers.] —Advertisements in the provincial papers, as well as in the *Gazette*, were not allowed.—*Re* BARROW & GEDDES, *Ex p.* CHRISTY, *Ex p.* HADFIELD (1837), 3 Mont. & A. 88; 6 L. J. Bcy. 68, Ct. of R.

See 1915 Rules, App., Part II., vii.

4752. —— Assignee's solicitor's costs of audit.] —The solr. for the trade assignee will not be allowed his costs of the audit, unless he attends the sitting.—ANON. (1850), 15 L. T. O. S. 211.

4753. —— Costs of copy depositions.]—If a party gives notice of his intention to use as evidence a deposition which is on the file, & serves his opponent with a copy of it, he will not be allowed the costs of the copy.—*Re* COOPER, *Ex p.* HALL (1882), 19 Ch. D. 580; 51 L. J. Ch. 556; 46 L. T. 549, C. A.

Annotation:—**Consd.** *Re* Carill-Worsley, [1915] 2 K. B. 534.

4754. —— ——.]—On any motion where notice is given to use in evidence against resp. on the hearing of the motion the deposition on the file of a person examined under 1914 Act, s. 25, resp., if he applies for it, is entitled to be supplied with a copy of the deposition on paying the usual charges. Afterwards it will be for the taxing master, on taxing the costs of the motion, to decide whether the costs of such a copy shall be allowed to the successful party, having special regard to the question of whether or not he could have otherwise obtained inspection of the deposition.—*Re* CARILL-WORSLEY, [1915] 2 K. B. 534; 84 L. J. K. B. 1414; 59 Sol. Jo. 428; [1915] H. B. R. 190.

4755. —— Costs of evidence.]—Evidence being entered in an order does not preclude the taxing-master from exercising his discretion as to whether the costs of such evidence are proper to be allowed or not.—*Re* ABRAHAMS, *Ex p.* TRUSTEE (1895), 2 Mans. 369; 15 R. 521.

4756. Form of allocatur—Whether necessary to decide out of what funds costs payable.]—It is no part of the duty of the taxing master in bkpcy. when taxing a solr.'s bill of costs in respect of conveyancing business under the General Regulations, r. 2, in the Appendix to 1886 Rules to consider or decide out of what funds the bill when taxed is to be paid. His duty is merely to tax the bill in accordance with the general order under Solrs.' Remuneration Act, 1881 (c. 44); but his *allocatur* should state that the amount of the bill as taxed & allowed is to be paid in accordance with r. 2 of the above General Regulations, leaving it to the parties to apply to the ct., if necessary, to determine the fund (if any) out of which the taxed bill is to be paid.—*Re* GARNER, *Ex p.* PEDLEY, [1906] 2 K. B. 213; 75 L. J. K. B. 584; 95 L. T. 60; 54 W. R. 627; 22 T. L. R. 597; 50 Sol. Jo. 528; 13 Mans. 204.

C. Review, Appeals, and Reopening Taxation.

4757. Jurisdiction of court—To review master's decision.]—Where a bkpcy. taxing master of the High Ct. has reviewed under 1886 Rules, r. 124, a bill of costs taxed by the registrar of the county ct., the judge of the High Ct. sitting in bkpcy. has power to review the master's decision.—*Re* ALISON, *Ex p.* JAYNES, [1892] 2 Q. B. 587; 66 L. T. 688; 36 Sol. Jo. 526; *sub nom. Re* ALLINSON, *Ex p.* JAYNES *v.* BOARD OF TRADE, 61 L. J. Q. B. 526; *sub nom. Re* ALLISON, *Ex p.* JAYNES, 40 W. R. 624; 9 Morr. 180.

Annotation:—**Refd.** *Re* Beeston, *Ex p.* Board of Trade (1899), 68 L. J. Q. B. 344.

4758. —— Appeal from master—Question one of principle not of amount.]—*Semble:* an appeal to the judge in bkpcy. lies from a decision of the taxing master on a question as to the fees to which the sheriff is entitled, where the question is one of principle & not of amount.—*Re* BEESTON, *Ex p.* BOARD OF TRADE (1899), 68 L. J. Q. B. 344; 79 L. T. 561; 6 Mans. 27; *affd.* without touching this point, [1899] 1 Q. B. 626, C. A.

4759. —— To order reopening of taxation.]—A receiving order was made on Oct. 17, 1910, & adjudication followed on Dec. 8, 1910. In the administration of bkpt.'s estate the official receiver, exercising the functions of a committee of inspection, sanctioned the employment by the trustee of a solr. to transact several separate & distinct matters of business, in each case limiting the amount of costs to be incurred. The solr. brought in his costs for taxation & lodged one general bill, not distinguishing the separate matters in respect of which his employment was authorised. In some instances the amount limited for costs was exceeded & in others not reached, but the total amount allowed on taxation did not exceed the aggregate amount authorised in respect of the whole of the matters for which the employment of the solr., was sanctioned. The taxing master

s. *What costs allowed — Instructions by creditors to obtain adjudication —Filing of debtor's petition after instructions.*]—The principal creditors of a tradesman instructed their solrs. to take the necessary steps to have their debtor adjudicated a bkpt., but before an act of bkpcy. was obtained upon which to found a creditors' petition debtor himself filed:—*Held:* the costs incurred by the creditors incidental to the instructions they had given to their solrs. were properly disallowed on taxation, though such costs would have been allowed if actual proceedings in bkpcy. had been taken.—*Re* EARLE (1892), 11 N. Z. L. R. 139.—**N.Z.**

PART XVI. SECT. 5, SUB-SECT. 2. —C.

t. *Who may apply.*]—Where bkpt. presented a petition to review taxation of costs taxed *ex p.*, & alleged there would be a surplus, & that he had a direct interest:—*Held:* the petition should be presented by the assignee unless bkpt. could show collusion to destroy his reversionary interest in the surplus.—*Re* MULLEN, *Ex p.* MULLEN (1828), 3 Mol. 77.—**IR.**

Sect. 5.—*Costs and fees: Sub-sect.* 2, *C. & D.; sub-sects.* 3 *& 4.*]

issued his *allocatur*, & in 1913 the taxed costs were paid by the Board of Trade. In 1915, bkpt. having provided for the payment of all his debts in full, the adjudication was, on his application, annulled. He then moved to reopen the taxation, on the ground that it had not been properly carried out, & that if each matter of business had been dealt with separately the total amount allowed on taxation would have been decreased:—*Held:* there was jurisdiction at the instance of the former bkpt. to order the reopening of the taxation, & it was a proper case for such an order.—*Re* YEATMAN, *Ex p.* YEATMAN, [1916] 1 K. B. 780; 85 L. J. K. B. 789; 114 L. T. 575; 32 T. L. R. 309; [1916] H. B. R. 30, C. A.

4760. In what cases—Order by Vice-Chancellor to tax bills & pay same.]—The Vice-Chancellor having directed the comrs. to tax certain bills, & having ordered them to be paid:—*Held:* the Ct. of Review would not order retaxation.—*Re* BARROW & GEDDES, *Ex p.* CHRISTY, *Ex p.* HADFIELD (1837), 3 Mont. & A. 88; 6 L. J. Bcy. 68, Ct. of R.

4761. —— Application by Board of Trade—For benefit of estate.]—An application by the Board of Trade for a review of taxation of the costs of a solr. under 1883 Rules, r. 104, can only be made for the benefit of the estate, & where there is no estate & no trustee, such rule will not apply.—*Re* RODWAY, *Ex p.* PHILLIPS (1884), 28 Sol. Jo. 721; 1 Morr. 228.

Annotation:—**Refd.** *Re* Dale, *Ex p.* Dale (1885), 33 W. R. 476.

4762. —— —— Limited to persons named in 1886 & 1890 Rules, r. 124.]—The above rule does not apply to persons litigating with the trustee outside the bkpcy., but is confined to the class of persons enumerated in the rule & employed by the trustee in the bkpcy.—*Re* HUNT, *Ex p.* BOARD OF TRADE, [1898] 1 Q. B. 287; 67 L. J. Q. B. 247; 46 W. R. 384; 4 Mans. 315.

4763. —— Change of trustee—Notice of appointment to tax not served on new trustee.]—"The trustee" who is entitled to not less than seven days' notice of the appointment to tax the solr.'s bill of costs, is the trustee at the time when the taxation takes place, so that where a new trustee had been appointed, & the solr. to the original trustee did not give him notice of the appointment to tax the solr.'s bill of costs, & the taxation proceeded in his absence & the *allocatur* was signed, a retaxation was ordered, on the application of the trustee, & in the meantime the *allocatur* was suspended.—*Re* SMITH, *Ex p.* WILSON, [1910] 2 K. B. 346; 80 L. J. K. B. 16; 102 L. T. 861; 26 T. L. R. 492; 17 Mans. 290.

4764. —— Disallowances in discretion of master.]—When disallowances on taxation are in the discretion of the taxing master, the ct. will not interfere.—*Re* TUDOR BROTHERS (1916), 51 L. Jo. 335.

Appeals.]—*See* Part XVII., Sect. 2, *post.*

D. Costs of Taxation.

4765. Jurisdiction of court—To order executor of deceased solicitor of assignees to pay costs.]—*Held:* the Ct. of Review had no jurisdiction to order the exor. of a deceased solr. of the assignees to pay the costs of taxing the solr.'s bill, the exor. not admitting assets.—*Re* PHILLIPS, *Ex p.* SPACKMAN (1836), 3 Mont. & A. 135, Ct. of R.

Annotation:—**Distd.** *Re* Jackson, *Ex p.* Hammond (1838), 8 L. J. Bcy. 26, Ct. of R.

See, also, No. 4774, *post.*

4766. —— To order costs to be paid by solicitor—Less than one-sixth taxed off.]—*Held:* cases might arise, as between the solr. & the estate, where costs would be ordered against the solr., though less than one-sixth was taxed off.—*Re* BARROW & GEDDES, *Ex p.* CHRISTY, *Ex p.* HADFIELD (1837), 3 Mont. & A. 88; 6 L. J. Bcy. 68, Ct. of R.

See, also, No. 4734, *ante.*

4767. Costs reduced more than one-sixth—Payment of costs by solicitor.]—A solr.'s bill having been reduced on retaxation by the master above a sixth the solr. was ordered to pay the costs of the taxation.—*Ex p.* WESTALL (1814), 3 Ves. & B. 141; 35 E. R. 432, L. C.

Annotation:—**Refd.** Barton *v.* Pyne (1842), 1 Hare, 493.

4768. —— ——.]—One-sixth of a bill of costs in bkpcy. delivered to the master to be taxed being taken off, the solr. was ordered to pay the costs of the taxation.—*Re* HATHERWAY, *Ex p.* HATHERWAY (1817), 2 Madd. 329; 56 E. R. 356.

4769. —— —— Action brought for taxed costs without deducting costs of taxation.]—An order was made in bkpcy., referring a solr.'s bill to a master for taxation, reserving the costs of taxation. The bill was taxed, & more than one-sixth was taken off. The solr. brought an action for the taxed costs, without deducting the costs of taxation. On petition, the action was stayed, & a reference made to the master to tax the costs of the taxation of costs, & after deducting the amount thereof from the taxed costs, same were ordered to be paid to the solr.—*Re* LINGARD, *Ex p.* BELLOTT (1819), 4 Madd. 379; 56 E. R. 745.

Annotation:—**Folld.** Walton *v.* Johnson, Heselton *v.* Johnson (1828), 2 Sim. 456.

4770. —— —— Disallowance of extra travelling expenses of commissioners.]—*Held:* a solr. must pay the costs of the taxation of his bill reduced by the taxation more than one-sixth of the amount, which reduction arose from the master disallowing extra fees paid to the comrs. for travelling expenses.—*Re* INMAN, *Ex p.* INMAN, *Ex p.* WOOD (1817), Buck, 129, L. C.

4771. —— —— Application to confirm report—costs of appearance.]—Where one-sixth of a solr.'s bill has been taxed off upon a reference, & he applies to confirm the report, giving notice to petitioner, he must pay the costs of the appearance on such application, & of the petition & taxation.—*Re* SHEPHERD, *Ex p.* NUTTING (1832), 1 Mont. & B. 267, Ct. of R.

4772. —— —— Action commenced before application for taxation.]—Notwithstanding an action is commenced by the solr. before an application for taxation is made, still if more than one-sixth is taken of the bill, the solr. pays the costs of the taxation.—*Re* SCHELINGSER, *Ex p.* WATTS (1836), 1 Deac. 588, Ct. of R.

4773. —— —— Modern practice.]—There is no rule in the Ct. of Bkpcy. that if on the taxation of the costs of the solr. to a trustee in bkpcy. the

4763 i. *In what cases—Application by new assignee—On what terms.*]—An attorney employed as agent to a commission of bkpcy., will be ordered, at the instance of a new assignee, to retax the bills of costs paid by the former assignee, upon the terms of being paid the costs of the former taxation, & having all the documents handed back to him previous to the taxation.—*Re* SLOANE (1828), 2 Ir. L. Rec. 1st ser. 29.—**IR.**

PART XVI. SECT. 5, SUB-SECT. 2. —D.

4767 i. *Costs reduced more than one-sixth—Payment of costs by solicitor—Set-off.*]—Solrs. rendered to the assignee of insolvent their bill for services to insolvent, & the assignee taxed the bill & had it reduced by more than one-sixth:—*Held:* he had a right personally to recover from the solrs. the costs of the taxation, & there should be no set-off against the amount coming to the solrs. from the estate of insolvent as a dividend upon their bill.—*Re* ROGERS & FAREWELL (1890), 14 P. R. 38.—**CAN.**

amount of the bill is reduced by more than one-sixth, he is to pay the costs of the taxation.—*Re* MARSH, *Ex p.* MARSH (1885), 15 Q. B. D. 340; 54 L. J. Q. B. 557; 53 L. T. 418; 34 W. R. 620; 2 Morr. 232, C. A.

Annotations:—**Distd.** *Re* Allingham (1886), 32 Ch. D. 36, C. A. **Mentd.** *Re* Palace Restaurants, [1914] 1 Ch. 492, C. A.; *Re* Geiger, [1915] 1 K. B. 439, C. A.

See, also, No. 4733, *ante*.

4774. —— Liability of representatives of deceased solicitor—Set-off.]—Representatives of a deceased solr. will not be ordered to pay costs of taxation of his bill, more than a sixth being taken off, nor, where they have brought an action for the amount, to the costs of which the assignees are liable, can they set off such costs against each other.—*Re* JACKSON & WILLIAMS, *Ex p.* HAMMOND & SMITH, (1839), 1 Mont. & Ch. 136; 4 Deac. 48, Ct. of R.

See, further, No. 4765, *ante*, & sub-sect. 4, *post*.

4775. —— Liability of assignees of bankrupt solicitor.]—Assignees of a bkpt. solr. are personally liable for the costs of taxation of a bill of costs delivered by them, where more than one-sixth is taken off.—*Re* PEERS (1856), 21 Beav. 520; 52 E. R. 961.

4776. —— How one-sixth calculated—Several bills.]—Various solr.'s bills were referred to taxation, under which more than a sixth part was taken off in the gross though not of every one of the bills:—*Held*: as more than a sixth part had been taken off the whole amount, the solr. must pay the costs of the taxation.—*Re* BARRETT, *Ex p.* BARRETT (1834), 3 Deac. & Ch. 731; 1 Mont. & A. 447, Ct. of R.

Annotation:—**Refd.** Barton *v.* Pyne (1842), 1 Hare, 493.

4777. —— —— Withdrawal of erroneous entries after reference for taxation.]—After a bill has been referred for taxation, erroneous overcharges inserted by mistake cannot be withdrawn by the parties, so as to be excluded from the calculation of the one-sixth, as between the solr. & the estate.—*Re* BARROW & GEDDES, *Ex p.* CHRISTY, *Ex p.* HADFIELD (1837), 3 Mont. & A. 88; 6 L. J. Bcy. 68, Ct. of R.

4778. —— —— Inclusion of entries disallowed by commissioner.]—On taxation of a bill, items disallowed by the comr., & again taxed off, are included in the one-sixth.—*Re* BARROW & GEDDES, *Ex p.* CHRISTY, *Ex p.* HADFIELD (1837), 3 Mont. & A. 88; 6 L. J. Bcy. 68, Ct. of R.

4779. —— Consideration by court of particulars of items—On application for order against solicitor.]—Upon an application that the solr. may be directed to pay the costs of taxation, more than a sixth part having been taken off his bill, the ct. will not enter into the particulars of the items of the bill.—*Re* HUDSON, *Ex p.* MILLINGTON (1835), 1 Deac. 114, Ct. of R.

4780. —— Trustee of absconding solicitor delivering grossly unreasonable bills—Ordered to pay costs personally.]—The trustee of an absconding solr. prepared & delivered three bills of costs amounting to £482 6*s.* 9*d.* On an originating summons they were taxed at £124 4*s.* 4*d.*, & the taxing-master certified that on the general account between the solr. & applct. there was an overpayment by the latter of £105. The question being whether, in the circumstances, the trustee should be ordered personally to pay the costs of the summons & taxation for proceeding with bills, which were made up of items grossly unreasonable:—*Held*: the ct. had a discretion, & the taxing master having reported strongly against the bills, the trustee must pay the costs personally.—*Re* T. (A SOLICITOR) (1901), 45 Sol. Jo. 363.

SUB-SECT. 3.—SOLICITOR AND CLIENT COSTS.

4781. Jurisdiction of court.]—The ct. has power to tax a bill of costs, as between solr. & client, independently of the character of solr. to any particular bkpcy.—*Re* SHERRY, *Ex p.* DAVIS (1838), 3 Mont. & A. 624, Ct. of R.

4782. In what cases—Application of assignee opposed by other assignees & solicitor—Bill reduced by more than one-sixth.]—An assignee presented a petition for the taxation of the bill of the solr. to the fiat, but the prayer was opposed by the other assignees & the solr. The usual order for taxation having been made, & the bill being reduced by more than one-sixth, the solr. paid petitioner the costs of taxation. Petitioner then applied to the comrs. to be allowed out of the estate his extra costs incurred in the proceedings, but the comrs. refused to allow him any further costs, although they allowed out of the estate the costs of the other assignees, as between solr. & client:—*Held*: petitioner was entitled to have his costs taxed, as between solr. & client.—*Re* FISHER, *Ex p.* FOSBROOKE (1841), 1 Mont. D. & De G. 533; 5 Jur. 370, Ct. of R.

4783. Time for making order.]—1883 Rules, r. 98, only empowers the ct. to direct that costs shall be taxed & paid as between solr. & client at the time when the order is made awarding the costs. If such a direction is not given at that time, the ct. has no power to give it subsequently.—*Re* ANGELL, *Ex p.* SHOOLBRED (1884), 14 Q. B. D. 298; 54 L. J. Q. B. 87; 51 L. T. 678; 33 W. R. 202; 2 Morr. 5, C. A.

See 1915 Rules, r. 115.

SUB-SECT. 4.—SET-OFF OF COSTS.

4784. Costs awarded against creditor—But not taxed—Against creditor's debt.]—Costs ordered to be paid, but not taxed until after the bkpcy. of the person to receive them, cannot be set off by the party from whom they were due, proving a debt under the commission.—*Ex p.* RHODES (1809), 15 Ves. 539; 33 E. R. 858.

Annotations:—**Refd.** *Re* Barber, *Ex p.* Abbott (1836), 5 L. J. Bcy. 33. **Mentd.** *Ex p.* Irvine (1815), 1 Madd. 74; Lane *v.* Pearce (1823), 12 Price, 742; *Re* Hance (1848), 11 L. T. O. S. 435.

4785. Costs payable by creditor—Against costs made part of petitioning creditor's debt.]—There can be no set-off of costs in bkpcy. proceedings between a creditor & his debtor, where the creditor makes costs payable to him part of the debt on which he bases his bkpcy. petition against his debtor, although, if such costs had not been made part of petitioning creditor's debt, a set-off of costs would have been allowed.—*Re* A DEBTOR, *Ex p.* PETITIONING CREDITORS, [1907] 2 K. B. 896; 97 L. T. 644; 51 Sol. Jo. 705; *sub nom.*

PART XVI. SECT. 5, SUB-SECT. 3.

4782 i. *In what cases—Action to preserve properly fraudulently transferred.*]—Costs incurred in a creditors' action in preserving for creditors property which had been fraudulently transferred, are allowed as between solr. & client.—*Re* JUDGMENT ACTS, HOOD, ALDRIDGE & CO. *v.* TYSON, 9 B. C. R. 233.—CAN.

PART XVI. SECT. 5, SUB-SECT. 4.

4785 i. *Costs payable by creditor—Against costs payable by insolvent.*]—TIPPETT *v.* HAACKE, 1 P. R. 365.—CAN.

u. *Costs payable by creditor being assignee—On commission being superseded—Against debt to assignee as creditor.*]—*Re* PETTICREW, *Ex p.* ORR (1850), 1 I. Ch. R. 102.—IR.

w. *Costs payable by insolvent—Against debt due by firm.*]—BRIGHAM *v.* SMITH (1870), 17 Gr. 512.—CAN.

Sect. 5.—Costs and fees: Sub-sect. 4. Part. XVII. Sects. 1 & 2.]

Re S., *Ex p.* PEAK HILL GOLDFIELD, LTD., 76 L. J. K. B. 1144; 14 Mans. 259.

4786. —— On dismissal of petition—Against costs payable by debtor—On failing to set aside bankruptcy notice.]—Costs payable by debtor on failing to set aside a bkpcy. notice, & costs payable by the creditor on the dismissal with costs of his bkpcy. petition based on such notice, may be set off. —*Re* A DEBTOR, *Ex p.* PETITIONING CREDITORS, [1907] 2 K. B. 896; 97 L. T. 644; 51 Sol. Jo. 705; *sub nom. Re* S., *Ex p.* PEAK HILL GOLDFIELD, LTD., 76 L. J. K. B. 1144; 14 Mans. 259.

4787. —— —— Against creditor's judgment debt.]—A creditor of a married woman, having obtained judgment against her separate estate for a debt of over £50 incurred by her whilst trading, presented a petition against her, which was dismissed with costs. She then obtained an order in the Bkpcy. Ct. for payment of her costs, & took out a judgment summons against the creditor, who had not complied with the order:—*Held:* the ct. had no jurisdiction to set off the judgment debt against the costs of the petition.—*Re* DRUMMOND, *Ex p.* ASHMORE, [1909] 2 K. B. 622; 78 L. J. K. B. 935; 25 T. L. R. 706; 53 Sol. Jo. 651; 16 Mans. 200.

4788. —— On rescission of receiving order—Against creditor's judgment debt—In proceedings on fresh petition.]—A receiving order had been made against A. on the petition of a co., the alleged act of bkpcy. being non-compliance with a bkpcy. notice served in respect of a judgment debt. A. appealed on the ground that the bkpcy. notice was issued for too large an amount, & the Ct. of Appeal allowed the appeal, rescinding the receiving order. Before the *allocatur* for the costs was issued, the co. presented a second petition in bkpcy. against A. When the *allocatur* was issued, A., as judgment creditor for the amount, commenced garnishee proceedings for the purpose of attaching the co.'s bank account, & by an order of the master the proposed garnishees were directed to pay a sum less their costs into ct., while A. & the co. were directed to proceed to the trial of an issue before a judge as to whether the co. were indebted to A. at the time when the order *nisi* was served on the garnishees. On appeal by A.:—*Held:* the appeal must be dismissed, as there were two judgment debtors & *primâ facie* in bkpcy. in such a case there was a right to set off one against the other, & the garnishee order *nisi* must be discharged.—SCOTT *v.* PEAK HILL GOLDFIELDS, LTD. (1908), *Times*, Nov. 16, C. A.

4789. Costs in High Court—Against costs in bankruptcy—Proceedings between substantially same parties.]—Costs incurred in the High Ct. cannot be set off against costs in bkpcy., although such costs be incurred in proceedings between substantially the same parties as are litigating in bkpcy.—*Re* ADAMS, *Ex p.* GRIFFIN (1880), 14 Ch. D. 37; 49 L. J. Bcy. 28; 42 L. T. 704; 28 W. R. 714, C. A.

Annotation:—**Consd.** Edwards *v.* Hope (1885), 14 Q. B. D. 922, D. C.

4790. Costs of appeal in winding up of company—Against costs of appeal in bankruptcy.]—Costs of an appeal from a county ct. to the High Ct. in proceedings in the winding up of a co., cannot be set off against costs of an appeal from a county ct. to the High Ct. in bkpcy. proceedings, although the two appeals are between the same parties.—*Re* BASSETT, *Ex p.* LEWIS, [1896] 1 Q. B. 219; 65 L. J. Q. B. 144; 73 L. T. 736; 44 W. R. 240; 40 Sol. Jo. 157; 2 Mans. 524.

Annotations:—**Apld.** *Re* Drummond, *Ex p.* Ashmore, [1909] 2 K. B. 622. **Refd.** Scott *v.* Peak Hill Goldfields (1908), *Times*, Nov. 16, C. A.

See, also, No. 4774, *ante*, &, *generally*, PRACTICE; SET-OFF & COUNTERCLAIM.

Part XVII.—Appeals.

NOTE.—*The only cases included in this Part are cases of general application to all appeals. Cases dealing with appeals from particular orders, etc., are collected in the Parts in which the orders appealed from are dealt with respectively.*

See 1914 Act, s. 108, & 1915 Rules, rr. 129–135.

SECT. 1.—TO WHAT COURT.

4791. From registrar—Sitting as judge—To Chief Judge in Bankruptcy—Or Court of Appeal.]—An appeal from a registrar sitting as judge cannot be heard by a county ct. judge, but must be to the Chief Judge in Bkpcy. or the Lords Justices of Appeal, as the case may be.—*Re* MARSDEN, *Ex p.* NICHOLSON (1876), 34 L. T. 592; 24 W. R. 714.

See, now, 1914 Act, s. 108 (2) (*a*).

4792. From registrar of county court—Sitting as registrar—To judge of his court.]—An appeal from the registrar of a county ct., sitting as registrar, must be before the judge of his ct. in the first instance.—*Re* SIDEY, *Ex p.* SIDEY (1871), 24 L. T. 143.

See, now, 1914 Act, ss. 102 (1), 108 (2) (*a*).

4793. From High Court—To Court of Appeal—Not to Divisional Court.]—All appeals from decisions of the High Ct. of Justice in bkpcy. matters, whether given in ct. or in chambers, lie to the Ct. of Appeal, & not to a Divisional Ct. of the High Ct.—*Re* FRIEDLANDER, *Ex p.* OASTLER (1884), 51 L. T. 309, C. A.

Annotations:—**Mentd.** in all the cases cited under Nos. 942 & 953, *ante*.

PART XVII. SECT. 1.

4791 i. *From registrar—To Supreme Court.*]—An appeal, from an order or act by the registrar of the district ct., lies to the Supreme Ct. under Bkpcy. Act, 1892, s. 15.—*Re* EWING, *Ex p.* MORGAN (1905), 24 N. Z. L. R. 808. —**N.Z.**

a. *From county court judge—To Supreme Court.*]—A county ct. judge, acting under Insolvent Act, 1869, having made an order that deft., the assignee of the estate of H., pay to pltf., assignee of the estate of A., the proceeds of the sale of a lease which A. had assigned to H., & which deft. contended was void:—*Held:* an appeal lay to the Supreme Ct.—SKINNER *v.* MCLEOD (1874), 2 Pug. 131.—**CAN.**

b. *From subordinate judge—To district judge.*]—An appeal against an order in insolvency, passed under Civil Procedure Code, s. 351, by a Ct. of Small Causes exercising the powers of a subordinate judge, will lie to the district judge, & not to the High Ct.—DEBI PRASAD *v.* JAMNA DAS (1900), I. L. R. 23 All. 56.—**IND.**

4793 i. *From High Court—To Court of Appeal.*]—Certain members of the United Irish League took part in an organised attempt to prevent the purchaser of premises ordered to be sold by the ct. in a bkpcy. matter from completing his contract with the ct. Four of the principal actors in the agitation were summoned under Irish 1857 Act, s. 308, to give evidence in the matter before the judge in bkpcy. Upon the evidence given by themselves in obedience to the summons the judge in bkpcy. committed them for contempt of ct.:—*Held:* a person committed for contempt of ct. under the bkpcy. code was entitled to appeal to the Ct. of Appeal.—*Re* SHANAHAN (1912), 46 I. L. T. 254. —**IR.**

4794. —— —— On special case stated by county court.]—An appeal lies to the Ct. of Appeal from the decision of the High Ct., upon a special case for its opinion stated by a county ct. sitting in bkpcy. under 1883 Act, s. 97 (3).—*Re* MOON, *Ex p.* DAWES (1886), 17 Q. B. D. 275; 55 L. T. 114; 34 W. R. 752; 3 Morr. 105, C. A.

Annotations:—**Refd.** *Re* Knight & Tabernacle Permanent Bldg. Soc. (1892), 67 L. T. 403, C. A. **Mentd.** *Re* Garnett, Robinson *v.* Gandy (1886), 55 L. T. 562, C. A.; *Re* James, Clutterbuck *v.* James (1890), 62 L. T. 454; *Re* Sartoris's Estate, Sartoris *v.* Sartoris, [1892] 1 Ch. 11; *Re* Gates (1895), 39 Sol. Jo. 331; *Re* Riggs, *Ex p.* Lovell, [1901] 2 K. B. 16; *Re* Cotgrave, Mynors *v.* Cotgrave, [1903] 2 Ch. 705; Postmaster General *v.* National Telephone Co. (1908), 72 J. P. 307, C. A.; Crouch *v.* Crouch, [1912] 1 K. B. 378; Loraine *v.* Loraine & Murphy (1912), 82 L. J. P. 29, C. A.; Cohen *v.* Popular Restaurants, [1917] 1 K. B. 480.

4795. —— To Divisional Court—From incidental orders.]—The appeal from an incidental order of a judge of the High Ct. for the time being exercising bkpcy. jurisdiction should be to a Divisional Ct. constituted to hear appeals in bkpcy. matters.—*Re* DUNHILL, *Ex p.* WILSON, [1894] 2 Q. B. 554; 64 L. J. Q. B. 64; 1 Mans. 244; 10 R. 351, D. C.

See 1915 Rules, r. 135.

4796. From commissioner—To Lord Chancellor—Proceedings in insolvency.]—*Held:* the effect of 1861 Act was to give the same right of appeal in insolvency cases as was given by 1849 Act, s. 12, in bkpcy. cases.—*Re* PERKINS, *Ex p.* PERKINS (1865), 6 New Rep. 369; 34 L. J. Bcy. 37; 12 L. T. 784; 11 Jur. N. S. 895; 13 W. R. 1001, L. C.

4797. From London Bankruptcy Court—To county court—Proceedings transferred from county court—Further appeal from county court to Divisional Court.]—The Divisional Ct. is not the Ct. of Appeal from the London Bkpcy. Ct., & where a cause has been transferred to that ct. from the county ct., application for rehearing should be made to the county ct., whence appeal lies to the Divisional Ct.—*Re* HUGHES, *Ex p.* HUGHES (1887), 4 Morr. 73, D. C.

SECT. 2.—IN REGARD TO WHAT ORDERS.

4798. Order of county court judge—For trial of facts.]—No appeal lies from an order made by a county ct. for the trial of issues of fact with a jury.—*Re* ANDERSON, *Ex p.* ANDERSON (1870), 39 L. J. Bcy. 32; *affd.* without touching this point, 23 L. T. 274, L. J.

4799. —— Imposing new terms on resolution of creditors.]—Any person, affected by an order of a county ct. judge made in bkpcy. imposing new terms on a resolution of creditors, *e.g.* the solr. of the trustee, may appeal therefrom to the chief judge.—*Re* WINN, *Ex p.* HUNT (1871), 19 W. R. 714.

4800. Order in regard to costs.]—The ct. will not allow an appeal for costs under 1861 Act.—*Re* PILLING, *Ex p.* OGLE, *Ex p.* SMITH (1873), 8 Ch. App. 711; 42 L. J. Bcy. 99, L. JJ.

4801. —— In exceptional circumstances.]—The creditors of a liquidating debtor in 1877 passed a special resolution authorising the sale of his estate to the trustee at such a price as would pay a dividend of 5*s.* in the pound to the creditors, & also the costs of the liquidation. The resolution was sanctioned by the ct., & was carried out by the trustee. Debtor was not a party to the arrangement, & did not know of it for some time afterwards. The creditors did not pass any formal resolution fixing the close of the liquidation, or granting debtor a discharge, but he commenced another business. In 1881 this came to the knowledge of the trustee, & he thereupon took possession of debtor's stock-in-trade, claiming it on behalf of the creditors under the liquidation:—*Held:* in the circumstances, the costs might properly be the subject of appeal.—*Re* WAINWRIGHT, *Ex p.* WAINWRIGHT (1881), 19 Ch. D. 140; 51 L. J. Ch. 67; 45 L. T. 562; 30 W. R. 125, C. A.

4802. —— Order declaring agreement as to costs void.]—A county ct. judge sitting in bkpcy. declared an agreement by a solr., to conduct bkpcy. proceedings on the terms that his costs should not exceed £10, to be void. On the hearing of an appeal against such declaration, a preliminary objection was taken to the jurisdiction of the Divisional Ct., on the ground that the appeal did not relate to a bkpcy. matter:—*Held:* by virtue of 1884 Act, the ct. had jurisdiction to hear the appeal.—*Re* OWEN, *Ex p.* PAYTON (1885), 52 L. T. 628; 2 Morr. 87, D. C.

4803. —— Costs not only subject matter of order appealed from.]—On appeal from an order of a county ct. registrar dismissing a bkpcy. petition presented by applt. against debtor, the preliminary objection was taken that since the order appealed from was made the debt of petitioning creditor had been paid, & the appeal was an appeal as to costs only:—*Held:* as the ground of the appeal was that the order of the registrar dismissing the petition was wrong, the appeal was not one as to costs only, & applt. was entitled to proceed.—*Re* SARTORIS, *Ex p.* ROSS (1891), 8 Morr. 25, D. C.

See, further, Part XVI., Sect. 5, *ante*.

4804. Interpleader order.]—Any order in interpleader made by the Chief Judge in Bkpcy. can be appealed from.—*Re* MORRIS, *Ex p.* STREETER (1881), 19 Ch. D. 216; 45 L. T. 634; 30 W. R. 127, C. A.

Annotations:—**Mentd.** Turner *v.* Bridgett & Wright (1882), 51 L. J. Q. B. 377, C. A.; Hession *v.* Jones, [1914] 2 K. B. 421.

4805. Order declining jurisdiction.]—On an application in a county ct. for an order to an official receiver to give up goods, which on a sale had realised £36, the judge declined to make an order,

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4796 i. *From commissioners—To Court of Sessions.*]—An appeal from a decision of comrs. refusing to discharge an insolvent debtor was taken to the Ct. of Sessions on the ground that there was no county ct. judge in the county where debtor was confined:—*Held:* the appeal was properly taken.—ARMSTRONG *v.* TREFNEY (1886), 7 R. & G. 19.—**CAN.**

4796 ii. —— *To Supreme Court in banco.*]—Deft. was imprisoned under process issued out of the county ct. & detained under an order of comrs. for the relief of insolvent debtors. An application was made to the Supreme Ct. *in banco* for a summons to have prisoner brought up by way of appeal:—*Held:* the ct. had no jurisdiction to hear the case, not having met within ten days from the date of the order from which the appeal was sought.—BROOKFIELD *v.* SYMES (1881), 3 R. & G. 17; 2 C. L. T. 601.—**CAN.**

c. *From Court of Insolvency—To full court.*]—An appeal lies to the full ct. from an order of the primary judge, made upon an appeal to him from the decision of a judge of the Ct. of Insolvency.—*Re* AARONS (1880), 6 V. L. R. 56.—**AUS.**

d. *From Court of Appeal—To Privy Council.*]—40 Vict. c. 41, s. 38, providing that the judgment of the Ct. of Appeal in matters of insolvency should be final, *i.e.*, not subject to the appeal as of right to Her Majesty in Council, allowed by the Lower Canada Civil Procedure Code, Art. 1178, is within the competence of the Canadian Parliament & does not infringe the Queen's prerogative, for it only limits the right of appeal as given by the Code. The sect., according to the true construction of the word "final" therein, excludes appeals to Her Majesty, but contains no words which purport to derogate from the prerogative of the Queen to allow such appeals as an act of grace.—CUSHING *v.* DUPUY (1880), 5 App. Cas. 409; 1 Cart. 252, P. C.—**CAN.**

PART XVII. SECT. 2.

4798 i. *Order of county court judge—Refusal of discharge from imprisonment.*]—The decision of a county ct. judge on an application by an insolvent for his discharge from imprisonment, is appealable.—HOOD *v.* DODDS (1873), 19 Gr. 639.—**CAN.**

4800 i. *Order in regard to costs.*]—An appeal will not be allowed on a question of costs.—TAIT *v.* DOWLING (1880), 20 N. B. R. 265.—**CAN.**

on the ground that he had no jurisdiction :—*Held :* an appeal could be made, as the order was one declining jurisdiction, & not an order relating to property.—*Re* GALEY, *Ex p.* CUNDY (1890), 7 Morr. 253, D. C.

4806. Order made on rehearing—Original order not varied.]—On Jan. 9, 1891, an order was made in the county ct. declaring that two sums of money had been received by applt. from debtor by way of fraudulent preference, & directing him to repay such sums to the trustee in the bkpcy. with costs. There was no appeal from that order, & on Apr. 10, on application by the trustee, an order was made by the county ct. judge committing applt. to prison for non-payment of the amount received by him & the costs. That order was also not appealed from, & on June 18 applt. was arrested, but on June 26 an application was made for his discharge when the county ct. judge varied his former order by directing the discharge on payment by applt. of the sums in question without costs :—*Held :* although there was no appeal from the original order of Jan. 9, or from the order of committal of Apr. 10, yet the county ct. judge having subsequently varied his order, & the appeal being brought from the decision then given by him, the ct. had jurisdiction to hear the appeal.—*Re* BISHOP, *Ex p.* OLAXTON (1891), 7 T. L. R. 610 ; 8 Morr. 221, D. C.

4807. —— ——.]—An appeal will lie from an order made on the rehearing of a matter in the county ct., although the order originally made by the ct. has not been varied on such rehearing.—*Re* ASHWORTH & OUTRAM (1893), 69 L. T. 259 ; 10 Morr. 175 ; 5 R. 496, D. C.

4808. Order extending time for appeal.]—Judicature (Procedure) Act, 1894 (c. 16), s. 1 (1) (*a*), which provides that no appeal shall lie from an order allowing an extension of time for appealing from a judgment or order, applies to an order of a Divisional Ct. in bkpcy. extending the time for appealing from an order of the county ct.—*Re* A DEBTOR (No. 20 OF 1910), [1911] 1 K. B. 841 ; 80 L. J. K. B. 508 ; 104 L. T. 233 ; 18 Mans. 107, C. A.

SECT. 3.—LEAVE TO APPEAL.

4809. When leave necessary—Small bankruptcy —Validity of 1883 Rules, r. 199.]—Upon an appeal from a county ct. in the case of a small bkpcy. under 1883 Act, s. 121, it was argued, against the preliminary objection taken that the necessary leave to appeal had not been obtained, that 1883 Rules, r. 199 (5), by which such leave was made requisite was *ultra vires :—Held :* as the right of appeal given by the Act was a statutory right, the same Act which gave the right could delegate to a prescribed authority the power to modify that right in the prescribed manner, & the necessary leave not having been obtained, the appeal could not be heard.—*Re* DALE, *Ex p.* DALE (1885), 52 L. T. 627 ; 33 W. R. 476 ; 2 Morr. 92, D. C.

See, further, Part XV., *ante.*

—— Rescission of receiving order.]—*See* Part IV., *ante.*

4810. —— Money involved not exceeding £50— Validity of 1886 Rules, r. 129.]—By the combined effect of 1883 Act, s. 104 (2) (*d*), providing that no appeal shall be entertained except in conformity with the rules, & of s. 127, allowing rules to be made for carrying into effect the objects of the Act, there is power to make rules restricting the right of appeal ; & 1886 Rules, r. 129, forbidding, except with leave, an appeal when the money or money's worth involved does not exceed £50, is *intra vires*, so that no such appeal can be brought without leave.—*Re* HANN, *Ex p.* FOREMAN (1887), 18 Q. B. D. 393 ; 56 L. J. Q. B. 161 ; 35 W. R. 370 ; 4 Morr. 16, C. A.

Annotation :—**Refd.** Chartered Institute of Patent Agents *v.* Lockwood (1894), 71 L. T. 205, H. L.

4811. —— —— Order of county court.]—An appeal in bkpcy. cannot be brought from an order of a county ct. relating to property not exceeding £50 in value, except by leave of the county ct.—*Re* EVERSON, *Ex p.* OFFICIAL RECEIVER, [1904] 2 K. B. 619 ; 74 L. J. K. B. 38 ; 91 L. T. 81 ; 52 W. R. 656 ; 48 Sol. Jo. 560 ; 11 Mans. 339, D. C.

Annotation :—**Consd.** *Re* Arnold, *Ex p.* Hext, [1914] 3 K. B. 1078, C. A.

4812. —— —— What is "involved."]—*Held :* the word "involved" in 1886 Rules, r. 129 (1) meant "involved in the appeal," but in considering what was the money or money's worth involved, the ct. ought to have regard to all the proceedings

Upon an application by the trustee in bkpcy. for an order that applt. should pay to the trustee a sum of £126, the proceeds of the sale of certain goods which had been paid to applt., upon the ground that the goods were in the possession, order, & disposition of bkpt. at the commencement of the bkpcy., or that the payment of a part of that sum to applt. was a fraudulent preference, the county ct. judge only made an order declaring that the payment of £13, part of the sum of £126, was a fraudulent preference :—*Held :* it was apparent from the proceedings that the money or money's worth involved did not exceed £50 within the above rules, & applt. could not appeal without leave.—*Re* ARNOLD, *Ex p.* HEXT, [1914] 3 K. B. 1078 ; 84 L. J. K. B. 110 ; 30 T. L. R. 691 ; 59 Sol. Jo. 9 ; 21 Mans. 319 ; [1915] H. B. R. 11, C. A.

4813. Application for leave—To what court.]—An application for leave to appeal under 1884 Act, s. 2, from the decision of a Divisional Ct., sitting as a Ct. of Appeal from a county ct. in bkpcy., should be made in the first instance to a Divisional Ct.—*Re* WALKER & SON, *Ex p.* NICKOLL & KNIGHT (1884); 1 Morr. 249, C. A.

4814. —— —— Appeal in formâ pauperis.]—An application for leave to appeal to the Ct. of Appeal in *formâ pauperis* from the decision of a registrar in bkpcy., by a person who has not

f. *Informal order.*]—An insolvent had been refused an absolute discharge by a county judge, from whose decision he appealed. The judge gave his reasons in writing, & concluded, "I must refuse his discharge absolutely, & must deny the prayer," etc. :—*Held :* an order which could be appealed from, no formal order having been drawn up & signed.—*Re* JONES (1868), 4 P. R. 317.—**CAN.**

g. *Order in aid of English Bankruptcy Court.*]—A county ct. judge was applied to, to act in aid of, & as auxiliary to the London Bkpcy. Ct., in relation to property of an English bkpt. situate in his district, & made an order accordingly :—*Held :* no appeal would lie from such order to the Supreme Ct.—*Re* CARVELL, *Ex p.* GLIDDON (1885), 5 R. & G. 410.—**CAN.**

k. *Order not taken out.*]—An appeal against an order of the registrar was allowed to be heard, notwithstanding that the order appealed from had never been taken out when the appeal was heard eleven days after the order appealed from was made, & where the official assignee, in whose favour the order had been made, had taken no steps within the time limited by the rules to take out the order.—*Re* PHILLIPS (1902), 2 S. R. N. S. W. 30.—**AUS.**

l. *Order that no act of bankruptcy committed—On application to antedate beginning of bankruptcy.*]—Where the judge in bkpcy., on an application to antedate the commencement of the bkpcy. found that no act of bkpcy. was committed :—*Held :* an appeal would lie against the decision.—*Re* KIDD, *Ex p.* OFFICIAL ASSIGNEE (1903), 3 S. R. N. S. W. 363.—**AUS.**

proceeded in *formâ pauperis* in the ct. below, must be made to the Ct. of Appeal.—*Ex p.* GOLDBERG, [1893] 1 Q. B. 417; 68 L. T. 142; 41 W. R. 210; 37 Sol. Jo. 174; 4 R. 232; *sub nom. Re* GOLDBERG, 62 L. J. Q. B. 127; 9 T. L. R. 162, C. A.

Annotations:—**Consd.** Merriman *v.* Geach, [1913] 1 K. B. 37. **Refd.** Handford *v.* Clarke (1906), 76 L. J. K. B. 76, C. A. **Mentd.** Clements *v.* L. & N. W. Ry. Co. (1894), 9 R. 223, C. A.

4815. —— Within what time.]—Application for leave to appeal under 1884 Act, s. 2, from the decision of a Divisional Ct., sitting as a Ct. of Appeal from a county ct. in bkpcy., ought to be made to the Divisional Ct. immediately after it has pronounced its decision.—*Re* WALKER & SON, *Ex p.* NICKOLL & KNIGHT (1884), 1 Morr. 249, C. A.

4816. —— ——.]—An application for leave to appeal from a decision of the Divisional Ct., sitting as a Ct. of Appeal from a county ct. in bkpcy., was made to the Divisional Ct. the day after they had given their decision:—*Held:* the application was too late, & leave to appeal refused.—*Re* MAUD, *Ex p.* TOWNEND (1891), 64 L. T. 743; 40 W. R. 47; 7 T. L. R. 511; 8 Morr. 144, D. C.

4817. —— How made—Ex parte—Appeal in formâ pauperis.]—An application for leave to appeal to the Ct. of Appeal in *formâ pauperis* may be made *ex p.*, & upon such application the requirements of R. S. C. Ord. 16, rr. 22, 24, must, by analogy, be complied with.—*Ex p.* GOLDBERG, [1893] 1 Q. B. 417; 68 L. T. 142; 41 W. R. 210; 37 Sol. Jo. 174; 4 R. 232; *sub nom. Re* GOLDBERG, 62 L. J. Q. B. 127; 9 T. L. R. 162, C. A.

Annotations:—**Refd.** Merriman *v.* Geach, [1913] 1 K. B. 37. **Mentd.** Clements *v.* L. & N. W. Ry. Co. (1894), 9 R. 223, C. A.; Handford *v.* Clarke (1906), 76 L. J. K. B. 76, C. A.

4818. Power of Court of Appeal—Leave refused by Divisional Court.]—The Divisional Ct. refused an application for leave to appeal from the decision, but leave to appeal was given by the Ct. of Appeal.—*Re* ARMSTRONG, *Ex p.* GILCHRIST (1886), 17 Q. B. D. 521; 55 L. J. Q. B. 578; 55 L. T. 538, C. A.

Annotations:—**Mentd.** *Re* Armstrong, *Ex p.* Boyd (1888), 21 Q. B. D. 264, C. A.; *Re* Roper, Roper *v.* Doncaster (1888), 39 Ch. D., 482; *Re* Rose, Rose's Trustee *v.* Rose, [1904] 2 Ch. 348; *Re* Tremayne *v.* Rashleigh, [1908] 1 Ch. 681; Goatley *v.* Jones, Goatley *v.* Jones, [1909] 1 Ch. 557.

4819. Jurisdiction of Divisional Court—Principles governing exercise of discretion.]—The jurisdiction which the judges of the Divisional Ct. have to give or to refuse leave to appeal from their own decision is a very delicate one. Merely to say that they are satisfied their decision is right is not a sufficient reason for refusing leave to appeal, when the question involved is one of principle & they have decided it for the first time.—*Re* ARMSTRONG, *Ex p.* GILCHRIST (1886), 17 Q. B. D. 521; 55 L. J. Q. B. 578; 55 L. T. 538, C. A.

Annotations:—**Mentd.** *Re* Armstrong, *Ex p.* Armstrong (1888), 5 Morr. 200, C. A.; *Re* Roper, Roper *v.* Doncaster (1888), 39 Ch. D. 482; *Re* Rose, Rose's Trustee *v.* Rose, [1904] 2 Ch. 348; Tremayne *v.* Rashleigh, [1908] 1 Ch. 681; Goatley *v.* Jones, Goatley *v.* Jones, [1909] 1 Ch. 557.

4820. Jurisdiction of High Court—Leave refused by county court—Amount involved under £50.]—The High Ct. cannot give leave to appeal, when it has been refused by the county ct. & the property is not exceeding £50.—*Re* EVERSON, *Ex p.* OFFICIAL RECEIVER, [1904] 2 K. B. 619; 74 L. J. K. B. 38; 91 L. T. 81; 52 W. R. 656; 48 Sol. Jo. 560; 11 Mans. 339, D. C.

Annotation:—**Mentd.** *Re* Arnold, *Ex p.* Hext, [1914] 3 K. B. 1078, C. A.

4821. Form of order granting leave—Should not be qualified.]—In granting leave to appeal a county ct. judge ought not to limit or qualify his leave to appeal.—*Re* SANDARS, *Ex p.* SERJEANT (1885), 52 L. T. 516, D. C.

4822. Effect of order granting leave—Right to registrar to refuse to pay money out of court until after expiry of period.]—Upon appeal from a county ct. in a bkpcy. proceeding the Divisional Ct. allowed the appeal, & ordered money, which had been paid into the county ct., to be paid out to applt. The Divisional Ct. also gave leave to appeal to the Ct. of Appeal, but made no order for a stay of proceedings. The registrar of the county ct. having refused to pay out the money until the time for appealing to the Ct. of Appeal had elapsed:—*Held:* the refusal was unjustifiable.—*Re* WISE, *Ex p.* CROYDON COUNTY COURT REGISTRAR (1886), 17 Q. B. D. 389; 55 L. J. Q. B. 362; 54 L. T. 722; 34 W. R. 711; *sub nom. Re* WISE, *Ex p.* ROWLAND, 3 Morr. 174, C. A.

4823. Appeal to House of Lords—How application made—Ex parte.]—An application to the Lord Chancellor, to certify for an appeal from an order of the Ct. of Appeal in Bkpcy. to be presented to the House of Lords, is properly made *ex p.*—*Re* BARKER, *Ex p.* KEMPSON (1865), 12 L. T. 43; 13 W. R. 446, L. C.

See, now, 1914 Act, s. 108 (2) (*b*).

4824. —— Jurisdiction of Lord Chancellor.]—On an application to the Lord Chancellor, to certify for an appeal from an order of the Ct. of Appeal in Bkpcy. to be presented to the House of Lords, the Lord Chancellor may, at his discretion, so certify under Ct. of Ch. Act, 1851 (c. 83), s. 10.—*Re* BARKER, *Ex p.* KEMPSON (1865), 12 L. T. 43; 13 W. R. 446, L. C.

See, now, 1914 Act, s. 108 (2) (*b*).

4825. —— Principles governing exercise of discretion.]—In determining under 1869 Act, s. 71, whether leave should be granted to appeal to the House of Lords, the ct. will be guided by the same principles as under 1849 Act, s. 18.—*Re* BOWES, *Ex p.* JACKSON (1880), 14 Ch. D. 725; 43 L. T. 272; 29 W. R. 253, C. A.

Annotations:—**Mentd.** *Re* Betts, *Ex p.* Harrison (1881), 18 Ch. D. 129, n.; *Re* Knight, *Ex p.* Voisey (1882), 21 Ch. D. 442, C. A.; *Re* Willis, *Ex p.* Kennedy (1888), 21 Q. B. D. 384, C. A.; *Re* Roundwood Colliery Co., Lee *v.* Roundwood Colliery Co., [1897] 1 Ch. 373, C. A.; *Re* Halstead. *Ex p.* Richardson, [1916] 2 K. B. 902.

4826. —— Grounds for granting—Generally.]—Conditions discussed under which leave would be given to appeal to the House of Lords under 1849 Act, s. 18.—*Re* CALTHROP (1868), 3 Ch. App. 252; 37 L. J. Bcy. 17; 18 L. T. 194; 16 W. R. 446, L. J.

Annotations:—**Refd.** *Re* Turner, *Ex p.* Attwater (1877), 5 Ch. D. 27, C. A. **Mentd.** *Re* Bristow, *Ex p.* Emanuel (1868), 18 L. T. 222, C. A.; *Re* Bowes, *Ex p.* Jackson (1880), 14 Ch. D. 725, C. A.

4827. —— —— Matter sufficiently important—Sufficient doubt.]—As to leave to appeal to the House of Lords under 1849 Act, s. 18, & Court of Ch. Act, 1851 (c. 83), s. 10, the ct. will not give it, unless it is of opinion that the point is one both of

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m. *Order refusing to make order.*]—The official accountant in insolvency in his report to the ct. upon an assigned estate stated that the trustee had declined to comply with certain provisions of 1897 Act. Upon hearing the official accountant & the trustee the judge made no order, but allowed the trustee his costs:—*Held:* the refusal of the judge to make an order was an "order" within 1890 Act, s. 11, & the official accountant was a "person desirous of appealing" from that order within the sect.—*Re* COMYNS & WILLIAMS (1901), 27 V. L. R. 275.—**AUS.**

PART XVII. SECT. 3.

4822 i. *Effect of order granting leave—Failure to proceed further.*]—An order was made by the county ct. judge in an insolvent matter under 1875 Act, for the purpose of appealing from which insolvent, within eight days from the making of the order, filed a bond approved of by the judge, & obtained from him an order giving leave to appeal. No further proceedings were taken within the eight days:—*Held:* applt. had not "adopted proceedings on the appeal" within s. 128, & the alleged appeal must be quashed.—*Re* BUCKLEY (1882), 3 R. & G. 154.—**CAN**

Sect. 3.—*Leave to appeal.* *Sect.* 4: *Sub-sects.* 1 & 2.]

sufficient doubt & of sufficient importance.—*Re* BARBARY, *Ex p.* BATEMAN (1854), 23 L. J. Bcy. 8.

4828. —— —— —— Question sufficiently difficult.]—The Ct. of Appeal will not grant leave for an appeal to the House of Lords under 1869 Act, s. 71, unless it can certify that the decision sought to be appealed against involves a question of law or equity of sufficient difficulty or importance to require the decision of the House of Lords.—*Re* TURNER, *Ex p.* ATTWATER (1877), 5 Ch. D. 27; 35 L. T. 917; 25 W. R. 328, C. A.

Annotation :—**Mentd.** *Re* Cross, *Ex p.* Payne (1879), 11 Ch. D. 539, C. A.

4829. —— —— Doubt as to law.]—In a case of grave doubt as to the law leave was granted to appeal to the House of Lords.—*Re* BANNISTER, *Ex p.* VALE (1881), 18 Ch. D. 137; 45 L. T. 200; 29 W. R. 855, C. A.

Annotation :—**Mentd.** *Re* Windas & Dunsmore, *Ex p.* Hough (1884), 50 L. T. 212.

4830. —— Grounds for refusing—Small amount.]—Leave to appeal to the House of Lords was refused on account of the smallness of the amount.—*Re* CURTOYS, *Ex p.* PILLERS (1881), 17 Ch. D. 653; 50 L. J. Ch. 691; 44 L. T. 691; 29 W. R. 575, C. A.

Annotations :—**Mentd.** *Re* Bannister, *Ex p.* Vale (1881), 45 L. T. 200, C. A.; *Re* Chinn, *Ex p.* Sulger (1881), 17 Ch. D. 839; Butler *v.* Wearing (1885), 3 Morr. 5; *Re* O'Shea's Settlmt., Courage *v.* O'Shea, [1895] 1 Ch. 325, C. A.; Hosack *v.* Robins, [1918-19] B. & C. R. 54, C. A.

4831. —— —— —— Result affecting large amount.]—Leave to appeal to the House of Lords was not allowed in the case of a small debt although it would determine the right to larger sums.—*Re* MELDRUM, *Ex p.* BUTCHER (1874), 43 L. J. Bcy. 98, L. JJ.; *affd. sub nom.* BUTCHER *v.* STEAD (1875), L. R. 7 H. L. 839, H. L.

Annotations :—**Mentd.** *Re* Cooke, *Ex p.* Hilder (1875), De Colyar's County Court Cases 252; *Re* Tate, *Ex p.* Tate (1876), 25 W. R. 52, C. A.

4832. —— —— Question one of fact.]—Leave to appeal to the House of Lords was refused, on the ground that the question in dispute was merely one of fact.—*Re* PULSFORD, *Ex p.* HAYMAN (1878), 8 Ch. D. 11; 47 L. J. Bcy. 54; 38 L. T. 238; 26 W. R. 597, C. A.

Annotation :—**Mentd.** *Re* Webber, *Ex p.* Slater (1891), 64 L. T. 426.

4833. *S. P. Re* ISAACS, *Ex p.* MILES (1885), 15 Q. B. D. 39; 54 L. J. Q. B. 566, C. A.

Annotations :—**Mentd.** Bethell *v.* Clark (1888), 20 Q. B. D. 615, C. A.; *Re* Gurney, *Ex p.* Hughes (1892), 67 L. T. 598.

4834. —— —— Interference with discretion of court.]—On an application by a trustee for leave to disclaim a lease, leave to appeal to the House of Lords was refused, on the ground that it would be from the discretion of the ct.—*Re* CLARKE, *Ex p.* EAST & WEST INDIA DOCK CO. (1881), 17 Ch. D. 759; 50 L. J. Ch. 789; 45 L. T. 6; 30 W. R. 22, C. A.

Annotations :—**Ment.** East & West India Dock Co. *v.* Hill (1882), 22 Ch. D. 14, C. A.; Harding *v.* Preece (1882), 9 Q. B. D. 281; *Re* Tipping, *Ex p.* Edmonds (1883), 48 L. T. 77.

4835. —— —— Question not sufficiently difficult—Delay in dividing estate.]—A trustee in bkpcy. applied for leave to appeal to the House of Lords, on the ground that the property was of large value, & that a difficult question of law was involved :—*Held :* the ct. would not encourage an application, which would result in further costs falling on the estate & in the division of the property being further delayed, unless the ct. was of opinion that there was a very difficult question of general law, which it was desirable that the House of Lords should settle, & as there was no such question in the case, the application must be refused.—*Re* FUSSELL, *Ex p.* ALLEN (1882), 20 Ch. D. 341; 51 L. J. Ch. 724; 47 L. T. 65; 30 W. R. 601, C. A.

Annotations :—**Mentd.** *Re* Morrish, *Ex p.* Hart Dyke (1882), 22 Ch. D. 410, C. A.; Lybbe *v.* Hart (1885), 29 Ch. D. 8, C. A.

4836. —— —— —— Appeal in action on same facts of right.]—Pending the hearing of a bkpcy. petition, & with notice of the act of bkpcy. on which it was founded, applt., the solr. of petitioning creditor, as his agent, received from debtor various sums of money as consideration for successive adjournments of the hearing of the petition, & those sums he paid over, or accounted for, to his client. Afterwards an adjudication was made on the petition, & applt., having received the money with notice of the act of bkpcy. to which the title of the trustee related back, ordered to repay the money to the trustee. Applt. applied for leave to appeal to the House of Lords, & contended that the same question might have arisen, not in a bkpcy., but in an action, when an appeal to the House of Lords would have been of right :—*Held :* the application must be refused as the case was not one of any difficulty.—*Re* CHAPMAN, *Ex p.* EDWARDS (1884), 13 Q. B. D. 747; 33 W. R. 268, C. A.

Annotation :—**Mentd.** *Re* Sinclair, *Ex p.* Payne (1885), 2 Morr. 255.

4837. —— —— —— Case full of suspicion.]—An application for leave to appeal to the House of Lords was refused, where there was not any doubtful question of law raised, & the case was full of suspicion.—*Re* TOLLEMACHE, *Ex p.* EDWARDS (1884), 14 Q. B. D. 415, C. A.

Annotation :—**Mentd.** Ward *v.* Pitt, Lloyd *v.* Powell Duffryn Steam Coal Co., [1913] 2 K. B. 130, C. A.

4838. —— Form of order granting leave—Conditional on creditors approving—Appeal by trustee.]—The ct. gave leave to the trustees appointed by the creditors in the bkpcy. to appeal to the House of Lords, if the creditors, at a meeting summoned by the trustees for the purpose, should approve of an appeal being brought.—*Re* PARKER, *Ex p.* BOARD OF TRADE (1885), 15 Q. B. D. 196; 54 L. J. Q. B. 372; 52 L. T. 670; 1 T. L. R. 464; 2 Morr. 158, C. A.; *affd. sub nom.* TURQUAND *v.* BOARD OF TRADE (1886), 11 App. Cas. 286, H. L.

Annotations :—**Mentd.** *Re* Wells & Croft, *Ex p.* Official Receiver (1894), 2 Mans. 41; *Re* Cohen, [1905] 2 K. B. 704, C. A.; The Suevic, [1908] P. 292, D. C.

4839. —— —— —— How consent approved.]—The Ct. of Appeal gave leave to appeal to the House of Lords, upon the consent being obtained of two-thirds in value of the creditors present in person or by proxy at a meeting to be summoned for the purpose.—*Re* BROWNE & WINGROVE, *Ex p.*

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n. *Application for leave to continue appeal—Abandoned by assignee.*]—Where an assignee for benefit of creditors abandons an appeal, there must be a request to the assignee to proceed, before a county ct. judge has jurisdiction to make an order under R. S. O., 1914, c. 134, s. 12 (2), allowing a creditor to intervene & prosecute the appeal at his own expense.—MAHER *v.* ROBERTS (1914), 6 O. W. N. 245, 380.—**CAN.**

o. *Appeal to Privy Council—Jurisdiction of Court of Appeal.*]—*Held :* the Ct. of Appeal had no power to grant leave to appeal against its own decision to the Privy Council, upon an appeal from the Ct. of Bkpcy.—*Re* ELL, *Ex p.* AUSTIN & HASKINS (1886), 4 N. Z. L. R. C. A. 114.—**N.Z.**

p. —— *Grounds for refusing leave.*]—Leave to appeal from a decision of the Full Ct. to the Privy Council will not be allowed where the effect of such decision is merely to have the case remitted for a rehearing on its merits, & where the merits of the case have not been finally determined by such decision.—*Re* CROMIE, *Ex p.* REAL ESTATE BANK (1894), 20 V. L. R. 124, 131.—**AUS.**

ADOR, [1891] 2 Q. B. 574 ; 40 W. R. 71 ; 7 T. L. R. 747 ; 8 Morr. 264, C. A.

Annotations :—**Mentd.** Wallace *v.* Universal Automatic Machines Co., [1894] 2 Ch. 547, C. A. ; *Re* Moss, *Ex p.* Hallett (1905), 92 L. T. 777.

SECT. 4.—**TIME FOR APPEAL.**

SUB-SECT. 1.—IN GENERAL.

See 1915 Rules, r. 130.

See, also, Nos. 4870–4880, 4886–4888, *post.*

4840. To whom time limit applicable—Whether to third parties.]—*Qu. :* whether the time limit of twenty-one days for bringing an appeal fixed by 1870 Rules, r. 143, applies to a third party, *e.g.*, the holder of a bill of sale, whose title to property is affected by the adjudication.—*Re* FOULDS, *Ex p.* LEAROYD (1878), 10 Ch. D. 3 ; 48 L. J. Bcy. 17 ; 39 L. T. 525 ; 27 W. R. 277, C. A.

Annotations :—**Consd.** *Re* Johnson, *Ex p.* Wigg (1879), 12 Ch. D. 905. **Refd.** *Re* Tucker, *Ex p.* Tucker (1879), 28 W. R. 219, C. A. **Mentd.** *Re* Sidebotham, *Ex p.* Sidebotham (1880), 14 Ch. D. 458, C. A. ; *Re* Langtry (1894), 1 Mans. 169, D. C. ; *Re* Langtry, *Ex p.* Stevenson (1894), 10 R. 220, D. C. ; *Re* Hobbins, *Ex p.* Official Receiver (1899), 6 Mans. 212.

4841. —— All persons aggrieved—Whether parties to order or not.]—The limit of time for bringing an appeal fixed by 1870 Rules, r. 143, applies equally to all "persons aggrieved," whether parties to the order or not.—*Re* JOHNSON, *Ex p.* WIGG (1879), 12 Ch. D. 905 ; 48 L. J. Bcy. 119 ; 40 L. T. 528 ; *sub nom. Re* WIGG, *Ex p.* JOHNSON, 27 W. R. 804.

Annotation :—**Mentd.** *Re* Stanger, *Ex p.* Geisel (1882), 53 L. J. Ch. 349, C. A.

4842. To what appeals time limit applicable—Appeal by motion.]—The limit of twenty-one days for the entering of an appeal fixed by 1849 Act, s. 12, applies to appeals by way of motion.—*Re* LUBLIN, *Ex p.* LUBLIN (1869), 21 L. T. 573 ; 18 W. R. 104, L. J.

4843. —— Application for new trial—No order made on verdict found in first trial.]—Where a jury have found a verdict on an issue of fact, but no order consequent thereon has been made by the judge, it is not necessary that an application for a new trial should be made within twenty-one days from the finding ; 1870 Rules, r. 143, does not apply to such a case, either directly or by analogy. —*Re* WRIGLEY, *Ex p.* READER (1875), L. R. 20 Eq. 763 ; 44 L. J. Bcy. 139 ; 33 L. T. 36.

4844. —— Appeal from interlocutory order.]—On appeal from an order made in the county ct. the preliminary objection was taken that the appeal could not be heard, on the ground that fourteen days' notice had been given, & the order appealed from being an interlocutory order, the notice of appeal must be a four days' notice in accordance with R. S. C. Ord. 58, r. 3. The ct. refused to allow the objection & decided to hear the appeal, there being considerable doubt as to the nature of an interlocutory order in bkpcy.—*Re* MILES, *Ex p.* TURNBULL (1889), 6 Morr. 213, D. C.

SUB-SECT. 2.—COMPUTATION OF TIME.

See, now, 1915 Rules, r. 130.

4845. When time begins to run—Whether from signing of order—Or from time of pronouncing same.]—The time of the comr. signing & delivering out an order, & not the time of his pronouncing it, is the proper date, from which the time within which appeals are allowed by 1849 Act begins to run.—*Re* ATKINSON, *Ex p.* HESLOP (1852), 1 De G. M. & G. 477 ; 20 L. T. O. S. 28 ; 42 E. R. 636, L. JJ.

Annotations :—**N.F.** *Re* Hopkins, *Ex p.* Dudley & West Bromwich Banking Co. (1863), 11 W. R. 576, L. C. **Mentd.** Quartermaine *v.* Bittleston (1853), 1 W. R. 131 ; *Re* Webb's Policy (1867), 16 L. T. 89 ; Semphill *v.* Queensland Sheep Investment Co. (1873), 29 L. T. 737.

4846. —— —— ——.]—An appeal from an order in the Ct. of Bkpcy. cannot be heard, if the petition is lodged more than twenty-one days from the day when the order was actually made, though the period of twenty-one days allowed by 1849 Act, s. 12, has not elapsed since the order was drawn up.—*Re* HOPKINS, *Ex p.* DUDLEY & WEST BROMWICH BANKING CO. (1863), 3 De G. J. & Sm. 456 ; 32 L. J. Bcy. 68 ; 8 L. T. 189 ; 9 Jur. N. S. 702 ; 11 W. R. 576 ; 46 E. R. 712, L. C.

4847. —— —— ——.]—Where an order has been made, the twenty-one days allowed for appealing run from the signing of the order, & not from the day when it was pronounced.—*Re* LEWER, *Ex p.* GARRARD (1877), 5 Ch. D. 61 ; 46 L. J. Bcy. 70 ; 36 L. T. 42 ; 25 W. R. 364, C. A.

Annotation :—**Expld. & Distd.** *Re* Sendall, *Ex p.* Cochrane (1878), 9 Ch. D. 698.

4848. —— —— ——.]—The twenty-one days, within which an appeal from a county ct. to the Chief Judge must be brought, are to be reckoned from the date of the settling & signing of the order. —*Re* SENDALL, *Ex p.* COCHRANE (1878), 9 Ch. D. 698 ; 48 L. J. Bcy. 31 ; 38 L. T. 820 ; 26 W. R. 818.

4849. —— —— ——.]—The twenty-one days, within which an appeal from a county ct. to the Chief Judge must be brought, are to be reckoned from the day when the decision of the county ct. was pronounced.—*Re* GREAVES, *Ex p.* WHITTON (1880), 13 Ch. D. 881 ; 49 L. J. Bcy. 31 ; 42 L. T. 63 ; 28 W. R. 432.

4850. —— —— Whether filing necessary to perfect order.]—An order of the Divisional Ct. was signed by the registrar & sealed on Dec. 1 & filed on Dec. 2 :—*Held :* (1) the order was perfected under 1886 Rules, r. 130 when signed by the registrar & the time for appealing ran from the date of his signature ; (2) it was not necessary to perfect an order that it should be filed with the proceedings.—*Re* HELSBY, *Ex p.* TRUSTEE, [1894] 1 Q. B. 742 ; 63 L. J. Q. B. 265 ; 70 L. T. 144 ; 42 W. R. 218 ; 10 T. L. R. 179 ; 38 Sol. Jo. 203 ; 1 Mans. 4 ; 9 R. 139, C. A.

Annotations :—**Consd.** Frere *v.* North Shore Mill Co. (1905), 49 Sol. Jo. 315. **Folld.** *Re* Coles & Ravenshear, [1907] 1 K. B. 1, C. A.

4851. —— From date of order on rehearing.]—On Feb. 17, 1873, an order was made in the county ct. that a charge on certain property given by a bkpt. to his bankers on Feb. 24, 1872, was void as against the trustee, & that a prior charge given on Jan. 6, 1872, was valid to the extent of £2,500. Liberty was reserved to either party to apply to rescind or vary the order on or before Mar. 31, 1873. On Mar. 31, on the application of the trustee, the order was varied by declaring that the bank's charge extended only to a part of the property comprised in the two documents in question. The substituted order did not expressly declare the charge of Feb. 24 to be void. On May 5, 1873, the order of Mar. 31 was again varied on the application of the bank, & an order was made declaring the charge of Feb. 24 void as against the trustee :—*Held :* as the county ct. judge had

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PART XVII. SECT. 4, SUB-SECT. 1.

r. *Appeal must be made promptly.*]—*Re* SHARPE (1866), 2 Ch. Ch. 67.—**CAN.**

PART XVII. SECT. 4, SUB-SECT. 2.

4852 i. *Whether Sunday included—1857 Act, s. 29.*]—Sundays are to be included in the "thirty days" allowed for appealing under the above sect.—*Re* MALCOMSON (1876), I. R. 10 Eq. 488.—**IR.**

Sect. 4.—*Time for appeal: Sub-sects.* 2 & 3. *Sect* 5.]

full power to review his order of Mar. 31, the appeal from the last order was not out of time.—*Re* BROWN, *Ex p.* LONDON & COUNTY BANKING CO., *Ex p.* TRICKETT (1873), L. R. 16 Eq. 391; 42 L. J. Bcy. 112; 29 L. T. 73; 21 W. R. 842.

Annotation:—**Expld. & Distd.** *Re* Lister, *Ex p.* Simmons (1876), 2 Ch. D. 749.

See, also, Nos. 4870-4880, 4886-4888, *post.*

4852. Whether Sunday included—1870 Rules, r. 143, 1873 Rules, r. 2.]—In reckoning the twenty-one days, within which an appeal must be entered under the above rules, the computation must be made exclusive of Sundays.—*Re* BALL, *Ex p.* HICKS (1875), L. R. 20 Eq. 143; 44 L. J. Bcy. 106; 32 L. T. 432; 23 W. R. 852.

Annotation:—**Expld. & Distd.** *Re* Gilbert, *Ex p.* Viney (1877), 36 L. T. 43, C. A.

4853. —— ——.]—Sundays are included in the computation of the time, within which an appeal must be brought.—*Re* GILBERT, *Ex p.* VINEY (1877), 4 Ch. D. 794; 46 L. J. Bcy. 80; 36 L. T. 43; 25 W. R. 364, C. A.

Annotations:—**Distd.** *Re* Alven, *Ex p.* Hall (1881), 50 L. J. Ch. 400, C. A. **Refd.** *Re* Helsby, *Ex p.* Trustee & Official Receiver (1894), 63 L. J. Q. B. 265, C. A. **Mentd.** *Re* Lambert, *Ex p.* Saffery (1877), 5 Ch. D. 365, C. A.; *Re* Walton, *Ex p.* Reddish (1877), 5 Ch. D. 882, C. A.; *Re* Baum, *Ex p.* Isaacs (1878), 9 Ch. D. 271, C. A.; Christopher *v.* Croll (1885), 16 Q. B. D. 66, C. A.

See, now, 1914 Act, s. 145.

4854. —— —— **Appeal from Chief Judge to Court of Appeal—Appeal from county court to Chief Judge.**]—In appeals in bkpcy. from the county ct. to the Chief Judge, the old bkpcy. rule still applies, & in the computation of the twenty-one days, within which, by 1870 Rules, r. 143, an appeal must be entered with the registrar, Sundays are still excluded. It is otherwise in appeals from the Chief Judge to the Ct. of Appeal.—*Re* ALVEN, *Ex p.* HALL (1881), 16 Ch. D. 501; 50 L. J. Ch. 400; 44 L. T. 8; 29 W. R. 298, C. A.

SUB-SECT. 3.—EXTENSION OF TIME.

See 1915 Rules, r. 130.

4855. Jurisdiction of court.]—The ct. has jurisdiction to give leave to appeal after the expiration of the twenty-one days, within which, under 1870 Rules, r. 143, the notice of appeal is to be given.—*Re* PHILLIPS, *Ex p.* KIVETON COAL CO. (1872), 7 Ch. App. 730; 42 L. J. Bcy. 11; 27 L. T. 670; 20 W. R. 1026, L. JJ.

4856. In what cases—Appeal from interlocutory order.]—A registrar having refused leave to summon a fresh meeting of creditors, an appeal was brought which, through a solr.'s mistake, was out of time:—*Held:* the order being in the nature of an interlocutory order, the time would be extended.—*Re* TIPPETT, *Ex p.* TIPPETT (1885), 2 Morr. 229, C. A.

4857. —— **Notice served in time—Appeal entered out of time.—Time extended on payment of costs.**]—On Oct. 12, 1908, a receiving order was made against debtor in the county ct. on a creditor's petition. On Oct. 31 certain other creditors served notice of appeal against the receiving order, & on Nov. 12 they presented the appeal to be entered for hearing, but were informed that the appeal was out of time. On an application to extend the time for entering the appeal:—*Held:* the application should be granted, on the terms that the appeal should be entered within two days & that appcts. should pay all the costs of & occasioned by the application.—*Re* TAYLOR, *Ex p.* BOLTON, [1909] 1 K. B. 103; 78 L. J. K. B. 102; 99 L. T. 939; 16 Mans. 19; *sub nom. Re* JOSEPH, *Ex p.* BOLTON, 25 T. L. R. 77.

Annotation:—**Apld.** *Re* Smith, *Ex p.* Valentine (1910), 54 Sol. Jo. 215.

See, also, No. 4871, *post.*

4858. For what purposes—To allow service on trustee in bankruptcy—Notice served on petitioning creditor only.]—In a case where notice of appeal is served on petitioning creditor in time, but is not served in time on the trustee in bkpcy., the appeal must be dismissed, & the time for appealing will not be extended in such a case.—*Re* WARD, *Ex p.* WARD (1880), 15 Ch. D. 292; 43 L. T. 183; 29 W. R. 206, C. A.

Annotation:—**Apld.** *Re* Webber, *Ex p.* Webber (1889), 24 Q. B. D. 313, D. C.

4859. —— **To allow appellant to get leave to appeal—No one prejudiced thereby.**]—On Aug. 12, 1885, the Divisional Ct., upon an appeal from a county ct. ordered a settlement made by bkpt. to be set aside. On Sept. 5 notice of appeal was served. No leave to appeal had then been obtained either from the Divisional Ct. or the Ct. of Appeal. The Divisional Ct. did not sit in bkpcy. after Aug. 12 until Nov. 16. On Nov. 3 applt. served resp. with notice of an application to the Ct. of Appeal for leave to appeal. The appeal came into the paper of the Ct. of Appeal on Nov. 13 & was then ordered to stand over to enable applt. to apply to the Divisional Ct. for leave to appeal, & that application was made on Nov. 16, but was refused. The case having come into the appeal paper again on the first day since Nov. 13 on which the Ct. of Appeal had taken bkpcy. appeals:—*Held:* leave to appeal should be granted, as no harm would be done to any one by relieving applt. from the effect of the blunder which had been made.—*Re* PLAYER, *Ex p.* PLAYER, [1885] W. N. 216, C. A.

4860. —— **To allow compliance with 1886 Rules, r. 132—Special circumstances.**]—Except in special circumstances the ct. will not extend the time for compliance with the above rules as to sending a copy of the notice of appeal to the registrar, & non-compliance should not be treated as an irregularity which can be cured.—*Re* VITORIA, *Ex p.* SPANISH CORPN., LTD., [1894] 1 Q. B. 259; *sub nom. Re* VITORIA, *Ex p.* VITORIA, 63 L. J. Q. B. 161; 70 L. T. 141; 42 W. R. 193; 10 T. L. R. 165; 38 Sol. Jo. 144; 1 Mans. 1; 9 R. 132, C. A.

4861. —— **To allow service on official receiver.**]—In special circumstances the ct. may extend the time for appealing against the making of a receiving order, in order that the official receiver may be served, if he has not been served within the time limited for service on petitioning creditor.—*Re* SLEATH, *Ex p.* LOTUS SHOE CO. (1913), 109 L. T. 222, D. C.

4862. Grounds for extending time—Appellants misled—Mistake of registrar's clerk.]—A mistake of the registrar's clerk, misleading applt.'s solr. as to the time for bringing an appeal:—*Held:* no

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PART XVII. SECT. 4, SUB-SECT. 3.

4855 i. *Jurisdiction of court.*]—The ct. has no jurisdiction to hear a motion for an extension of time *ex p.*—*Re* MALCOMSON (1876), I. R. 10 Eq. 488.—IR.

s. *How application made.*]—An application under 1857 Act, s. 29, for "special leave" to extend the time for appealing, must be made on special grounds & upon notice to the party having the carriage of the order sought to be appealed from. *Ex p.* order granting special leave to appeal rescinded.—*Re* MALCOMSON (1876), I. R. 10 Eq. 488.—IR.

4857 i. *In what cases—Notice of appeal not given in time.*]—*Held:* the ct. would not enlarge the time for appealing under 1867 Act, s. 25, if notice of appeal had not been given within the twenty-one days, unless for cause shown, & where a proper ground of appeal existed.—*Re* SMITH, *Ex p.* STUART (1869), 1 C. A. 279.—N.Z.

ground for extending the time to appeal.—*Re* GILBERT, *Ex p.* VINEY (1877), 4 Ch. D. 794; 36 L. T. 43; 25 W. R. 364, C. A.

Annotations:—**Refd.** *Re* Helsby, *Ex p.* Trustee & Official Receiver (1894), 63 L. J. Q. B. 265, C. A. **Mentd.** *Re* Lambert, *Ex p.* Saffery (1877), 5 Ch. D. 365, C. A.; *Re* Walton, *Ex p.* Reddish (1877), 5 Ch. D. 882, C. A.; *Re* Baum, *Ex p.* Isaacs (1878), 9 Ch. D. 271, C. A.; *Re* Alven, *Ex p.* Hall (1881), 50 L. J. Ch. 400, C. A.; Christopher *v.* Croll (1885), 16 Q. B. D. 66, C. A.

4863. —— Party aggrieved ignorant of date of act of bankruptcy.]—A third person who is aggrieved by an adjudication of bkpcy., by reason of his ignorance of the date of an act of bkpcy. on which the adjudication purports to be founded, is, after the expiration of the time limited for appealing, entitled, *ex debito justitiæ*, to an extension of the time for appealing, if he applies promptly after he becomes aware of the date of the act of bkpcy., which affects his rights.—*Re* TUCKER, *Ex p.* TUCKER (1879), 12 Ch. D. 308; 48 L. J. Bcy. 118; 28 W. R. 219, C. A.

Annotations:—**Apld.** *Re* Stanger, *Ex p.* Geisel (1882), 22 Ch. D. 436, C. A. **Folld.** *Re* Debtor, *Ex p.* Person Aggrieved *v.* Petitioning Creditors & Official Receiver (1912), 106 L. T. 344, D. C.

4864. —— Mistake of law by appellant's solicitor.]—Where an appeal, under 1883 Act, which had only shortly come into force, was out of time, owing to the mistaken impression of applt.'s solr. that the rules under that Act were the same as under the previous Act, an extension of time was refused.—*Re* COURTENAY, *Ex p.* DEAR (1884), 1 Morr. 89, C. A.

Annotation:—**Refd.** *Re* Faulconer, *Ex p.* Cochrane (1889), 61 L. T. 56, D. C.

4865. —— ——.]—A mistake of law made by applt.'s solr. does not constitute special circumstances, entitling applt. to an extension of time for bringing the appeal.—*Re* A DEBTOR (No. 692 OF 1910) (1910), 55 Sol. Jo. 48, C. A.

4866. Appeal from order extending time—Order of county court.]—*Re* A DEBTOR (No. 20 OF 1910), No. 4808, *ante*.

SECT. 5.—NOTICE OF APPEAL AND SERVICE.

On whom served—Appeal by debtor against suspension of certificate.]—*See* No. 5255, *post*.

—— **Appeal from refusal to annul adjudication.**]—*See* No. 1791, *ante*.

—— **Appeal from receiving order.**]—*See* Part IV., Sect. 5, *ante*.

4867. —— Registrar—Appeal from registrar acting as chief judge.]—Notice of an appeal from a registrar acting as chief judge ought not, even if it is *ex p.*, to be addressed to or served on the registrar.—*Re* MOIR, *Ex p.* IZARD (1882), 20 Ch. D. 703; 51 L. J. Ch. 939; 47 L. T. 212; 30 W. R. 861, C. A.

4868. —— Respondent—Appeals generally.]—An appeal is brought by serving the notice on resp.—*Re* FAULCONER, *Ex p.* COCHRANE (1889), 61 L. T. 56; 6 Morr. 206, D. C.

4869. —— Registrar of county court—Appeal from county court.]—Upon an appeal from a county ct. it appeared that no copy of the notice of appeal had been sent to the registrar of the county ct.:—*Held:* notwithstanding the utility of sending a copy of the notice of appeal to the registrar of the ct. appealed from was done away with by R. S. C. Ord. 58, the ct. would not entertain an appeal unless 1886 Rules, r. 132, had been complied with.—*Re* VITORIA, *Ex p.* SPANISH CORPN., LTD., [1894] 1 Q. B. 259; *sub nom. Re* VITORIA, *Ex p.* VITORIA, 63 L. J. Q. B. 161; 70 L. T. 141; 42 W. R. 193; 10 T. L. R. 165; 38 Sol. Jo. 144; 1 Mans. 1; 9 R. 132, C. A.

4870. Within what time served—Within twenty-one days—From day on which order pronounced.]—Notice of an appeal must be given within twenty-one days from the day on which the order appealed from was pronounced, not from the day on which it was drawn up,—*Re* HINTON, *Ex p.* HINTON (1875), L. R. 19 Eq. 266; 44 L. J. Bcy. 36; 31 L. T. 852; 23 W. R. 488.

Annotation:—**Distd.** *Re* Sendall, *Ex p.* Cochrane (1878), 9 Ch. D. 698.

See, also, Nos. 4845-4854, *ante*.

4871. —— —— Entry of appeal within period insufficient.]—Notice of appeal must be given within twenty-one days, & the entry of the appeal before that time makes no difference.—*Re* GILBERT, *Ex p.* VINEY (1877), 4 Ch. D. 794; 46 L. J. Bcy. 80; 36 L. T. 43; 25 W. R. 364, C. A.

Annotations:—**Distd.** *Re* Alven, *Ex p.* Hall (1881), 50 L. J. Ch. 400, C. A. **Refd.** *Re* Lambert, *Ex p.* Saffery (1877), 5 Ch. D. 365, C. A.; *Re* Walton, *Ex p.* Reddish (1877), 5 Ch. D. 882, C. A.; *Re* Baum, *Ex p.* Isaacs (1878), 9 Ch. D. 271, C. A.; Christopher *v.* Croll (1885), 16 Q. B. D. 66, C. A.; *Re* Helsby, *Ex p.* Trustee & Official Receiver (1894), 63 L. J. Q. B. 265, C. A.

See, also, No. 4857, *ante*.

4872. —— —— Registrar's office closed for vacation.]—An order, which was a refusal of an application, was made by the London Bkpcy. Ct. on Mar. 10. An appeal was entered with the registrar of appeals on Apr. 4, & on the same day notice was served on resp. The registrar's office had been entirely closed for the Easter Vacation from Mar. 30 to Apr. 3, both inclusive:—*Held:* notwithstanding the closing of the office, the notice of appeal might have been served on resp., &, as it had not been served within twenty-one days, the appeal was too late.—*Re* LAMBERT, *Ex p.* SAFFERY (1877), 5 Ch. D. 365; 46 L. J. Bcy. 89; 36 L. T. 532; 25 W. R. 572, C. A.

Annotations:—**Refd.** *Re* Baum, *Ex p.* Isaacs (1878), 9 Ch. D. 271, C. A.; Christopher *v.* Croll (1885), 16 Q. B. D. 66, C. A.

See, now, 1914 Act, s. 145.

4873. —— Within time for bringing appeal—1886 Rules, r. 130.]—On appealing from an order of the Bkpcy. Ct. the notice of appeal must be given within the time limited for bringing an appeal by the above rule.—*Re* TAYLOR, *Ex p.* BOLTON, [1909] 1 K. B. 103; 78 L. J. K. B. 102;

PART XVII. SECT. 5.

4867 i. *On whom served.*]—Notice must be served on the assignee of the day for presenting to the ct. a petition in appeal by insolvent.—*Re* PARR (1867), 17 C. P. 621.—**CAN.**

4870 i. *Within what time served.*]—During the hearing of a motion, in which Y. & H. were resps., the motion was dismissed as against H. on Aug. 28. The order dismissing the motion against Y. was made on Sept. 6, & notice of appeal was filed on Sept. 20. The order taken out was dated Sept. 6, & in it was embodied the order dismissing the motion as against H.:—*Held:* the notice of appeal had been filed within the time limited by the rules.—*Re* HAMILTON, *Ex p.* OFFICIAL ASSIGNEE (1893), 14 N. S. W. B. 40.—**AUS.**

4870 ii. ——.]—Under 1869 Act, ss. 83, 84, the application in appeal must be served upon resp., & security for costs given, within five days from the day on which judgment is rendered. It is not enough to serve notice & file bond.—*Re* THOMAS, MCMASTER *v.* THOMAS (1875), 6 P. R. 252.—**CAN.**

4870 iii. ——.]—Notice of application for allowance of an appeal must be served within eight days from the day on which the judgment appealed from is pronounced, but the application itself may be after the eight days.—*Re* OWENS (1866), 12 Gr. 446; *dbtd. Re* DAVIDSON, 4 P. R. 153.—**CAN.**

4870 iv. ——.]—An order in insolvency was made on Dec. 24, 1872. The fifth day thereafter fell on a Sunday:—*Held:* service of notice of appeal on the Monday following was in time.—HOOD *v.* DODDS (1873), 19 Gr. 639.—**CAN.**

Sect. 5.—Notice of appeal and service. Sects. 6 & 7.]

99 L. T. 939 ; 16 Mans. 19 ; *sub nom. Re* JOSEPH, *Ex p.* BOLTON, 25 T. L. R. 77.

Annotation :—**Consd.** *Re* Smith, *Ex p.* Valentine (1910), 54 Sol. Jo. 215.

4874. —— On registrar of court appealed from.]—Applt. entered an appeal from an order of a county ct. judge within twenty-one days from the date of the order, but did not send a copy of the appeal notice to the registrar of the county ct. till more than two months had elapsed :—*Held :* under 1870 Rules, r. 144, the appeal was too late.—*Re* SILLENCE, *Ex p.* SILLENCE (1877), 7 Ch. D. 238 ; 47 L. J. Bcy. 87 ; 37 L. T. 676 ; 26 W. R. 129.

Annotations :—**Refd.** *Re* Southam, *Ex p.* Lamb (1881), 19 Ch. D. 169 ; *Re* Jones, *Ex p.* Williams (1882), 46 L. T. 237 ; *Re* Vitoria, *Ex p.* Vitoria (1893), 63 L. J. Q. B. 161, C. A.

See, now, 1915 Rules, r. 132.

4875. —— ——.]—Where the order appealed from was made on Apr. 21, & notice of appeal was duly entered with the registrar of appeals, but no notice was served upon the registrar of the ct. appealed from until May 19 :—*Held :* the appeal was out of time, & could not be heard.—*Re* GREEN, *Ex p.* DONNITHORNE (1879), 40 L. T. 660 ; 27 W. R. 824.

Annotation :—**Refd.** *Re* Southam, *Ex p.* Lamb (1881), 19 Ch. D. 169.

4876. —— ——.]—The London agents of the country solrs. of applt. from an order made by a county ct. in bkpcy., entered the appeal with the registrar of appeals in London on Aug. 5, the last possible day, but did not post a copy of the notice to the country solrs. until the following day, & it was not received by them until Aug. 8. On that day they sent a copy of the notice to the registrar of the county ct. :—*Held :* the copy of the notice had not been sent to the registrar "forthwith," & the appeal was out of time.—*Re* SOUTHAM, *Ex p.* LAMB (1881), 19 Ch. D. 169 ; 51 L. J. Ch. 207 ; 45 L. T. 639 ; 30 W. R. 126, C. A.

Annotations :—**Folld.** *Re* Lyon, *Ex p.* Lyon (1882), 45 L. T. 768. **Consd.** *Re* Vitoria, *Ex p.* Spanish Corpn., [1894] 1 Q. B. 259, C. A. **Refd.** *Re* Jones, *Ex p.* Williams (1882), 46 L. T. 237.

4877. —— ——.]—An order of a county ct. was made on Dec. 17. Notice of appeal was entered in London on Dec. 22. On the five following days the county ct. office was closed, & the registrar did not receive a copy of the notice till the 28th. Resp.'s country solrs., however, received notice on Dec. 23 :—*Held :* the copy notice had been sent to the registrar "forthwith."—*Re* JONES, *Ex p.* WILLIAMS (1882), 46 L. T. 242, C. A.

4878. —— ——.]—Where the registrar of the county ct., from which an appeal was brought, did not receive notice until three days after the time for appealing had elapsed :—*Held :* the notice not having been sent "forthwith," the appeal was out of time & could not be heard.—*Re* LYON, *Ex p.* LYON (1882), 45 L. T. 768.

4879. —— Service by letter.]—If notice of a bkpcy. appeal is sent by post, as provided by 1883 Act, s. 142 :—*Qu. :* whether the notice will be in time, unless the letter is received by resp. before the expiration of the twenty-one days limited for appealing.—*Re* ARDEN, *Ex p.* ARDEN (1884), 14 Q. B. D. 121 ; 33 W. R. 460 ; 2 Morr. 1 ; *sub nom.* ARDEN *v.* DEACON, 51 L. T. 712, D. C.

4880. —— ——.]—Notice of appeal must be served on resp. within twenty-one days.

Notice of appeal was posted on the last day allowed, but such notice did not reach resp. until after the expiration of the twenty-one days :—*Held :* a preliminary objection, that the appeal was out of time, must be allowed.—*Re* FAULCONER, *Ex p.* COCHRANE (1889), 61 L. T. 56 ; 6 Morr. 206, D. C.

See, also, Sect. 4, *ante,* No. 4919, *post.*

4881. How served—Substituted service—Jurisdiction of court to order.]—In a proper case the Ct. of Appeal has jurisdiction to make an order for substituted service of a notice of appeal, though no express provision to that effect is contained in R. S. C.—*Re* WHALLEY, *Ex p.* WARBURG (1883), 24 Ch. D. 364 ; 53 L. J. Ch. 336 ; 49 L. T. 243, C. A.

4882. Form of notice—In whose names.]—After the presentation of a bkpcy. petition & the appointment of a receiver, but before the appointment of a trustee, an order was made that the receiver should deliver up to appcts. some bills of exchange which had come into his hands, on the ground that they did not form part of debtor's estate. Notice of the application had been addressed to the receiver, debtors, & petitioning creditor. Notice of appeal was given in the name of the receiver alone :—*Held :* the notice must be amended by naming debtors & petitioning creditor also as applts.—*Re* SAWERS, *Ex p.* CHALMERS (1879), 11 Ch. D. 911 ; 41 L. T. 263, C. A.

4883. —— Contents—Grounds of appeal.]—A notice of appeal from a county ct. must state the grounds of appeal, but the omission to do so will not involve the dismissal of the appeal.—*Re* SMITH, *Ex p.* DENBIGH (EARL) (1892), 9 T. L. R. 72 ; 9 Morr. 316, D. C.

See Regulation of High Court of 18 Feb., 1890, 7 Morr. 64.

4884. Appeal by one of two bill of sale holders—Notice of appeal given to trustee & other grantee—Trustee's cross-notice.]—On the application of a trustee in bkpcy., the registrar of a county ct. declared two bills of sale which bkpt. had executed void against the trustee. On appeals by the two grantees, the Chief Judge affirmed the decision as to the first bill of sale, but held that the second bill of sale was valid as against the trustee. The first grantee gave notice of appeal, addressed to the trustee & to the second grantee. The trustee gave no original notice of appeal, but served notice on both the grantees that, on the hearing of the first grantee's appeal, he should contend that the decision of the Chief Judge as to the second bill of sale ought to be varied in his favour :—*Held :* this was a good notice under R. S. C., 1875, Order 58, r. 6.—*Re* CROSS, *Ex p.* PAYNE (1879), 11 Ch. D. 539 ; 40 L. T. 563 ; 27 W. R. 808, C. A.

Annotations :—**Mentd.** Lyons *v.* Tucker (1881), 6 Q. B. D. 660 ; *Re* Emery, *Ex p.* Chief Official Receiver (1888), 37 W. R. 21 ; Sanguinetti *v.* Stuckey's Banking Co., [1895] 1 Ch. 176.

SECT. 6.—ENTRY OF APPEAL.

See, also, Sect. 4, sub-sect. 1, & No. 4871, *ante.*

4885. Entry in office of chief registrar—Whether necessary.]—*Held :* it was not necessary, in order to secure the right of appealing, that formal notice

t. *Sufficiency of notice—Amendment.*]—Where the notice was served in time, but named a day for the application, which did not give the time insolvent was entitled to, & was irregular in some other respects :—*Held :* the notice was amendable.—*Re* OWENS (1866), 12 Gr. 446, 560 ; *dbtd. Re* DAVIDSON, 4 P. R. 153.—**CAN.**

w. —— ——.]—On Sept. 23 insolvent gave notice of an intended application on the 24th to a judge at Osgoode Hall for leave to appeal from an order refusing a discharge :—*Held :* the notice was insufficient, but in favour of the liberty of a subject, should be amended.—*Re* DAVIDSON (1867), 4 P. R. 153.—**CAN.**

x. —— *Statement of grounds of appeal.*]—*Held :* the grounds of appeal should be stated in the notice, but where the form & matter in the case on appeal had been agreed on the statement of grounds was unnecessary.—*Re* ELL, *Ex p.* AUSTIN & HASKINS (1886), 4 N. Z. L. R. C. A. 114.—**N.Z.**

of the appeal should be entered in the office of the chief registrar within twenty-one days of the order appealed from, provided that notice of appeal had been duly served on the other side within that period.—*Re* REDFEARN, *Ex p.* BROMLEY (1865), 6 New Rep. 51; 34 L. J. Bcy. 33; 12 L. T. 292; 11 Jur. N. S. 611; 13 W. R. 667, L. C.

Annotation:—**N.F.** *Re* Lublin, *Ex p.* Lublin (1870), 21 L. T. 573.

4886. Within what time.]—Where notice of motion of appeal had been served within twenty-one days from the date of the pronouncing of an order, but the appeal had not been taken to the chief registrar for entry till after the expiration of the twenty-one days:—*Held:* the appeal was too late.—*Re* LUBLIN, *Ex p.* LUBLIN (1869), 21 L. T. 573; 18 W. R. 104, L. J.

4887. —— Time given in 1861 Act, s. 171—Order of county court judge to whom proceedings transferred.]—In the case of an appeal from an order of a county ct. judge, to whom proceedings in bkpcy., commenced under the old law, have been transferred, under 1869 Act, s. 130, the time allowed for entering the appeal is thirty days, as given by 1861 Act, s. 171, & not twenty-one days within which an appeal must be entered under General Rules of Jan. 1, 1870.—*Re* PALMER, *Ex p.* PALMER (1870), 5 Ch. App. 470; 39 L. J. Bcy. 48; 22 L. T. 323; 18 W. R. 587, L. J.

Annotation:—**Mentd.** *Re* Anderson, *Ex p.* Anderson (1870), 5 Ch. App. 473, L. J.

4888. —— Time limited for appealing by 1886 Rules, r. 130.]—On appealing from an order made by a Bkpcy. Ct., the appeal must be entered within the time limited for bringing an appeal by the above rule.—*Re* TAYLOR, *Ex p.* BOLTON, [1909] 1 K. B. 103; 78 L. J. K. B. 102; 99 L. T. 939; 16 Mans. 19; *sub nom. Re* JOSEPH, *Ex p.* BOLTON, 25 T. L. R. 77.

Annotation:—**Refd.** *Re* Smith, *Ex p.* Valentine (1910), 54 Sol. Jo. 215.

4889. Sufficiency of entry—Appeal tendered to registrar's clerk at private residence.]—Where, by an accident, a petition of appeal in bkpcy. did not reach the registrar's office in office hours on the last day before entering it, but was on that day tendered to one of the clerks in the office at his residence, who declined to receive it, doubting his authority to do so, the ct. ordered the petition to be received as of that day, without prejudice to any objection.—*Re* HARRISON, *Ex p.* HARRISON (1858), 2 De G. & J. 229; 44 E. R. 976, L. C. & L. JJ.

4890. Procedure in entering appeal.]—Having regard to 1878 Rules, r. 2, the proper practice is for the registrar, before entering an appeal, to give a direction to the Bank of England to receive the deposit on the appeal, &, after receiving a certificate from the bank that the money has been paid, to enter the appeal.—*Re* DICKINSON, *Ex p.* ROSENTHAL (1882), 20 Ch. D. 315; 51 L. J. Ch. 736; 47 L. T. 266; 30 W. R. 667, C. A.

Annotation:—**Refd.** *Re* Pidsley, *Ex p.* Luxon (1882), 31 W. R. 71, C. A.

See 1915 Rules, r. 131.

4891. —— Appeals to Court of Appeal—Effect of irregularity—Appellant not in default.]—The practice as to the payment of deposit & entry of appeals in bkpcy. laid down in *Re Dickinson*, No. 4890, *ante*, applies to appeals to the Ct. of Appeal as well as to appeals to the Chief Judge.

Where the registrar's clerk had improperly entered an appeal before receiving the Bank of England's certificate of the payment of the deposit, although the deposit had been paid within the limited period:—*Held:* as there had been no default on the part of applt. the appeal could be heard.—*Re* PIDSLEY, *Ex p.* LUXON (1882), 20 Ch. D. 701; 51 L. J. Ch. 928; 47 L. T. 211; 31 W. R. 71, C. A.

Annotation:—**Refd.** *Re* Helsby, *Ex p.* Trustee, [1894] 1 Q. B. 742, C. A.

See, further, Nos. 4893, 4894, *post.*

4892. Effect of entry of appeal—On failure to give notice in time.]—The entry of an appeal within twenty-one days makes no difference when notice of appeal is not given within that time.—*Re* GILBERT, *Ex p.* VINEY (1877), 4 Ch. D. 794; 46 L. J. Bcy. 80; 36 L. T. 43; 25 W. R. 364, C. A.

Annotations:—**Refd.** *Re* Lambert, *Ex p.* Saffery (1877), 5 Ch. D. 365, C. A.; *Re* Walton, *Ex p.* Reddish (1877), 5 Ch. D. 882, C. A.; *Re* Baum, *Ex p.* Isaacs (1878), 9 Ch. D. 271, C. A.; *Re* Alven, *Ex p.* Hall (1881), 50 L. J. Ch. 400, C. A.; Christopher *v.* Croll (1885), 16 Q. B. D. 66, C. A.; *Re* Helsby, *Ex p.* Trustee & Official Receiver (1894), 63 L. J. Q. B. 265, C. A.

See, also, Sect. 4, sub-sect. 1, & Nos. 4885, 4886, *ante.*

SECT. 7.—DEPOSIT OF SECURITY FOR COSTS OF APPEAL.

See 1915 Rules, r. 131.

4893. Within what time deposit must be made—Within time for entering appeal.]—The deposit directed to be made by applt., under 1870 Rules, r. 145, must be made within the twenty-one days limited by r. 143 for entering an appeal.

Where an appeal was entered on Feb. 17, & the deposit was not paid till Mar. 6:—*Held:* this was not a formal defect or irregularity which could be cured, & the appeal could not be heard.—*Re* DICKINSON, *Ex p.* ROSENTHAL (1882), 20 Ch. D. 315; 51 L. J. Ch. 736; 47 L. T. 266; 30 W. R. 667, C. A.

Annotation:—**Refd.** *Re* Pidsley, *Ex p.* Luxon (1882), 31 W. R. 71, C. A.

4894 —— —— 1886 Rules, r. 130.]—On appealing from an order made by a Bkpcy. Ct. the deposit must be paid within the time limited for bringing an appeal by the above rule.—*Re* TAYLOR, *Ex p.* BOLTON, [1909] 1 K. B. 103; 78 L. J. K. B. 102; 99 L. T. 939; 16 Mans. 19; *sub nom. Re* JOSEPH, *Ex p.* BOLTON, 25 T. L. R. 77.

Annotation:—**Mentd.** *Re* Smith, *Ex p.* Valentine (1910), 54 Sol. Jo. 215.

See, also, Nos. 4890, 4891, *ante.*

4895. Sufficiency of deposit—Several orders—Whether one deposit sufficient.]—On an appeal to a county ct. judge from the rejection by the

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PART XVII. SECT. 7.

a. *Within what time application for security must be made.*]—An application for security for costs of an appeal must be made promptly, or it will be refused.—*Re* VAGG (1886-7), 13 V. L. R. 172.—**AUS.**

4893 i. *Within what time deposit must be made.*]—The security required by the rules made under 1883 Act need not be given within twenty-one days from the date of the decision appealed from; it is sufficient if given at or before the time of the transmission of the case to the registrar.—ELL *v.* OFFICIAL ASSIGNEE IN BANKRUPTCY (1889), 7 N. Z. L. R. 640.—**N.Z.**

b. *Bond for security—How executed.*]—It is not necessary that the bond for security to be given on an appeal in insolvency should be executed in presence of a judge.—HOOD *v.* DODDS (1873), 19 Gr. 639.—**CAN.**

c. *Objections to security—To whom made.*]—Objections to the security on an appeal from the county ct. judge, under 1864 Act, are to be made to such judge.—*Re* OWENS (1866), 12 Gr. 446; *dbtd. Re* DAVIDSON, 4 P. R. 153.—**CAN.**

d. *In what court deposit should be paid.*]—Under Insolvency Stat., 1871, s. 12, the deposit upon an appeal may be paid into either the Ct. of Insolvency or the Ct. of Appeal, but for the purpose of convenience it should be paid into the Ct. of Insolvency.—*Re* THONEMAN (1887), 13 V. L. R. 162, 204.—**AUS.**

f. *Deposit dispensed with—Jurisdiction of court—Appeal to Privy Council.*]—In giving leave to appeal to the Privy Council the ct. has no jurisdiction to dispense with security for costs.—GOODMAN *v.* BOULTON (1868), 5 W. W. & A'B. 86.—**AUS.**

trustee of three proofs tendered against bkpt.'s estate, three orders were drawn up affirming the trustee's rejection. An appeal was brought to the Divisional Ct. in Bkpcy., only one notice of appeal being duly stamped & one deposit lodged :—*Held :* the ct. could not hear the appeal, until the additional payments had been made.—*Re* SMITH & SONS, *Ex p.* SMITH (1890), 38 W. R. 719 ; 7 Morr. 30, D. C.

4896. What costs secured.]—The security for costs, which applts. are required to lodge by 1886 Rules, r. 131, is security for all costs in relation to the appeal.—*Re* CHILD, *Ex p.* DEBTOR (1901), 84 L. T. 326 ; *sub nom. Re* CHILD, *Ex p.* CHILD, 49 W. R. 447 ; 45 Sol. Jo. 363.

4897. Increase of deposit—Jurisdiction of Court of Appeal—After entry of appeal.]— The Ct. of Appeal, but not the Bkpcy. Ct., can, in special circumstances, increase the amount of a deposit to any extent after the entry of an appeal.—*Re* BAUM, *Ex p.* ISAACS (1878), 9 Ch. D. 271 ; 47 L. J. Bcy. 111 ; *sub nom. Re* BAUM, *Ex p.* COOPER, 38 L. T. 924 ; 26 W. R. 890, C. A. ; *subsequent proceedings*, 10 Ch. D. 1, C. A.

Annotations :—**Distd.** Mycock *v.* Yorkshire Banking Co. (1879), 41 L. T. 92. **Refd.** *Re* Dickinson, *Ex p.* Rosenthal (1882), 51 L. J. Ch. 559.

4898. —— Time for making application for.]—After the appeal has been lodged, & the usual deposit made of £20, the amount prescribed by 1870 Rules, r. 145, in the absence of any other direction, the ct. will not entertain an application for a larger deposit, & *semble :* the proper time to make such an application is at the original hearing. —*Re* THORPE, *Ex p.* LOVERING (1873), L. R. 15 Eq. 291 ; 42 L. J. Bcy. 39.

Annotation :—**Expld.** *Re* Baum, *Ex p.* Isaacs (1878), 47 L. J. Bcy. 111, C. A.

4899. —— Grounds for granting order for—Bankrupt engaged in protracted & unsuccessful litigation.]—The deposit paid by bkpt. was ordered to be increased, on the ground that he had been already engaged in protracted & uniformly unsuccessful litigation with resps. respecting the matters in question.—*Re* MCHENRY (1886), 17 Q. B. D. 351 ; 55 L. J. Q. B. 496 ; *sub nom. Re* MCHENRY, *Ex p.* NEW YORK, LAKE ERIE & GREAT WESTERN RY. CO., 35 W. R. 20, C. A.

Annotation :—**Distd.** *Re* Phillips, *Ex p.* Treboeth Brick Co., [1896] 2 Q. B. 122.

4900. —— —— That respondent's costs will exceed £20.]—Where debtor appeals from a receiving order made against him & lodges in ct. the sum of £20, the fact that resp.'s costs of the appeal out of pocket will exceed £20 is not a special ground for increasing the amount of the deposit.—*Re* PHILLIPS, *Ex p.* TREBOETH BRICK CO., [1896] 2 Q. B. 122 ; 65 L. J. Q. B. 648 ; 12 T. L. R. 335 ; 3 Mans. 156.

4901. Deposit dispensed with—In what cases.]—The ct. will not order petitioner residing out of its jurisdiction to give security for, or pay into ct., a sum of money which he had been entitled to by a previous order, merely because resp. intends to appeal against the order, if there is no probability of a different decision on the appeal.—*Re* MABERLY, *Ex p.* DAVIDSON (1833), 3 Deac. & Ch. 447 ; 2 L. J. Bcy. 69, Ct. of R.

4902. —— —— Appeal by Board of Trade.]—On an appeal by the Board of Trade the deposit may be dispensed with.—*Re* MUTTON, *Ex p.* BOARD OF TRADE (1887), 4 Morr. 115, D. C.

4903. —— —— No respondent.]—Where there is no resp. to an appeal, the ct. will dispense with the security required by 1886 Rules, r. 131.—*Re* GARRARD (1905), 92 L. T. 779 ; 49 Sol. Jo. 538, D. C.

4904. —— On what grounds—Lack of means.] —The inability of a party desiring to appeal to make the necessary deposit, is not a sufficient ground for dispensing with it.—*Re* ROBERTSON (1885), 2 Morr. 117, C. A.

4905. —— —— ——.]—Mere want of means, on the part of bkpt. wishing to appeal, to provide the sum required to be deposited as security for costs is not a sufficient ground for dispensing with the security.—*Re* GREPE, *Ex p.* GREPE (1887), 4 Morr. 128, C. A.

4906. —— —— —— Special circumstances.]—Bkpt. having declined to answer questions, on the ground that the answers might tend to incriminate him, the judge ordered him to answer. Bkpt. appealed & filed an affidavit that he had no means & could not deposit £20 :—*Held :* the deposit might be dispensed with in the special circumstances.—*Ex p.* BURKE (1888), 4 T. L. R. 362, C. A.

4907. —— —— —— ——.]—Both appct. & debtor were working colliers, the wages of each averaging about 30*s.* a week, & in Oct., 1890, judgment for £50 & costs was given in favour of appct. in an action brought by him against debtor for the loss of his eye, which had been injured by a stone thrown by debtor. Debtor thereupon presented his petition, upon which he was adjudicated bkpt., & a subsequent application for an order under 1883 Act, s. 53 (2), directing debtor to set aside a portion of his wages towards payment of his debts was refused by the county ct. judge. On an application to dispense with the deposit of £20 on an appeal from that decision :—*Held :* in the special circumstances, the case was one in which the ct. would dispense with the usual deposit.—*Re* JONES, *Ex p.* LLOYD (1891), 64 L. T. 803 ; 8 Morr. 192, D. C.

4908. —— Costs of application for—Payable out of deposit.]—The deposit of £20 may be applied to satisfy the costs of an unsuccessful application to diminish or dispense with such security, as well as to the costs of the actual appeal.—*Re* CHILD, *Ex p.* DEBTOR (1901), 84 L. T. 326 ; *sub nom. Re* CHILD, *Ex p.* CHILD, 49 W. R. 447 ; 45 Sol. Jo. 363.

4909. Return of deposit—To appellant—Withdrawal of appeal—Costs of respondent in lower court not deducted.]—On an appeal being brought from an order made in the county ct., the sum of £20 was lodged in the High Ct. by applt. as security for the costs of the appeal. The appeal was afterwards withdrawn, the costs of resp. in respect of it being paid, but an application by applt. for a return of the deposit was opposed by resp., on the ground that certain costs incurred by applt. in the county ct. had not been paid :—*Held :*

4901 i. —— *In what cases—Appeal from registrar to judge.*]—A person appealing to the judge in bkpcy. against an order of the registrar is not bound to give security for the costs of the appeal.—*Re* PHILLIPS (1902), 2 S. R. N. S. W. 30.—**AUS.**

4904 i. —— *On what grounds—Belief that rule ultra vires—Extension of time to deposit.*]—Rule 57 of the rules under 1883 Act, requiring the deposit of security for the costs of an appeal, is not *ultra vires*. If a party disregards a rule, speculating on an objection to it as being *ultra vires*, it is not a case for dispensing with a strict compliance with the rule. *Qu. :* whether there is power to extend the time for depositing security under r. 57.—*Re* ELL, *Ex p.* LATTER (1889), 7 N. Z. L. R. 387. —**N.Z.**

g. *Failure to deposit—Time to supply omission.*]—On an application to strike an appeal out, on the ground that no security for costs had been lodged, applt. asked for time to supply the omission. The ct. looked through the proceedings to ascertain if there was a *primâ facie* case of merits, & not finding such a case refused the application.—ELL *v.* WESTON (1887), 5 N. Z. L. R. C. A 120.— **N.Z.**

applt. was entitled to have the deposit paid out, & resp. could not claim the deposit as security for the costs incurred by applt. in unsuccessfully contesting the motion in the county ct.—*Re* SCOTT & MITCHELL, *Ex p.* SCOTT (1890), 62 L. T. 840; 39 W. R. 32; 6 T. L. R. 359; 7 Morr. 178.

SECT. 8.—HEARING OF APPEAL.

4910. Who may be heard—Solicitor—Appeal to Divisional Court from county court.]—A solr. has a right of audience on an appeal to the Divisional Ct. from a county ct. sitting in bkpcy.—*Re* BARNETT, *Ex p.* REYNOLDS (1885), 15 Q. B. D. 169; 54 L. J. Q. B. 354; 53 L. T. 448; 2 Morr. 122, D. C.; *revsd.*, without affecting this point, 15 Q. B. D. 169, 180, C. A.

Annotations:—**Mentd.** Sharp *v.* McHenry, Sharp *v.* Brown (1886), 55 L. T. 747; *Re* Bassett's Plaster Co., *Ex p.* Bassett (1894), 1 Mans. 297, D. C.; *Re* Richardson & Cook, *Ex p.* Grime's Exors. (1902), 86 L. T. 690, D. C.

4911. —— —— Appeal to Court of Appeal.]—The right of audience given to a solr. in bkpcy. matters by 1883 Act, s. 151, is limited to the High Ct., & does not extend to the Ct. of Appeal.—*Re* ELLERTON (1887), 3 T. L. R. 324; *sub nom. Re* ELDERTON, *Ex p.* RUSSELL, 4 Morr. 36; 31 Sol. Jo. 235, C. A.

4912. What matters may be considered—So much only of case as is appealed against.]—Upon an appeal in bkpcy. from part of an order so much only of the case as is covered by the appeal is open to resp., & unless he presents a cross appeal he cannot go into the whole case, as he might do upon an appeal in Ch., which is in the nature of a rehearing.—*Re* PHILLIPS, *Ex p.* KIVETON COAL CO. (1872), 7 Ch. App. 730; 42 L. J. Bcy. 11; 27 L. T. 670; 20 W. R. 1026, L. JJ.

4913. —— New case inconsistent with case in lower court.]—Applt. is not entitled to raise upon his appeal a new case inconsistent with that which he originally raised in the primary ct., even though the evidence taken in that ct. supports the new case.—*Re* WALTON, *Ex p.* REDDISH (1877), 5 Ch. D. 882; 37 L. T. 237; 25 W. R. 741, C. A.

Annotation:—**Mentd.** *Re* A Debtor, *Ex p.* Cardiff & Channel Mills (1917), 117 L. T. 574, D. C.

See 1915 Rules, r. 134, & R. S. C. Ord. 58, rr. 1, 4.

4914. —— Objection not taken in lower court.]—The trustee in a bkpcy., applied to a county ct. to set aside as fraudulent a mtge. executed by bkpt. The ct. having directed the trial of issues by a jury, & the deed having been found fraudulent, an order was made setting it aside, & a new trial refused. The mtgee. appealed against the setting aside, but not against the refusal of a new trial. The objection was then taken that the case was not one where the Ct. of Bkpcy. ought to exercise its extraordinary jurisdiction under 1869 Act, s. 72:—*Held:* the objection was raised too late after the mtgee. had taken his chance of a decision on the merits before the jury, &, as there had been no appeal from the refusal of a new trial, the finding of the jury was conclusive, & the order setting aside the deed a necessary consequence.—*Re* HARRISON, *Ex p.* BUTTERS (1880), 14 Ch. D. 265; 43 L. T. 2; 28 W. R. 876, C. A.

4915. Who opens.]—On a petition of appeal presented upon a special case:—*Held:* it was the constant practice for applt. to open in bkpcy.—*Re* MABERLEY, *Ex p.* BELCHER (1833), 3 Deac. & Ch. 87; Mont. & B. 286, L. C.

4916. Judge's note—To what court application must be made.]—A party who requires a copy of the notes of the judge of a county ct. must apply to him for it.—*Re* LOCK, *Ex p.* POPPLETON (1891), 8 Morr. 44, D. C.

4917. Admissibility of evidence—Evidence not called in lower court—Owing to party's default.]—On the hearing of an appeal in bkpcy., leave ought not to be given to use evidence, which was not used upon the hearing in the ct. below, where it was the fault of the person desiring to use the new evidence that it was not used on the original hearing.

Where applt. on the original hearing accepted an order in his favour, without insisting upon an application which he had made to have the matter ordered to stand over, in order that an affidavit

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PART XVII. SECT. 8.

k. *Form of petition.*]—A petition of appeal from the decision of a county ct. judge, acting in insolvency, need not set out all the evidence, documents, & materials used before the judge. What is needed is, that either the petition, or the notice accompanying it, should show to the opposite party the objection which is taken to the proceeding appealed from, & the materials to be used on the argument of the appeal.—HOOD *v.* DODDS (1873), 19 Gr. 639.—**CAN.**

l. ——.]—The petition in appeal under 1864 & 1865 Acts need not be signed by the insolvent or his assignee, but must be addressed to the ct., not to the chief justice but, *semble*, such irregularity may be corrected.—*Re* PARR (1867), 17 C. P. 621.—**CAN.**

m. ——.]—On an application to a judge in chambers for the allowance of an appeal from the decision of the judge in insolvency, an order was made referring the matter to the appellate ct., without directing a special case to be settled between the parties, but no objection was made on that ground:—*Held:* only an irregularity which might be waived, & if not waived ought to have been objected to by a rule to set aside the proceedings on that ground, & as the petition of appeal had been filed by permission of the ct., & applt. authorised to serve notice of hearing of appeal for a day named, the case was properly before the ct. for adjudication.—*Re* SHARPE (1869), 20 C. P. 82.—**CAN.**

n. *Requisites of jurisdiction.*]—Applt. from the decision of a judge of the county ct., under 1869 Act, s. 83, is bound to show that all the necessary preliminary steps have been taken. Without proof of the necessary preliminary steps being taken the ct. has no jurisdiction over the case, & no power to make any order with reference to it (WELDON, J.).—HAMILTON *v.* BOURGEOIS (1875), 3 Pug. 232.—**CAN.**

o. *Principle on which court acts.*]—The appellate ct. will, on appeals from the judge's ruling in insolvency, as on appeals from other cts., in cases where the evidence is contradictory, be governed in a great measure by the opinion of the judge who has seen the witnesses give their testimony; yet where giving full credence to all the witnesses relied on by the judge, the ct. differed in opinion from him as to the effect of that evidence, the ct. reversed the finding of the judge.—*Re* WEEKS (1876), 23 Gr. 252.—**CAN.**

4912 i. *What matters may be considered—So much only of case as is appealed against.*]—Under 1892 Act, & the rules of Mar. 21, 1893, thereunder, an appeal is an appeal within the strict meaning of that word, & not a rehearing. If resp. wishes to go into any part of the case not included in the notice of appeal he must give notice of cross-appeal.—*Re* REIMER (1897), 15 N. Z. L. R. 198.—**N.Z.**

4912 ii. —— ——.]—The Ct. of Appeal ought to be careful not to allow questions to be raised upon appeal which are clearly not within the notice of motion in the Supreme Ct.—*Re* MORRISON, *Ex p.* OFFICIAL ASSIGNEE (1905), 25 N. Z. L. R. 513.—**N.Z.**

4914 i. —— *Point not raised in court below.*]—Where the point on which an appeal is taken was not raised in the ct. below, the ct. will order the registrar to attend in the Ct. of Appeal, but will not annex a statement to that effect to the sched. of evidence.—*Re* CRAIG, *Ex p.* MORETON (1858), 8 I. Ch. R. 214.—**IR.**

4914 ii. *S. P. Re* PARR (1867), 17 C. P. 621.—**CAN.**

p. —— *Specifying errors in decision appealed from.*]—Where there was an appeal from the judgment of the comrs., the ct. did not require specific errors to be pointed out.—*Re* FRENCH & Co., *Ex p.* TOWNSEND (1828), 2 Mol. 242.—**IR.**

q. *Judge's reasons for order appealed against—Duty to forward.*]—The provision in 1890 Act, s. 11, directing a judge of the Insolvency Ct. to forward to the Supreme Ct. a statement of his reasons for making an order appealed against should be strictly complied with.—*Re* DAVIES (1896), 22 V. L. R. 40.—**AUS.**

4917 i. *Admissibility of evidence—Evidence not admitted in lower court.*]—In an appeal from the Ct. of Insolvency where there is no note in the appeal book of the refusal by the judge below to admit a particular deposition, the ct. will not act either on the statement of counsel or on an affidavit that it was tendered & refused, but will hear the appeal only on the materials before the judge below.—*Re* MCINTYRE (1885), 11 V. L. R. 312.—**AUS.**

Sect. 8.—*Hearing of appeal. Sects.* 9 & 10: *Subsect.* 1.]

on his behalf, which had been sworn but not filed, might be used, leave was refused to use that affidavit upon the hearing of an appeal.—*Re* DE VECCHY, *Ex p.* ISAAC (1870), 6 Ch. App. 58; 23 L. T. 523; 19 W. R. 38, L. JJ.

Annotation:—**Mentd.** *Re* Ferrige, *Ex p.* Ferrigo (1875), L. R. 20 Eq. 289.

4918. —— —— Special reasons—What is not sufficient reason.]—Debtor, in an affidavit filed in a county ct., stated that a debtor's summons had been served upon him on or about July 2, 1870. In an affidavit subsequent to the hearing in the county ct., & while the case was under appeal, he stated that he had been mistaken as to the date, which he remembered to have been June 30. He was sure of it, as it was on a market-day, & June 30 was a market-day:—*Held:* no special reasons existed for the admission of such evidence, but, on the contrary, the above rule would be worse than useless if such evidence could be admitted.—*Re* BROADBENT, BLACKBURN *v.* HOMAN (1871), 19 W. R. 1078.

4919. —— —— To explain delay in serving notice of appeal.]—The ct. will not admit evidence not before the ct. below, in order to explain delay in serving notice of appeal.—*Re* GREEN, *Ex p.* DONNITHORNE (1879), 40 L. T. 660; 27 W. R. 824.

Annotation:—**Mentd.** *Re* Southam, *Ex p.* Lamb (1881), 19 Ch. D. 169, C. A.

See, also, No. 4880, *ante.*

4920. —— Evidence taken but not used in original hearing.]—Evidence taken before, but not used upon the original hearing, was not admitted upon the hearing of an appeal.—*Re* JAMES, *Ex p.* HARRIS (1874), L. R. 19 Eq. 253.

4921. —— Shorthand writer's notes—Judge's notes before court.]—Where an issue of fact has been tried before a judge under 1869 Act, s. 72, & the Ct. of Appeal is furnished with the judge's notes of the trial, they are conclusive as to the evidence adduced before him, & the ct. will not receive the notes of a shorthand writer except by consent of both parties.—*Re* SIDEBOTHAM, *Ex p.* GILLEBRAND (1874), 10 Ch. App. 52; 31 L. T. 715; 39 J. P. 165; 23 W. R. 194, L. C. & L. JJ.

Annotation:—**Mentd.** *Re* Simpson, *Ex p.* Morgan (1876), 2 Ch. D. 72, C. A.

4922. —— —— —— As regards vital points.]—On the hearing of an appeal, the judge's note may by special order be supplemented on vital points by a transcript of a shorthand writer's note, but the whole of the shorthand writer's note ought not to be referred to.—*Re* SPRANGE, *Ex p.* OFFICIAL RECEIVER (1898), 77 L. T. 808; 4 Mans. 335, D. C.

4923. —— Notes of proceedings verified by affidavit—Judge having failed to take notes.]—It is the duty of a county ct. judge sitting in bkpcy. to take a note of the oral evidence given before him, but where such judge has neglected his duty to take a note, the ct. will not readily decline to entertain an appeal from his decision on the ground of the absence of evidence, if a note of the proceedings, which should be verified by affidavit, can be obtained from other sources.—*Re* SHARP, *Ex p.* SHARP (1893), 10 Morr. 114, D. C.

4924. —— Vivâ voce evidence—Further evidence necessary.]—Where additional evidence was necessary to enable the Ct. of Appeal to dispose of a case satisfactorily, such evidence was taken *vivâ voce* on the hearing of the appeal.—*Re* WIKE, *Ex p.* KEIGHLEY (1874), 9 Ch. App. 667; 44 L. J. Bcy. 13, L. JJ.

Annotation:—**Mentd.** *Re* Ashworth & Outram (1893), 69 L. T. 259.

4925. Sufficiency of evidence—Findings of trial judge not conclusive.]—The Ct. of Appeal is not bound to accept as conclusive the finding of a judge on the trial of an issue of fact under 1869 Act, s. 72.—*Re* SIDEBOTHAM, *Ex p.* GILLEBRAND (1874), 10 Ch. App. 52; 31 L. T. 715; 39 J. P. 165; 23 W. R. 194, L. C. & L. JJ.

Annotation:—**Consd.** *Re* Simpson, *Ex p.* Morgan (1876), 2 Ch. D. 72, C. A.

4926. Dismissal of appeal—Appellant failing to appear—Respondent not proving receipt of notice of appeal.]—When a bkpcy. appeal has been set down in the ordinary course & is in the day's paper for hearing, if applt. does not appear, resp. is entitled to have the appeal dismissed with costs without giving any proof that he has been served with a notice of appeal.—*Re* LOWS, *Ex p.* LOWS (1877), 7 Ch. D. 160; 47 L. J. Bcy. 24; 37 L. T. 583; 26 W. R. 229, C. A.

Annotation:—**Follid.** James *v.* Crow (1878), 7 Ch. D. 410.

4927. —— Appeal abandoned.]—Where, after an appeal has been lodged, applt. desires to abandon his appeal, the proper form of order is that the appeal be dismissed with costs.—*Re* DOWNING, *Ex p.* MARDEN (1891), 65 L. T. 665; 8 Morr. 302, C. A.

See, also, No. 4931, *post.*

SECT. 9.—**COSTS OF APPEAL.**

4928. General rule.]—The Ct. of Bkpcy. will follow the rule laid down by the Ct. of Appeal, & in general a successful applt. will, in bkpcy., be entitled to his costs of appeal.—*Re* WINSON, *Ex p.* MASTERS (1875), 1 Ch. D. 113; 45 L. J. Bcy. 18; 33 L. T. 613; 24 W. R. 113.

4929. Costs not allowed—Appeal successful.]—A successful applt. from the county ct. was not allowed costs of appeal.—*Re* CHERRY, *Ex p.* MATHEWS (1871), L. R. 12 Eq. 596; 40 L. J. Bcy. 90; 19 W. R. 1005.

4930. —— —— On point not raised in lower court.]—Where an appeal was successful, on the ground of an objection to the jurisdiction which had not been taken in the ct. below, the appeal was allowed, but without costs.—*Re* CLIFFE, *Ex p.* EATOUGH & CO., LTD. (1880), 42 L. T. 95; 28 W. R. 433.

4931. —— Appeal abandoned—On new evidence being produced.]—When a party appeals, &, subsequently, further evidence is adduced which causes him to abandon his appeal, no costs will be given to either side.—*Re* AIRD, *Ex p.* WEIR (1873), 21 W. R. 785.

4932. —— Appeal dismissed on preliminary objection — Respondent having failed to give notice.]—When resp. to an appeal intends to take a preliminary objection he should give notice to

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r. —— *Evidence outside case stated.*]—On an appeal under 1892 Act, & the rules of Mar. 21, 1893, thereunder, it is open to applt. to contend that the appellate ct. ought, upon the case stated, to come to different conclusions of fact from those arrived at by the ct. below; but the appeal is not a rehearing, & evidence outside of the case stated will not be admitted in the appellate ct.—*Re* MCGRATH, *Ex p.* OFFICIAL ASSIGNEE (1897), 17 N. Z. L. R. 646.—**N.Z.**

s. *Grounds for refusing.*]—The neglect by the assignee to file the papers on or before the day of presenting a petition in appeal by insolvent is no reason for rejecting the appeal.—*Re* PARR (1867), 17 C. P. 621.—**CAN.**

PART XVII. SECT. 9.

a *Scale of costs.*]—On an appeal to the Ct. of Appeal in bkpcy. the scale of costs fixed by r. 22 of the Ct. of Appeal Rules will be followed.—*Re* MORRISON, *Ex p.* OFFICIAL ASSIGNEE, (1905), 25 N. Z. L. R. 513.—**N.Z.**

b. *Taxation of costs of appeal—Jurisdiction to tax.*]—The taxing officers of the Local Bkpcy. Cts. have no jurisdiction to tax costs incurred in the Ct. of Appeal on appeal from orders of the Local Bkpcy. Judge.—*Re* RADCLIFFE (1916), 50 I. L. T. 81.—**IR.**

applt. of his intention so to do. If no such notice is given & the objection prevails, the appeal will be dismissed without costs.—*Re* SPEIGHT, *Ex p.* BROOKS (1884), 13 Q. B. D. 42.

Annotations :—**Folld.** *Re* Blinkhorn, *Ex p.* Blease (1884), 14 Q. B. D. 123. **N.F.** *Re* Mundy, *Ex p.* Shead (1885), 53 L. T. 655, C. A.

4933. ——— ——— ——— **Practice as to giving notice.**]—When resp. to an appeal intends to take a preliminary objection, it is not the usual practice for resp. to give notice to applt. at the earliest possible moment of his intention to do so, & of the nature of the objection, in order that applt. may know that if he goes on with his appeal he does so at the peril of costs.—*Re* COURTENAY, *Ex p.* DEAR (1884), 1 Morr. 89, C. A.

Annotation :—**Refd.** *Re* Faulconer, *Ex p.* Cochrane (1889), 61 L. T. 56.

4934. ——— ——— ———.]—Resp. to an appeal, who intends to rely on a preliminary objection ought to give notice to applt. of his intention to do so, & if he does not, & the objection is successful, the appeal will be dismissed without costs.—*Re* BLINKHORN, *Ex p.* BLEASE (1884), 14 Q. B. D. 123; 33 W. R. 432; *sub nom. Re* BLENKHORN, *Ex p.* BLEASE & BLEASE, 1 Morr. 280, D. C.

Annotation :—**Consd.** *Re* Mundy, *Ex p.* Shead (1885), 53 L. T. 655, C. A.

4935. ——— ——— ———.]—Where resp. succeeds on a preliminary objection to the hearing of an appeal, his omission to give notice to applt. of his intention to raise such preliminary objection is not sufficient ground for depriving him of the costs of the appeal.—*Re* MUNDY, *Ex p.* SHEAD (1885), 15 Q. B. D. 338; 53 L. T. 655; 2 Morr. 227, C. A.

4936. ——— ——— ———.]—Where no notice had been given to applt. of a preliminary objection raised by resp. :—*Held :* the appeal could not be heard, but resp. was not entitled to costs.—*Re* PHILLIPS, *Ex p.* TRUSTEE (1895), 2 Mans. 206, D. C.

4937. What costs—Costs of original hearing—Appellant succeeding on ground not raised in lower court.]—Where applt. succeeds only upon a ground not raised in the ct. of first instance, he will have to pay the costs of the original hearing.—*Re* JAMES, *Ex p.* HARRIS (1874), L. R. 19 Eq. 253; 44 L. J. Bcy. 31; 31 L. T. 621; 23 W. R. 536.

4938. ——— **Copy of shorthand notes of county court proceedings.**]—The charge for a copy of a shorthand writer's notes of the proceedings in a county ct., was allowed as part of the costs of an appeal.—*Re* BOWDEN, *Ex p.* SAWYER (1876), 1 Ch. D. 698; 45 L. J. Bcy. 56; 33 L. T. 759; 24 W. R. 375.

Annotation :—**Refd.** Hill's Exors. *v.* Metropolitan District Asylum (1880), 49 L. J. Q. B. 668, C. A.

Set-off of costs of appeals.]—*See* Part XVI., Sect. 5, sub-sect. 4, *ante*.

4939. Country solicitor attending personally.]—A country solr. personally attending an appeal, instead of employing his London agent, will, on taxation, be allowed the additional charges & expenses thereby occasioned.—*Re* FOSTER, *Ex p.* DICKENS (1878), 8 Ch. D. 598; 48 L. J. Bcy. 32; 26 W. R. 915.

Annotations :—**Refd.** *Re* Sherwell, *Ex p.* Snow, [1879] W. N. 22; *Re* Storer (1884), 26 Ch. D. 189; The Soto, [1893] P. 73.

Creditors opposing discharge.]—*See* No. 5236, *post*.

4940. Debtor—For what amount liable.]—An undischarged debtor was ordered to pay the costs of his unsuccessful appeal up to, but not beyond, the amount of his deposit.—*Re* BAUM, *Ex p.* BAUM (1878), 7 Ch. D. 719; 47 L. J. Bcy. 48; 38 L. T. 367; 26 W. R. 568, C. A.

Annotation :—**Mentd.** *Re* Baum, *Ex p.* Evans (1880), 28 W. R. 500, C. A.

4941. ——— **Whether personal order made against.**]—No personal order can be made against bkpt. for payment of the costs of an unsuccessful appeal.—*Re* JACOBS, *Ex p.* JACOBS (1875), 44 L. J. Bcy. 34, C. A.

Annotations :—**Mentd.** *Re* Fothergill, *Ex p.* Corry (1876), 45 L. J. Bcy. 153, C. A.; Mortgage Insce. Corpn. *v.* Pound (1895), 64 L. J. Q. B. 394.

See, also, Nos. 1689 *et seq., ante*.

Official receiver.]—*See* Part VI., Sect. 6, *ante*.

Trustee in bankruptcy.]—*See* Part VII., Sect. 5, sub-sect. 2, B. (*a*), *ante*, Part XXI., *post*.

SECT. 10.—REHEARING.

SUB-SECT. 1.—JURISDICTION AND DISCRETION OF COURT.

See 1914 Act, s. 108.

4942. Jurisdiction of court—Application for bond.]—The ct. has power to rehear the application for a bond under 1849 Act, s. 79.—ANON. (1851), 18 L. T. O. S. 128.

4943. ——— **Notwithstanding that result may allow appeal otherwise too late.**]—Cts. having jurisdiction in bkpcy. are entitled to rehear cases which they have decided, even if they should, by varying their former orders, give a right of appeal, which would otherwise have been lost by lapse of time.—*Re* BROWN, *Ex p.* LONDON & COUNTY BANKING CO., *Ex p.* TRICKETT (1873), L. R. 16 Eq. 391; 42 L. J. Bcy. 112; 29 L. T. 73; 21 W. R. 842.

Annotation :—**Consd.** *Re* Lister, *Ex p.* Simmons (1876), 2 Ch. D. 749.

4944. ——— **Notwithstanding appeal pending.**]—The jurisdiction given to every Ct. of Bkpcy., by 1869 Act, s. 71, to review, rescind or vary any order made by it, is almost without limit in proper cases, & the fact that an appeal from an order is pending will not prevent the rehearing of the case by the ct. below.—*Re* WIKE, *Ex p.* KEIGHLEY (1874), 9 Ch. App. 667; 44 L. J. Bcy. 13, L. JJ.

Annotation :—**Apld.** *Re* Ashworth & Outram, *Ex p.* Ashworth & Outram (1893), 10 Morr. 175, D. C.

4945. ——— ——— **Registrar sitting as Chief Judge.**]—A registrar sitting as Chief Judge has a discretion to rehear a case, even after an appeal from his decision, if the point on which a rehearing is desired is unaffected by the appeal.—*Re* JEAVONS,

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PART XVII. SECT. 10, SUB-SECT. 1.

c. *Jurisdiction of court—On hearing of appeal.*]—Upon an appeal under Insolvency Act, 1871, s. 12, where the facts do not sufficiently appear from the judge's reason & notes of evidence, the ct. has jurisdiction to remit the case for further restatement, with power to the judge to rehear the case.—*Re* RUDDOCK (1879), 5 V. L. R. 51.—**AUS.**

d. ——— *Order made by mistake.*]—The solr. of an opposing creditor informed insolvent's solr., on the morning of the hearing, of his intention to persist in his opposition. The case was called on in the momentary absence of the creditor's solr.; &, no one being present to oppose, a discharge was pronounced by the judge. The creditor's solr., coming in immediately after asked for a rehearing :—*Held :* when an adjudication under Bkpcy. & Insolvency Act, s. 212, had been pronounced by the lips of the judge, he had no power to set it aside under s. 236, on the ground that the discharge was a mistake.—*Re* LOGAN, *Ex p.* DUKE OF WELLINGTON (1859), 9 I. Ch. R. 569; 12 Ir. Jur. 41.—**IR.**

e. *Discretion of court—To set aside order made on rehearing.*]—Where the ct. orders an application before a registrar to be reheard, & the registrar takes the evidence formerly given as part of the case, the registrar's further order will not be set aside, if the witnesses examined & the material facts proved at the first hearing be again examined & proved.—*Re* BLOOMFIELD (1886), 4 N. Z. L. R. C. A. 356.—**N.Z.**

f. ——— *As to costs of rehearing.*]—Where there are some variations made in the decree, though not all the party seeks, there will be no costs given of the rehearing.—GRAHAM *v.* WALKER (1809), 2 Mol. 445.—**IR.**

Sect. 10.—*Rehearing: Sub-sects.* 1 & 2. *Part XVIII. Sect.* 1.]

Ex p. MACKAY (1873), 9 Ch. App. 127 ; 43 L. J. Bcy. 105 ; 29 L. T. 713 ; 22 W. R. 198, L. C. & L. J. ; *subsequent proceedings, sub nom. Re* JEAVONS, *Ex p.* BROWN (1874), 9 Ch. App. 304, L. C. & L. JJ.

4946. —— —— In special circumstances.]—*Semble :* A rehearing upon fresh evidence may be granted, notwithstanding a pending appeal to the House of Lords, but only in special circumstances. —*Re* HOOPER, *Ex p.* BANCO DE PORTUGAL (1880), 14 Ch. D. 1 ; 49 L. J. Bcy. 21 ; 42 L. T. 210 ; 28 W. R. 433, C. A.

Appeal from order made on rehearing.]—*See* Nos. 4806, 4807, *ante.*

SUB-SECT. 2.—APPLICATION FOR REHEARING AND HEARING OF APPLICATION.

See 1914 Act, s. 108.

4948. In what cases rehearing proper course to adopt.]—The ct. will not lay down a general rule in bkpcy. that, where a party bringing an appeal has not appeared at the hearing in the ct. below, the proper course is to apply for a rehearing.—*Re* MICHAEL, *Ex p.* MICHAEL (1891), 8 Morr. 305, D. C.

Annotation :—**Mentd.** *Re* Walker (1910), 26 T. L. R. 260.

4949. To what court—Court making order.]—The power given to the ct. by 1883 Act, s. 104, to review, rescind, or vary an order made by it is only given to the ct. by which the order is in fact made.—*Re* MAUGHAM, *Ex p.* MAUGHAM (1888), 21 Q. B. D. 21 ; 57 L. J. Q. B. 487, D. C.

Annotation :—**Mentd.** *Re* Maund, *Ex p.* Maund, [1895] 1 Q. B. 194.

4950. —— —— Decision of registrar—Subject to review only by himself & Court of Appeal.]—The decision of a registrar can only be reviewed by himself or by the Ct. of Appeal.—*Re* MOORE (1885), 2 Morr. 78.

4951. —— —— —— Not subject to review by county court judge.]—A county ct. judge has no power to review a decision of the registrar.—*Re* CLIFTON (LORD), *Ex p.* CLIFTON (LORD), (1890) 7 Morr. 59, D. C.

4952. Within what time.]—There is no rule in bkpcy., that any time is a bar to a petition for a rehearing.—*Re* BAILLIE, *Ex p.* GREENWOOD (1834), 3 Deac. & Ch. 398 ; 1 Mont. & A. 65 ; 3 L. J. Bcy. 6, Ct. of R.

4953. ——.]—An application to review an order was granted, where the delay in making the application was *bonâ fide* & unavoidable & a *primâ facie* case had been made out.—*Re* PARKER & BULTEEL, *Ex p.* DEARE, DEARE *v.* PEARCE, [1917] H. B. R. 230, D. C.

4954. —— After time allowed for appeal.]—Although 1 & 2 Will. 4, c. 56, s. 32, directed that the decision of the Ct. of Review, on any appeal from the comr. on a question of proof, should be final, unless an appeal to the Lord Chancellor was lodged within a month, the Ct. of Review in special circumstances, permitted a case of such description to be reheard, notwithstanding the petition for rehearing was not presented until six months after the former hearing.—*Re* WARWICK & CLAGETT, *Ex p.* JACKSON RIDDLE & CO. (1839), 3 Deac. 651 ; 8 L. J. Bcy. 36, Ct. of R.

4955. —— Within time for entering appeal—Effect of delay.]—An application for a rehearing ought, in ordinary cases, to be made within the time fixed by 1870 Rules, r. 143, for entering an appeal, & where a long delay is unaccounted for a rehearing will not be granted.—*Re* JEAVONS, *Ex p.* BROWN (1874), 9 Ch. App. 304 ; 43 L. J. Bcy. 105 ; 30 L. T. 108 ; 22 W. R. 602, L. C. & L. JJ.

Annotations :—**Distd.** *Re* Wrigley, *Ex p.* Reader (1875), L. R. 20 Eq. 763. **Apld.** *Re* Elham Valley Ry. Co., Dickson's Case (1879), 12 Ch. D. 298. **Expld.** *Re* Stanger, *Ex p.* Geisel (1882), 22 Ch. D. 436, C. A. The ct. did not lay down any absolute limit of time as to rehearing ; they only said that as a general rule they would adhere to the limit of twenty-one days fixed for appealing (JESSEL, M.R.). **Consd.** *Re* Ritso, *Ex p.* Ritso (1883), 22 Ch. D. 529, C. A. **Refd.** Heatley *v.* Newton (1881), 19 Ch. D. 326, C. A.

4956. —— —— Special circumstances.]—Though as a general rule a rehearing ought not to be allowed after the expiration of the time limited for appealing from the order, yet, there being no time fixed by 1869 Act or 1870 Rules for applying for a rehearing, the ct. will on special grounds allow a rehearing when it is applied for after the expiration of the time for appealing, even when the application is to rehear a petition which has been dismissed. —*Re* RITSO, *Ex p.* RITSO (1883), 22 Ch. D. 529 ; 52 L. J. Ch. 535 ; 48 L. T. 376 ; 31 W. R. 373, C. A.

Annotation :—**Mentd.** *Re* Lennox, *Ex p.* Lennox (1885), 16 Q. B. D. 315, C. A.

4957. —— —— Power of court when time expired.]—The power of the ct. to rehear may be exercised, although the application has not been made within the time for appealing.—*Re* MAY, *Ex p.* MAY (1884), 12 Q. B. D. 497 ; 50 L. T. 744 ; 32 W. R. 839 ; 1 Morr. 50, C. A.

4958. How made—Whether ex parte.] — *Semble :* an application for rehearing should not be made *ex p.*—*Re* RITSO, *Ex p.* RITSO (1883), 22 Ch. D. 529 ; 52 L. J. Ch. 535 ; 48 L. T. 376 ; 31 W. R. 373, C. A.

Annotation :—**Mentd.** *Re* Lennox, *Ex p.* Lennox (1885), 16 Q. B. D. 315, C. A.

4959. Who begins.]—Upon a petition for a rehearing, the counsel for applt. begins.—*Re* MABERLEY, *Ex p.* CUNNINGHAM (1833), 2 L. J. Bcy. 75.

4960. Grounds for application—Materials previously before court—Clear mistake.]—An application for rehearing should not be made on materials previously before the ct., except in the case of clear mistake.—*Re* AYSHFORD, *Ex p.* LOVERING (1887), 35 W. R. 652 ; 3 T. L. R. 604 ; 4 Morr. 164.

Annotation :—**Mentd.** *Re* Craig, *Ex p.* Hinchcliffe, [1916] 2 K. B. 497.

4961. For what purpose granted—To enable appeal to be brought.]—Where an order has been made, the ct. ought not to allow a rehearing merely for the purpose of enabling an appeal to be brought which would otherwise have been too late.—*Re* LISTER, *Ex p.* SIMMONS (1876), 2 Ch. D. 749 ; 45 L. J. Bcy. 113 ; 34 L. T. 744.

4962. —— ——.]—The power to rehear ought not to be exercised to extend the time for appealing. —*Re* MAY, *Ex p.* MAY (1884), 12 Q. B. D. 497 ; 50 L. T. 744 ; 32 W. R. 839 ; 1 Morr. 50, C. A.

4963. *S. P. Re* PARKER & BULTEEL, *Ex p.* DEARE, DEARE *v.* PEARCE, [1917] H. B. R. 230, D. C..

4964. —— To insert evidence not before court—For purpose of appeal to House of Lords.]—The

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PART XVII. SECT. 10, SUB-SECT. 2.

4948 i. *In what cases, [rehearing proper course to adopt.*]—On a petition by two creditors, who had proved claims under a decree for the administration of their debtor's estate in accordance with the trusts of an assignment for the benefit of creditors, seeking to have the priority of their claims determined :—*Held :* the proper procedure was not to seek to have the existing decree varied, but to rehear the cause, & they were entitled to do so, though not parties, the decree affecting their interest.—MULHOLLAND *v.* HAMILTON (1866), 12 Gr. 413.—CAN.

Ct. of Appeal in Bkpcy. has jurisdiction, under 1869 Act, s. 71, to rehear upon fresh evidence, & to alter, vary or rescind its orders; but it will not rehear an order under appeal to the House of Lords, merely to insert in the order, for the purposes of such appeal, evidence that was not before it.—*Re* HOOPER, *Ex p.* BANCO DE PORTUGAL (1880), 14 Ch. D. 1; 49 L. J. Bcy. 21; 42 L. T. 210; 28 W. R. 433, C. A.

4965. When granted—Application for rehearing before whole court—Certificate of Lord Justices as to fitness of case.]—Application that a petition of appeal, which had been heard before the Lords Justices, might be reheard before the full ct. An order had been made by the District Ct. of Bkpcy. at Liverpool, which had been reversed by the Lords Justices, who had refused a case to enable appct. to appeal to the House of Lords. The point was one of great nicety, & involved property to a very large amount:—*Held:* if the Lords Justices would certify that they thought the case a fit one to be heard before the full ct., the application should be granted.—TURNER *v.* CROSTHWAITE (1852), 20 L. T. O. S. 58, L. C.

4966. Grounds for granting—Applicant not properly represented.]—On an application for an interpleader order in the Ct. of Bkpcy. the execution creditor was represented only by a solr.'s clerk. The registrar declined to hear him &, later, refused an application for rehearing:—*Held:* appct. was entitled to a rehearing.—*Re* MORRIS, *Ex p.* STREETER (1881), 19 Ch. D. 216; 45 L. T. 634; 30 W. R. 127, C. A.

Annotations:—**Mentd.** Turner *v.* Bridgett & Wright (1882), 51 L. J. Q. B. 377, C. A.; Hession *v.* Jones, [1914] 2 K. B. 421, D. C.

4967. —— —— Solicitor failing to attend.]—An application for the rehearing of a motion, on the ground that a solr. who had been instructed had failed to attend the original hearing, was granted, subject to payment of costs.—*Re* BLENNERHASSET, *Ex p.* BLENNERHASSET (1890), 7 Morr. 282.

4968. Grounds for refusing—No new facts.]—A petition for rehearing was dismissed, as (1) petitioner did not state "any new fact, or if anything had been discovered since the former hearing," (2) nothing was alleged "which might not equally have been alleged at the former hearing," (3) there had been no application then to adjourn the hearing, & (4) the sole ground of the petition to rehear was, that "petitioner was furnished with an affidavit of some party stating that the deeds, which were established in evidence on the former hearing, & on which the order of the ct. was founded, were fraudulent & void."—*Re* HARRIOTT, *Ex p.* MOULD (1842), 2 Mont. D. & De G. 744, Ct. of R.

4969. —— Order not made under bankruptcy jurisdiction—Charging order.]—In an action in the Ch. Div., by one partner against another, for a dissolution of the partnership, judgment was given for a dissolution, & the appointment of a receiver of the assets of the partnership. Both the partners were afterwards adjudged bkpt.; the action was transferred to the Q.B. Div. in bkpcy., & the judge having jurisdiction in bkpcy. made an order under Solrs. Act, 1860 (c. 127), s. 28, charging the costs of pltf.'s solr. on the funds in the hands of the receiver. Before the order was made, the landlord of the premises, in which bkpts. had carried on their business, had given notice to the receiver of a claim for rent due to him, but had not attempted to distrain. The judge was not informed of such claim before he made the order, & he subsequently made a further order, by which he directed the receiver to pay the rent due to the landlord, & to pay the balance in his hands to the solr.:—*Held:* the charging order was not made by the judge in the exercise of his bkpcy. jurisdiction, & he had no power to rescind or vary it under 1883 Act, s. 104.—*Re* SUFFIELD & WATTS, *Ex p.* BROWN (1888), 20 Q. B. D. 693; 58 L. T. 911; 36 W. R. 584; 5 Morr. 83, C. A.

Annotations:—**Consd.** *Re* Wood, *Ex p.* Fanshawe, [1897] 1 Q. B. 314; *Re* Deakin, *Ex p.* Daniell, [1900] 2 Q. B. 489, C. A. **Refd.** *Re* Crown Bank (1890), 44 Ch. D. 634; Preston Banking Co. *v.* Allsup, [1895] 1 Ch. 141, C. A.; *Re* Humphreys, *Ex p.* Lloyd-George (1898), 67 L. J. Q. B. 412, D. C. **Mentd.** Cole *v.* Eley (1894), 38 Sol. Jo. 533, C. A.

4970. Costs—Included in taxed costs of petitioning creditor.]—The "taxed costs of petitioning creditor" in 1886 Rules, r. 125, include as a rule the costs of a rehearing by the registrar & the Ct. of Appeal.—*Re* BRIGHT, *Ex p.* WINGFIELD & BLEW, [1903] 1 K. B. 735; 72 L. J. K. B. 287; 10 Mans. 31.

Part XVIII.—Order of Discharge.

See, now, 1914 Act, s. 26, & 1915 Rules, rr. 227–239.

SECT. 1.—APPLICATION FOR ORDER.

4971. Who may apply—Debtor adjudged bankrupt under 1869 Act—Application under Discharge & Closure Act, 1887 (c. 66), s. 2.]—*Held:* under the above sect. debtor, who had been adjudged bkpt., or whose affairs had been liquidated by arrangement under 1869 Act, & who had not obtained his discharge, might apply to the ct. for an order of discharge.—*Re* GREPE (1889), 6 T. L. R. 19.

4972. —— Liquidation under 1869 Act—Application under Discharge & Closure Act, 1887 (c. 66), s. 2.]—In 1884 at a meeting of the creditors of debtor, whose affairs were being liquidated by arrangement under 1869 Act, resolutions were passed releasing the trustee & closing the liquidation, & it was also resolved that the discharge of debtor should be granted. At a subsequent meeting held in 1889 a resolution was obtained, whereby the discharge of debtor was granted. On an application under 1869 Act, s. 125 (10), for a certificate to that effect, the county ct. registrar refused to certify, on the ground that the resolution

4967 i. *Grounds for granting—Appeal struck out through mistake of counsel.*]—Through misapprehension as to the hour at which the ct. sat, counsel appeared after his appeal had been struck out:—*Held:* considering the nature of the order appealed from, the appeal would be reinstated, were there reason to believe that upon full argument the order would prove to be erroneous.—MCMONAGLE *v.* ORTON (1890), 6 Man. L. R. 350.—**CAN.**

PART XVIII. SECT. 1.

a. *Who may apply—Debtor with estate to be administered.*]—*Re* SMITH (1867), 4 P. R. 89.—**CAN.**

b. —— *Executors.*]—Exors. of deceased insolvent, cannot, on the acceptance of a composition, obtain, under Insolvency Statute 1865, s. 42, a release of the estate from sequestration.—*Re* SCALLAN (1876), 2 V. L. R. 2.—**AUS.**

c. —— *Non-traders—Effect of* 1871 *Act.*]—T. & J. who had applied for a discharge in insolvency under 1869 Act, at the time of its passage had ceased to be traders. Before judgment 1871 Act was passed, amending the former Act:—*Held:* applts. came within the latter Act & were entitled to the discharge.—*Re* ARCHIBALD & ARCHIBALD (1871), 8 N. S. R. 303.—**CAN.**

Sect. 1.—Application for order. Sect. 2.]

was *ultra vires:—Held:* the proper course for debtor to take was to apply to the ct. for his discharge under Discharge & Closure Act, 1887, s. 2.—*Re* HART & SON, *Ex p.* HART (1889), 58 L. J. Q. B. 440; 61 L. T. 256; 38 W. R. 32; 5 T. L. R. 641; 6 Morr. 235.

4973. —— Bankrupt undischarged under previous bankruptcy.]—When an undischarged bkpt. makes an application for his discharge under a second bkpcy., the ct. will not entertain the application, until he has purged himself of his former bkpcy.

On the application of bkpt. for his discharge the official receiver reported that bkpt. had previously filed a petition for liquidation of his affairs, under which his discharge had not been granted:—*Held:* it appearing that bkpt. had not obtained his discharge under the liquidation petition, the application would be adjourned *sine die* with liberty to apply.—*Re* BINKO (1885), 1 T. L. R. 239; 2 Morr. 45.

See, further, Sect. 5, *post*.

4974. —— Discharge suspended under previous bankruptcy—Application during suspension.]—An application for discharge under a second bkpcy. may be made, although the period for which his discharge was suspended under the first bkpcy. has not expired.—*Re* DAVIES (1910), 26 T. L. R. 457.

4975. Second application—On what conditions.]—*Qu.:* whether & where an order of discharge has been refused by reason of the conduct of bkpt., such bkpt. may not at a subsequent period again apply for his discharge, if he is able to show that, during the years it has been suspended, he had displayed qualities, the want of which caused his discharge to be refused on the previous occasion.—*Re* LLOYD, *Ex p.* LLOYD (1889), 62 L. T. 366; 6 Morr. 297, D. C.

Annotation:—**Consd.** *Re* Tobias, *Ex p.* Tobias, [1891] 1 Q. B. 463, D. C.

4976. —— ——.]—Where the discharge of bkpt. has been refused absolutely, such bkpt. is not entitled to apply to the ct. *de novo* for an order of discharge; but the ct. has power under 1883 Act, s. 104 to entertain an application by bkpt. for a review, & may thereupon rescind or vary its former order if it thinks right to do so.—*Re* TOBIAS & CO., *Ex p.* TOBIAS, [1891] 1 Q. B. 463; 60 L. J. Q. B. 244; 64 L. T. 115; 39 W. R. 399; 7 T. L. R. 296; 8 Morr. 30, D. C.

Annotation:—**Refd.** *Re* Shields, *Ex p.* Bankrupt (1912), 106 L. T. 345, D. C.

See, further, Nos. 5008, 5009, 5028, 5029, *post*.

—— Liberty to apply.]—*See* No. 4973, *ante*, Nos. 5235, 5254, 5259, 5288, *post*.

4977. —— Discharge refused under 1890 Act, s. 8 (2)—Period of probation.]—Where the discharge of bkpt. has been refused under the above sub-sect. in consequence of his having committed a misdemeanour in connection with his bkpcy., the ct. has jurisdiction to grant the order of discharge at a later date, & an application by bkpt. for such an order may be considered after the lapse of such time from the refusal of the order of discharge as the ct. may, in the circumstances, think a sufficient period of probation.—*Re* SOLOMONS, [1904] 1 K. B. 106; 73 L. J. K. B. 55; 89 L. T. 637; 52 W. R. 473; 10 Mans. 369, C. A.

Annotation:—**Mentd.** *Re* Smith, *Ex p.* Smith (1918), 88 L. J. K. B. 113, D. C.

4978. Effect of delay—Punishment of applicant—1883 Act, s. 28.]—The fact that bkpt., who, by his conduct, has brought himself within the *quasi*-penal provisions of the above sect., abstains from applying for his discharge for a considerable time after he is entitled to do so, affords no ground for mitigation of the punishment proper to be imposed by the ct. under that sect. by reason of such conduct.—*Re* GOOD (1886), 3 Morr. 43.

4979. —— Whether ground for refusal.]—Delay in applying is no justification for an absolute refusal of discharge.—*Re* PEARSE, *Ex p.* BANKRUPT (1912), 107 L. T. 859, D. C.

4980. Withdrawal—Power of court.]—The Bkpcy. Ct. has power to allow a bkpt. to withdraw an application, made under 1883 Act, s. 28, for an order of discharge.—*Re* WALLIS, *Ex p.* BOARD OF TRADE (1891), 60 L. J. Q. B. 455; 55 J. P. 389; 39 W. R. 453; 7 T. L. R. 419; 8 Morr. 110, C. A.

Annotations:—**Folld.** *Re* Robertson (1902), 18 T. L. R. 670. **Consd.** *Re* Tanner (1902), 19 T. L. R. 28.

4981. —— When refused—Opposition prejudiced.]—The ct. will refuse to allow an application for an order of discharge to be withdrawn, only in cases where witnesses are brought forward by the official receiver in opposition to the discharge, & the opposition might be prejudiced by the application being withdrawn & renewed at a later date.—*Re* ROBERTSON (1902), 18 T. L. R. 670; 46 Sol. Jo. 603.

4982. —— —— ——.]—Leave to withdraw an application for discharge was refused, the official receiver stating that evidence which was available

d. —— *Sole creditor who has proved.*]—On an application for a certificate under Stat. 1865 (No. 273), s. 109, where one creditor only has proved, the ct. will not on his request grant the certificate, as such one creditor does not constitute a "majority" within the sect.—*Re* FALLU (1877), 3 V. L. R. 106.—**AUS.**

4975 i. *Second application—On what conditions.*]—Where an application to discharge an insolvent debtor was refused with costs, the ct. refused to make the payment of the costs a condition precedent to another application.—MCFARLANE *v.* GORDON (1851), 2 All. 201.—**CAN.**

4975 ii. —— *Previous application refused on account of insufficiently executed deed.*]—It is no objection to an application by an insolvent for a discharge under 1875 Act, ss. 64, 65, that a previous application under s. 56 to confirm a deed of composition & discharge has been refused, where it appears that the ground of refusal was that the deed was not executed by a sufficient number of creditors who had proved claims.—*Re* RUSSELL (1882), 7 A. R. 777.—**CAN.**

f. *Time for application.*]—There is under 7 Vict. No. 19 no limitation of time, within which applications for certificates must be made.—*Re* TYRER (1878) 4 V. L. R. 12.—**AUS.**

g. ——.]—*Semble:* if an insolvent obtains the consent of the required number of creditors, or the execution of a deed of composition & discharge, he may at once make the application without waiting for the expiration of a year, but he is not precluded from applying after the expiration of a year, under 1875 Act, s. 64.—*Re* HILL (1882), 7 A. R. 694.—**CAN.**

k. —— *At what stage—Contents of affidavit.*]—Applications for relief under 1 Will. IV., c. 43, may be made in the suit, or may be considered as distinct judicial proceedings. The affidavit must account for all the property deft. may appear to have possessed.—WILMOT *v.* CORNWELL & BABINO (1835), 2 N. B. R. (Ber.) 31.—**CAN.**

l. *Notice of application.*]—On an application for a discharge under 1864 Act, s. 9 (10):—*Held:* unnecessary to mail notices to creditors under s. 11 (1).—*Re* STARLING, 2 C. L. J. N. S. 303.—**CAN.**

m. ——.]—1864 Act, s. 11, with reference to notices, does not apply to insolvent, who has a consent from his creditors to his discharge or has procured the execution by the requisite number of his creditors of a deed of composition & discharge, & who is applying for a confirmation of discharge. All that is to be done by insolvent, to enable him to bring his application before the judge is pointed out by s. 9 (6), (10).—*Re* WADDELL, 2 C. L. J. N. S. 242.—**CAN.**

n. —— *Requisites.*]—Notice of application for discharge in Canada *Gazette*, & not in local *Gazette*:—*Held:* sufficient.—*Re* HUFFMAN, 5 C. L. J. N. S. 71.—**CAN.**

4981 i. *Withdrawal—When refused.*]—Bkpt. cannot, after applying for his discharge, withdraw his application so as to oust the jurisdiction of the ct.—*Re* GILMOUR (1888), 6 N. Z. L. R. 421.—**N.Z.**

then might not be available at a later date & the ct. refused to order the official receiver to give particulars of such evidence.—*Re* TANNER (1902), 19 T. L. R. 28.

4983. —— Costs of creditor appearing to oppose.]—Where, on an application for leave to withdraw an application for discharge, a creditor, who has appeared at the hearing to oppose the discharge, asks for his costs, leave will only be granted on condition that bkpt. pays them.—*Re* RICHARDS (1903), 20 T. L. R. 79.

SECT. 2.—**HEARING OF APPLICATION.**

4984. Power to call meeting—Though former proceedings not available—1842 Act.]—Under s. 39 of the above Act, the comr. is at liberty to appoint a public sitting for the allowance of bkpt.'s certificate, notwithstanding the former proceedings in the bkpcy. are not recorded before him.—*Re* BALDWIN, *Ex p.* BALDWIN (1843), 1 L. T. O. S. 411; 7 Jur. 636, Ct. of R.

Annotation:—**Folld.** *Re* Appleton, *Ex p.* Appleton (1844), 4 L. T. O. S. 161, Ct. of R.

4985. —— —— ——.]—Where the proceedings under a bkpcy., which occurred in 1819, had been lost, the ct., upon the application of bkpt., directed that, notwithstanding the loss of the proceedings, the comr. should be at liberty to appoint a public sitting for the allowance of his certificate according to s. 39 of the above Act.—*Re* APPLETON, *Ex p.* APPLETON (1844), 4 L. T. O. S. 161, Ct. of R.

4986. Notice of meeting—Persons entitled to—Advertisement.]—When a meeting of the creditors of bkpt. under 1869 Act is summoned by the trustee, for the purpose, *e.g.*, of ascertaining whether the creditors will assent to an application by bkpt. for an order of discharge, it is only necessary that it should be summoned by means of a notice sent by the trustee to each creditor in accordance with 1870 Rules, r. 95; it is not necessary that advertisements of the meeting should be published as provided by r. 89 in reference to the first meeting of the creditors.—*Re* COHEN, *Ex p.* COHEN (1884), 13 Q. B. D. 56; 53 L. J. Ch. 641; 50 L. T. 347; 32 W. R. 669, C. A.

4987. —— —— What fee payable.]—When bkpt. has sent in an application for an order of discharge, & a day has been fixed for the hearing of such application, a notice must be sent to each person who has appeared in bkpt.'s statement of affairs, whether they have proved in the bkpcy. or not, & bkpt. must pay a fee of 1s. in respect of each person so notified.—*Re* SPRATLEY, [1909] 1 K. B. 559; 78 L. J. K. B. 390; 100 L. T. 378; 25 T. L. R. 261; 53 Sol. Jo. 246; 16 Mans. 91.

4988. Who must attend—Bankrupt.]—Where bkpt.'s certificate is in question, bkpt. ought himself to be present.—*Re* WOOD & TARRANT, *Ex p.* TURNER (1858), 3 De G. & J. 46; 27 L. J. Bcy. 30; 31 L. T. O. S. 111; 4 Jur. N. S. 470; 6 W. R. 475; 44 E. R. 1186, L. JJ.

4989. What Act governs proceedings—Adjudication under 1883 Act—1890 Act, s. 8.]—*Held:* an application for his discharge by debtor, adjudicated bkpt. under 1883 Act, must be dealt with under s. 28 of that Act, & not under s. 8 of 1890 Act.—*Re* RAISON, *Ex p.* RAISON (1891), 60 L. J. Q. B. 206; 63 L. T. 709; 39 W. R. 271; 7 T. L. R. 185; 8 Morr. 11.

Annotation:—**Mentd.** *Re* Athlumney, *Ex p.* Wilson, [1898] 2 Q. B. 547.

4990. Opposition to application—Who may oppose—Trustee of debt.]—A creditor, making a loan & executing a deed, whereby her solr. is constituted trustee for securing the debt & its repayment, is precluded from personally opposing insolvent debtor's discharge, the right of opposition being in the trustee of the debt.—*Re* BAKER (1853), 22 L. T. O. S. 173.

4991. —— —— Holder of bill of exchange.]—Where the names of several parties are entered in the sched. in connection with a bill of exchange, the holder only has a right to oppose.—*Re* CANN (1854), 23 L. T. O. S. 348.

4992. —— —— Judgment creditor not proving debt—Making no claim under commission.]—A judgment creditor, who had not proved his debt or put in any claim under a commission against bkpt., claimed to be heard in opposition to the granting of his certificate as a creditor within 1842 Act, s. 39:—*Semble:* he was not entitled to be heard.—*Re* MALLAM (1845), 6 L. T. O. S. 175.

PART XVIII. SECT. 2.

4988 i. *Who must attend—Bankrupt.*]—Insolvent should be present when application is made for confirmation of discharge.—*Re* STEVENSON, 1 C. L. J. 52.—**CAN.**

4988 ii. ——.]—The ct. has jurisdiction to order bkpt. to attend at the adjourned hearing of an application for discharge, & from time to time until the application is disposed of by the ct.—*Re* GILMOUR (1888), 6 N. Z. L. R. 421.—**N.Z.**

o. —— *Opposing creditor.*]—The absence of an opposing creditor is not a bar to the case being proceeded with.—*Re* FERRALL (1869), 3 I. L. T. Jo. 650.—**IR.**

p. *Opposition to application—Who may oppose.*]—An objection to insolvent's certificate, on the ground that he had appropriated to his own use trust funds, may be taken by any creditor, & not only by the creditor defrauded.—*Re* LLOYD (1879), 2 N. S. W. S. C. R. N. S. 114.—**AUS.**

q. —— —— *Not agent for Collector-General of Taxes—Pending vacancy in that office.*]—*Re* BUSHE (1870), 4 I. L. T. Jo. 200.—**IR.**

4992 i. —— —— *Not creditor who has not proved.*]—*Re* DITCHBURNE (1876), 2 V. L. R. 49.—**AUS.**

r. —— —— *Not creditor for amount less than* $100.]—*Re* CREIGHTON (1879), 1 R. & G. 211; *overd. Re* BAUER (1882), 3 R. & G. 149.—**CAN.**

s. —— —— *Creditor not named in schedule.*]—*Re* STEVENSON, 1 C. L. J. 52.—**CAN.**

t. —— —— *Creditor who has not filed claim.*]—On an application to confirm a deed of composition & discharge under 1875 Act a creditor appeared to oppose the discharge, who had not filed his claim, though he was mentioned in the list annexed to the affidavit accompanying insolvent's petition & notice of the application had been sent him:—*Held:* the creditor was a claimant within the Act, for the purpose of opposing the discharge.—*Re* BAUER (1882), 3 R. & G. 149.—**CAN.**

w. —— —— *Not creditor who has not filed objection with assignee.*]—*Held:* except for defects apparent on the face of the proceedings, or which did not exist at the time of the meeting before the assignee, & possibly other irregularities, a creditor contesting the discharge could not oppose the application for confirmation of the discharge, unless he had filed objections with the assignee under 1875 Act, s. 51.—BANK OF NOVA SCOTIA *v.* STEEVES (1880), 20 N. B. R. 333.—**CAN.**

x. —— —— *Not creditor who has accepted terms of composition.*]—*Re* LAWSON, 5 C. L. J. N. S. 232.—**CAN.**

y. —— —— *Creditor who did not take earlier in proceedings objection raised.*]—Creditors are not estopped from urging, at the hearing of an application by insolvents for their certificate of insolvency & final discharge, matters which might have been urged on the original application for insolvency.—*Re* BULLEY MITCHELL & CO.'S INSOLVENCY (1859), 4 Nfld. L. R. 401.—**NFLD.**

z. —— —— ——.]—A creditor has no right to object before the county ct. judge that insolvent has not kept proper books of account, not having raised such objection at the meeting before the assignee.—*Re* HANINGTON, *Ex p.* CLEMENTSON (1880), 20 N. B. R. 413.—**CAN.**

a. —— —— ——.]—A creditor has no right to object before the county ct. judge that insolvent has not kept proper books, when he has not raised objection before the assignee.—GILBERT *v.* GIROUARD (1878), 2 P. & B. 148.—**CAN**

b. —— —— ——.]—The ct. will permit a creditor at the certificate meeting to apply to have a stay put on the certificate, on the ground of vexatious litigation, though the creditor did not appear on the final examination.—*Re* WALL (1870), 4 I. L. T. Jo. 305.—**IR.**

c. —— —— *Not creditor who has taken civil proceedings to recover debt.*]—

Sect. 2.—*Hearing of application.*]

4993. —— —— Creditor appearing for first time.]—Upon an adjournment of the last examination for a specific purpose:—*Held:* a creditor, who had neglected to appear at the previous examinations would not then be admitted to oppose.—*Re* CANN (1854), 23 L. T. O. S. 348.

4994. —— —— Joint creditors of two joint traders—Separate fiat against one.]—Under a separate fiat against one of two joint traders the joint creditors have a right to be heard against the granting of the certificate.—*Re* MAY (1845), 5 L. T. O. S. 332.

4995. —— —— Party lending money at exorbitant rates.]—The ct., upon an application for a certificate, refused to pronounce an adverse judgment at the instance of a creditor, who had been in the habit of discounting bills for bkpt. at the rate of 60 per cent.—*Re* BEARD, *Ex p.* BEARD (1861), 9 W. R. 520.

4996. —— —— Creditor balancing books & discounting bills for bankrupt—On ground of debt incurred without ability to pay.]—Opposition to bkpt.'s discharge, on the ground of contracting a debt without reasonable expectation of being able to pay it, cannot be sustained by a creditor, who, having been employed by bkpt. to write up his books of account, & having subsequently discounted bills for him, must be taken to have acquired a sufficient insight into his affairs to put him on his guard.—*Re* DRYDEN (1866), 14 L. T. 172.

4997. —— Duty of trustee to oppose—Bankrupt guilty of offences in 1849 Act, s. 256.]—It is the duty of the assignees of bkpt. to oppose his application for a certificate of conformity, if he has been guilty of any of the offences specified in 1849 Act, s. 256.—*Re* BULL (1852), 20 L. T. O. S. 24.

4998. —— What must be produced—Fresh evidence—Facts already on proceedings.]—Upon opposing the granting of bkpt.'s certificate it is not necessary to produce fresh evidence of such facts as are already on the proceedings.—*Re* WESTROPP & COXEDGE, *Ex p.* WESTROPP (1845), 6 L. T. O. S. 42.

See 1915 Rules, r. 231.

4999. Adjournment of proceedings—Power of court to allow—Production of fresh evidence—Costs.]—If an adjournment is wanted to allow partner opposing the application to produce fresh evidence, the ct. will give an adjournment at the creditor's expense, but not at the expense of the estate.—*Re* WESTROPP & COXEDGE, *Ex p.* WESTROPP (1845), 6 L. T. O. S. 42.

5000. —— —— At instance of creditor—After meeting fixed & advertised.]—Where a meeting has been fixed, & duly advertised, for showing cause against a bkpt.'s certificate, the ct. will, in certain circumstances, upon the application of a creditor, without hearing bkpt., adjourn the meeting.

A meeting was appointed & advertised in the usual way, & everything required by bkpt. to be done previous to the meeting was done regularly. The hour appointed for the meeting was one o'clock. At twelve o'clock of the day appointed for the meeting, a solr., who had opposed the passing of bkpt.'s last examination on behalf of several creditors, applied to the ct. to adjourn the meeting, on the ground that the solr. for the assignees, in writing to him at his request to apprize him of the meeting, had stated that the meeting was to be held at eleven instead of one o'clock, which was the proper hour, & that he had attended accordingly, & his other arrangements prevented his being present at one o'clock:—*Held:* the meeting should be adjourned to a future day.—*Re* MAY (1845), 5 L. T. O. S. 332.

Re KIRKWOOD (1870), 4 I. L. T. Jo. 661.—**IR.**

d. —— —— *Not creditor who has condoned breach of trust.*]—*Re* LYNCH (1860), 13 Ir. Jur. 143.—**IR.**

f. —— —— *Not creditor who has unsuccessfully relied on penal clauses.*]—A creditor, whose opposition under the penal clauses fails, will not be allowed to rely on the discretionary clause, unless he relied upon it originally.—*Re* LYNCH (1860), 13 Ir. Jur. 143.—**IR.**

g. —— —— *Not co-surety with insolvent.*]—Where a surety is joined with insolvent to a third party for the debt of that third party, & the surety pays nothing on foot of that security, such surety is not, in point of law, a creditor, & will not be allowed to oppose.—*Re* BYRNE (1869), 20 L. T. O. S. 1019; I. R. 4 Eq. 53; 3 I. L. T. Jo. 503.—**IR.**

k. —— —— *Indorsees of bills—Insolvent contracting debts without reasonable expectation of payment.*]—Where insolvent is guilty of extravagance & contracts debts without reasonable expectation of payment, indorsees of bills with whom insolvent had no personal dealings will be allowed to oppose, the schedule in such case being sufficient evidence.—*Re* TURNER (1852), 20 L. T. O. S. 24.—**IR.**

l. —— —— *Not trustee.*]—On an application by debtor for an order of discharge under Debtors & Creditors Act, 1876, the trustee had no right to appear by counsel for the purpose of opposing the motion.—*Re* SALMON, 4 J. R. N. S. 33.—**N.Z.**

m. —— —— *Of partners adjudicated in England—On application by other partners in India.*]—Where some of the partners of a firm had filed their petition in insolvency in Calcutta & others had been adjudicated bkpt. in England, & in the insolvency proceedings in Calcutta an order had been made that such proceedings should be "in aid of & auxiliary to" the bkpcy. proceedings:—*Held:* the trustee in bkpcy. & official receiver had no *locus standi* to oppose the personal discharge of the insolvents, who had filed their petition in the Calcutta Ct.—*Re* SHRAGER (1906), I. L. R. 33 Calc. 1062.—**IND.**

n. —— —— *Notice—Of grounds of objection.*]—It is not necessary, under 1875 Act, s. 54, to give insolvent notice of the facts, upon which the objecting creditors intend to contest the confirmation of a deed of composition & discharge.—*Re* WALKER (1878), 2 A. R. 265.—**CAN.**

n. —— —— —— *Form of pleadings.*]—In objections to certificates the exactness of pleadings is not required, unless the insolvent is likely to be misled.—*Re* AARONS (1880), 6 V. L. R. 56.—**AUS.**

p. —— —— *Of intention to oppose—On renewed application for discharge.*]—An application for discharge was set down, but on the case being called no one appeared for debtor, & it was struck out. Certain creditors had previously given due notice of their intention to oppose. A second notice of intention to apply for discharge was gazetted & set down, but no fresh notice of intention to oppose was given:—*Held:* the former notice was sufficient.—*Re* OWEN (1879), 1 O. B. & F. 144.—**N.Z.**

q. —— *Costs—Unsuccessful opposition by trustee.*]—An insolvent applied for his discharge under Ord. 6 of 1843, s. 117. The majority of his creditors consented & none of them opposed the application, but the trustee opposed & set forth his grounds of opposition:—*Held:* as the trustee had failed to make good his objection, the application must be granted with costs of opposition against the trustee.—*Ex p.* FOURIE (1915), C. P. D. 344.—**S. AF.**

r. *What evidence admissible.*]—The comr. has power to examine witnesses upon oath at a certificate meeting under Insolvency Stat., s. 102, although not expressly so authorised.—*Re* BELL (1870), 1 V. R. 2.—**AUS.**

s. ——.]—An estate, in which A. was a partner was sequestrated in 1854, &, at the second meeting of the creditors, the partners were examined by the chief comr., as to their dealing with the estates, & generally as to their conduct. A. deposed to the removal by him of property of the firm for his own use (which afterwards came into the hands of the assignee), &, to the assignment by him alone, of a partnership lease, for no consideration. Twenty-three years after, he applied for his certificate, on affidavit as to his transactions since then, & was examined by the chief comr. generally, who refused the certificate on the grounds disclosed by the depositions of the firm, & the observations of the former comr.:—*Held:* the only evidence admissible was that of insolvent himself.—*Re* TYRER (1878), 4 V. L. R. 12.—**AUS.**

t. —— *Insolvent's own examination.*]—On an application for discharge, insolvent is entitled to read his own examination, though taken at the instance of a friendly creditor, & the only question is as to the weight to be attached to it.—*Re* HOLT & GRAY (1867), 13 Gr. 568.—**CAN.**

5001. —— Grounds for—Pendency of appeal—Against adjudication.]—The pendency of an appeal of two partners from a joint adjudication of bkpcy. against four:—*Held:* not a sufficient ground for adjourning the allowance of the certificates of the other two.—*Re* CASTELLI, *Re* BRAGGIOTTI, *Ex p.* BRAGGIOTTI, *Re* CASTELLI, *Ex p.* CASTELLI (1852), 2 De G. M. & G. 964; 22 L. J. Bcy. 76 & 77; 42 E. R. 1149, L. JJ.

5002. —— —— Answer filed to pending bill likely to disclose further assets.]—Bkpt. applied for an order of discharge, but the comr. adjourned the meeting for bkpt. to put in his answer to a bill in Ch., on the ground that the answer might show that he had not made a full discharge of his property. On appeal the order was reversed, &, there being nothing on the bkpcy. proceedings to raise a suspicion that a full disclosure had not been made, the order of discharge was granted.—*Re* LEE, *Ex p.* LEE (1867), 3 Ch. App. 150; 16 W. R. 170, L. J.

5003. —— —— Bankrupt unable to pay rent— & refusing to give up possession.]—Where bkpt. is unable to pay the rent due in respect of premises occupied by him, & refuses to give up possession to his landlord, the ct. will order him to give up the premises, & adjourn the consideration of the order of discharge until that is done.—*Re* M'CARTHY (1863), 7 L. T. 804.

Annotation:—**Consd.** *Re* Tubb, *Ex p.* Tubb (1864), 11 L. T. 222.

See, also, No. 5000, *ante.*

5004. Transfer of proceedings—From registrar to judge in bankruptcy—Issues of importance.]—Where an application by bkpt. for his discharge raises a number of issues of great importance & magnitude & of great difficulty in their determination, the judge in bkpcy. will direct a transfer to himself of the application from the registrar. The mere fact that the registrar has granted leave for a public prosecution of bkpt. is not a sufficient ground for transferring the hearing of the application for discharge from the registrar.—*Re* HOOLEY, *Ex p.* DEBTOR (1899), 80 L. T. 495; 6 Mans. 176.

5005. Notes of oral evidence—Duty of county court judge to take.]—It is the duty of a county ct. judge, on the hearing of an application for discharge, to take a note of the oral evidence.—*Re* SHARP, *Ex p.* SHARP (1893), 10 Morr. 114, D. C.

5006. Reopening—On what grounds—Insufficient examination.]—The examination of bkpt. was stopped by a county ct. judge, & he was declared entitled to his order of discharge. Upon an affidavit filed, under direction of the ct., by the solr. of applts. the opposing creditors, stating his belief that if he had been permitted to continue the examination, he would have been enabled to prove that bkpt., a commission agent, had been in the habit of receiving money due from customers of applts., not for the purpose of paying them over to them, but for payments in respect of gambling & betting transactions, the ct. ordered applts. to be at liberty to continue bkpt.'s examination on any matters which would be a statutory ground of objection to his receiving an order of discharge, & that their solr. was to lay before the judge a clear & definite statement of the nature of the charges to which the examination was to be directed.—*Re* THURSTAN, *Ex p.* URWICK (1864), 10 L. T. 81, L. C.

5007. Appeal from refusal to hear—Hearing by Court of Appeal.]—Upon an appeal by bkpt. from the registrar's refusal to hear his application for discharge, the Ct. of Appeal will, in a proper case, itself hear the application instead of remitting it to the registrar.—*Re* SOLOMONS, [1904] 1 K. B. 106; 73 L. J. K. B. 55; 89 L. T. 637; 52 W. R. 473; 10 Mans. 369, C. A.

Annotation:—**Mentd.** *Re* Smith, *Ex p.* Smith, [1918–19] B. & C. R. 69, D. C.

5008. Rehearing—On what grounds—Power of county court judge.]—On Mar. 18, 1886, an order was made in the county ct. that the discharge of bkpt. be suspended for three years, & that it be then granted, subject to the condition that he should consent to judgment being entered against him for the balance of the provable debts under 1883 Act, s. 28 (6). On June 20, 1889, application was made by bkpt. to the county ct. to review, rescind, or vary its former order by expunging the conditions on which it had been granted, on the ground that the ct. had no power under s. 28 to make a conditional order of discharge & also suspend the order. The county ct. judge refused the application, being doubtful whether under s. 104 (1), he had authority to deal with it:—*Held:* the county ct. judge had power to rehear the case, & it must be remitted back to him for that purpose, & to make such order as he might think fit in all the circumstances.—*Re* TREGASKIS, *Ex p.* TREGASKIS (1889), 6 Morr. 309, D. C.

5009. —— —— Object to obtain another opportunity for appealing—Previous delay in appealing.]—The general though not the invariable rule is, that the ct. should not grant a rehearing under 1883 Act, s. 104, where the only object of appct. is to obtain another opportunity for appealing, when he has let the time for appealing from the original decision go by.—*Re* TOBIAS & CO., *Ex p.* TOBIAS, [1891] 1 Q. B. 463; 60 L. J. Q. B. 244; 64 L. T. 115; 39 W. R. 399; 7 T. L. R. 296; 8 Morr. 30, D. C.

Annotation:—**Mentd.** *Re* Shields, *Ex p.* Bankrupt (1912) 106 L. T. 345.

See, also, Nos. 4943, 4961 *et seq.*, 4975, 4976, *ante*, 5028, 5029, *post.*

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w. —— *Effect of bankrupt's denial on oath.*]—When the granting of the certificate is opposed on the ground of reckless trading, & dealing in fictitious or accommodation bills, & the oath of bkpt. is appealed to to sustain the charge, which he denies, the opposing creditor is bound by the answer.—*Re* PREAGER (1856), 27 L. T. O. S. 26; 8 Ir. Jur. 251.—**IR.**

x. —— *Deed of assignment for creditors.*]—Where a person, who has assigned his property to trustees for the benefit of his creditors, applies for discharge under Insolvent Debtors' Act, a copy of the trust deed must be brought before the ct.—MCFARLANE *v.* GORDON (1851), 2 All. 162.—**CAN.**

5001 i. *Adjournment of proceedings—Grounds for—Doubt as to allegations against debtor.*]—At an adjourned hearing insolvent was remanded, because the ct. could not declare that it felt no doubt touching the matters alleged against insolvent at the hearing, which would prevent his discharge, & the hearing was adjourned *sine die.*—*Re* TRAIN (1868), 2 I. L. T. Jo. 355.—**IR.**

y. *Jurisdiction of court to continue hearing—After death of debtor.*]—The Ct. of Insolvency has no jurisdiction to hear an application for a certificate of discharge, where insolvent has died, notwithstanding the application for such certificate was begun during insolvent's lifetime.—*Re* JAMES (1898), 24 V. L. R. 359.—**AUS.**

z. *Appeal from refusal to allow insolvent to be examined.*]—*Semble:* an appeal to the Supreme Ct. would lie from a refusal by a judge of the Ct. of Insolvency to allow insolvent to be examined on his certificate application.—*Re* AARONS (1880), 6 V. L. R. 56.—**AUS.**

5008 i. *Rehearing—On what grounds—Certificate not signed by one commissioner.*]—Where one of the comrs. had not signed the certificate, because the assignees had assigned all bkpt.'s estate to bkpt.'s son, upon his securing 10*s.* in the pound to all the creditors, the ct. referred it back to be reconsidered.—*Re* BAILY (1809), 2 Mol. 444.—**IR.**

SECT. 3.—DISCRETION OF COURT.

SUB-SECT. 1.—EXERCISE OF DISCRETION.

5010. In awarding punishment—Powers not cumulative—1861 Act, s. 159.]—Under 1861 Act, s. 159, the powers given to the comr. either to refuse or suspend the order of discharge, or to imprison, are alternative, not cumulative.—*Re* MARKS (1866), 1 Ch. App. 334; 35 L. J. Bcy. 16; 14 L. T. 37; 14 W. R. 321, L. C.

Annotation:—**Consd.** *Re* Ainsworth, *Ex p.* Bayley (1867), 3 Ch. App. 244, L. JJ.

5011. —— Intention of legislature.]—By conferring on the ct. absolute discretion as to the manner & *quantum* of punishment, Parliament assumes that each of the offences may be committed in such circumstances as would justify the ct. in absolutely refusing the order of discharge, or, on the other hand in circumstances which would justify the ct. in suspending the order for the smallest conceivable fraction of time. —*Re* SCHARRER (1888), 4 T. L. R. 627.

5012. —— Duty to view offences seriously.]—A suspension of an order of discharge for three months or six months is not as a general rule such a punishment as the ct. ought to impose, & although it cannot be said that there are no cases in which a suspension for those periods may not be justifiable, it is the duty of the ct. to take a sufficiently serious view of the offences which bkpts. from time to time commit, & to show by the punishment awarded that such offences cannot be committed with impunity.—*Re* FREEMAN, *Ex p.* FREEMAN (1890), 62 L. T. 367; 7 Morr. 38, D. C.

5013. Whose interests court must consider—Public interests.]—*Held:* in considering the question of bkpt.'s discharge the ct. is bound to have regard not to the interests of such bkpt. or of the creditors alone, but also to the interests of the public, & of commercial morality.—*Re* BADCOCK, *Ex p.* BADCOCK (1886), 3 Morr. 138, D. C.

5014. —— Bankrupt.]—The overriding intention of the Legislature in all bkpcy. Acts is that bkpt., on giving up the whole of his property, shall be a free man again, able to earn his livelihood & having the ordinary inducements to industry (VAUGHAN WILLIAMS, L.J.).—*Re* GASKELL, [1904] 2 K. B. 478; 73 L. J. K. B. 656; 91 L. T. 221; 20 T. L. R. 469; 11 Mans. 125, C. A.

Discretion to hear particular creditors opposing discharge.]—*See* Nos. 4995, 4996, *ante*.

5015. What court may consider—Misconduct as trader—Before 1849 Act.]—*Held:* misconduct as a trader before 1849 Act came into operation might be properly regarded, upon an application for a certificate under that Act.—*Re* STANER, *Ex p.* STANER (1852), 2 De G. M. & G. 263; 21 L. J. Bcy. 56; 19 L. T. O. S. 333; 16 Jur. 1124; 42 E. R. 873, L. JJ.

Annotation:—**Consd.** *Re* Salaman, *Ex p.* Salaman (1885), 14 Q. B. D. 936, C. A.

5016. —— Offences under 1849 Act, s. 201—In applications after repeal of that Act.]—The ct. will not lay down any general rule as to the granting of an order of discharge under 1861 Act, but each case must depend upon its own individual circumstances. In the inquiry into the circumstances, acts which, under 1849 Act, s. 201, would constitute offences disentitling bkpt. to any certificate, are not to be taken into the consideration of the ct., that sect. having been repealed. —*Re* MATHESON (1862), 31 L. J. Bcy. 23; 6 L. T. 203; 8 Jur. N. S. 371; 10 W. R. 256, L. JJ.

5017. —— Additional facts in official receiver's report.]—The official receiver reported that bkpt. had committed certain offences under 1883 Act, s. 28 (3); he also reported certain additional facts:—*Held:* such additional facts reported by the official receiver ought to be taken into consideration by the ct., when deciding whether or not bkpt.'s discharge should be granted.—*Re* COOK, *Ex p.* COOK (1889), 61 L. T. 335; 6 Morr. 224, D. C.

Annotation:—**Refd.** *Re* Bottomley, *Ex p.* Bottomley (1893), 10 Morr. 262.

5018. —— Conduct of bankrupt.]—The general conduct of bkpt. in his dealings, etc., will be taken into consideration in the question of the certificate, although the actual trading is limited to small transactions.—*Re* POWNALL (1851), Fonbl. 221.

5019. —— —— Standard to be applied.]—In judging of the conduct of bkpt. with reference to his certificate, it may not be necessary to apply to him the same rigid rules which are properly applicable to persons well to pass in the world, a certain degree of indulgence being proper to be allowed to a man in difficulties.—*Re* HOLLINGWORTH, *Ex p.* HOLLINGWORTH (1851), 4 De G. & Sm. 44; 20 L. J. Bcy. 13; 17 L. T. O. S. 303; 15 Jur. 914; 64 E. R. 727.

5020. —— —— Trustee, without reason, refusing to certify.]—Resolutions were passed in a liquidation that debtor should have his discharge, on the trustee certifying that he had satisfied himself that debtor had rendered all the assistance in his power in realising his estate. The trustee, without

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PART XVIII. SECT. 3, SUB-SECT. 1.

a. *By what officer—Commissioner of bankrupts.*]—K. having become a bkpt., & passed the several examinations required by 7 Vict. c. 10, before the judge of the Niagara district ct., & obtained from the comr. his certificate, a petition was presented to the V.-C. by several of his creditors, praying a stay of the certificate, on grounds of fraud, etc.:—*Held:* the comr. of bkpts. was the only person who could exercise any discretion in granting or refusing the certificate to bkpt., under the Act.—*Re* KISSOCK (1845), 1 O. S. 225.—**CAN.**

b. *What court may consider—Not bankruptcy in another jurisdiction.*]—The prior adjudication of bkpcy. or insolvency referred to in 1898 Act, s. 40 is an adjudication in New South Wales, & does not include an adjudication of bkpcy. in Western Australia.—MORGAN *v.* WHITE (1912), 15 C. L. R. 1. —**AUS.**

c. —— *Grounds of original judgment.*]—In 1883 the estate of A., an infant, was voluntarily sequestrated. The only debt proved against the estate was a judgment debt & costs in an action for money had & received in which A. did not raise the defence of infancy. In 1901 A. applied for a certificate of discharge:—*Held:* the Ct. of Insolvency ought not to go behind the original judgment.—*Re* CAULFIELD (1901), 27 V. L. R. 588.—**AUS.**

Power to go behind judgment.]—*See, generally,* Part VIII., Sect. 7, sub-sect. 1, *ante*.

d. —— *Depositions & judicial observations in former examination.*]—An estate, in which A. was a partner, was sequestrated in 1854, &, at the second meeting of the creditors, the partners were examined by the chief comr., as to their dealing with the estate, & generally as to their conduct. A. deposed to the removal by him of property of the firm for his own use (which afterwards came into the hands of the assignee), & to the assignment by him alone of a partnership lease, for no consideration. Twenty-three years after, he applied for his certificate, on affidavit as to his transactions since then, & was examined by the chief comr. generally, who refused the certificate on the grounds disclosed by the depositions of the firm, & the observations of the former comr.:—*Held:* the acts relied on did not justify the refusal.—*Re* TYRER (1878), 4 V. L. R. 12.—**AUS.**

5018 i. —— *Conduct of bankrupt.*]—*Held:* the ct. might refuse a certificate if the conduct of the insolvent was suspicious, though no actual offence against the insolvent laws had been proved.—*Re* WILLIAMSON, *Ex p.* FITZPATRICK (1882), 3 N. S. W. L. R. 149.—**AUS.**

5018 ii. —— ——.]—The ct., in considering whether it will grant or refuse to an insolvent trader his final discharge, will take into consideration the whole course of his mercantile dealings, & will not confine itself to his conduct with reference to the opposing creditor merely.—*Re* PESTANJI SHAPURJI KAKA (1871), 8 Bom. O. C. 37.—**IND**

sufficient reason, refused so to certify & procure debtor's discharge :—*Held :* the ct. had no power to compel the trustee to sign such certificate, but it would order debtor to be discharged.—*Re* SCHOLES, *Ex p.* ROYLE (1878), 47 L. J. Bcy. 28 ; 37 L. T. 832 ; 26 W. R. 216.

Annotations :—**Expld.** *Re* Dempster, *Ex p.* Chesney (1878), 9 Ch. D. 701. **Refd.** *Re* Hart, *Ex p.* Hart (1889), 58 L. J. Q. B. 440.

5021. —— —— Bankrupt with only one creditor filing own petition.]—Debtor, who had only one creditor, filed his own petition. The petition & the adjudication were both unchallenged, but on application by bkpt. for his discharge it was alleged against him that, by reason of the fact that he had only one unsecured creditor, the filing of the petition was an act of misconduct on his part, which the ct. was bound to take into consideration :—*Held :* the petition & adjudication having been both unchallenged the registrar was right in refusing to consider the alleged matter on application for discharge.—*Re* BULLEN, *Ex p.* ARNAUD (1888), 36 W. R. 836 ; 4 T. L. R. 677 ; 5 Morr. 243, C. A.

Annotations :—**Mentd.** *Re* Goud, *Ex p.* Goule (1890), 63 L. T. 292, D. C. ; *Re* Jones, *Ex p.* Jones (1890), 24 Q. B. D. 589, D. C. ; *Re* Gaskell (1904), 20 T. L. R. 469, C. A.

5022. —— —— Only as stated in 1883 Act, ss. 24, 28.]—Bkpt.'s principal asset was a contingent reversionary interest in a sum of £2,000 to which he would be entitled, if he survived his mother. This was practically unsaleable, unless his life could be insured. The trustee required him to submit to a medical examination with a view to effecting an insurance upon his life. He refused to do so without offering any reason or excuse. The official receiver reported that fact to the ct. :—*Held :* (1) the conduct of bkpt., which the ct. must take into consideration on an application for discharge, must be, either one of the matters specifically mentioned in 1883 Act, s. 28, or a refusal to perform the duties imposed upon him by s. 24 ; (2) bkpt. was not by s. 24 bound to submit to a medical examination.—BOARD OF TRADE *v.* BLOCK (1888), 13 App. Cas. 570 ; 58 L. J. Q. B. 113 ; 59 L. T. 734 ; 53 J. P. 164 ; 37 W. R. 259 ; 4 T. L. R. 770, H. L.

Annotations :—**Consd.** *Re* Barker, *Ex p.* Constable, *Re* Jones, *Ex p.* Jones (1890), 25 Q. B. D. 285, C. A. ; *Re* Jones, *Ex p.* Jones (1890), 24 Q. B. D. 589.

5023. —— —— —— Only relevant matters.]—Upon an application by bkpt. for an order of discharge, the ct., in deciding whether it should grant an absolute or a conditional order, is not entitled, under 1883 Act, s. 28 (2), to take into consideration " conduct & affairs " of bkpt. which could have had nothing to do with producing the bkpcy., but it may consider any conduct which might have had some effect upon the bkpcy.

The bkpcy. of a debtor was brought about by a verdict against him for damages in an action for breach of promise of marriage :—*Held :* such action was a proper subject for the consideration of the ct. in determining whether a condition should be imposed upon his discharge.—*Re* BARKER, *Ex p.* CONSTABLE, *Re* JONES, *Ex p.* JONES (1890), 25 Q. B. D. 285 ; 59 L. J. Q. B. 331 ; 38 W. R. 609 ; 6 T. L. R. 296 ; 7 Morr. 111, C. A.

Annotations :—**Refd.** Moore *v.* Brompton County Court (1893), 69 L. T. 140, D. C. ; *Re* Gaskell (1904), 20 T. L. R. 469, C. A. **Mentd.** *Re* Gould, *Ex p.* Gould (1890), 7 Morr. 215, D. C.

5024. —— Amount of bankrupt's assets.]—In granting an order of discharge the ct. exercises discretion, & amongst the facts which the ct. takes into consideration is the fact that bkpt.'s assets are not of a value equal to 10*s.* in the pound on the amount of his unsecured liabilities. The fact that the debts of bkpt. amounted to nearly £10,000, & the assets were sufficient to pay a dividend of 2*d.* in the pound only, would be a very serious fact, which would have to be taken into consideration on an application by bkpt. for an order of discharge.—*Re* KEET, [1905] 2 K. B. 666 ; 74 L. J. K. B. 694 ; 93 L. T. 259 ; 54 W. R. 20 ; 21 T. L. R. 615 ; 12 Mans. 235, C. A.

Annotation :—**Mentd.** *Re* Aron (1905), 21 T. L. R. 693.

5025. —— Professional position of bankrupt.]—On a question of discharge where bkpt. is a solr. the ct. ought to be very careful as to releasing him, by granting the discharge from a position in which the Law Society may think it its duty to say, that bkpt.'s certificate to practice as a solr. ought to be refused.—*Re* DALZELL (1908), 25 T. L. R. 9 ; 16 Mans. 203, C. A.

5026. —— Facts other than those in official receiver's report.]—Where bkpt. applies for his discharge, the judge may take into consideration other offences & other facts than those disclosed in the official receiver's report, & his discretion is unlimited.—*Re* SHIELDS, *Ex p.* THE BANKRUPT (1912), 106 L. T. 345, D. C.

5027. —— On second application—Misdemeanour committed by bankrupt.]—When a second application for an order of discharge is made by bkpt., who has committed a misdemeanour in connection with his bkpcy., the object of bkpt. when he committed the offence, & the circumstances in which it was committed, may be taken into consideration as " special reasons " within 1890 Act, s. 8 (2). *Qu. :* whether the good conduct of bkpt. in commerce since his bkpcy. & the refusal of his discharge is in itself a " special reason " within the sub-sect.—*Re* SOLOMONS, [1904] 1 K. B. 106 ; 73 L. J. K. B. 55 ; 89 L. T. 637 ; 52 W. R. 473 ; 10 Mans. 369, C. A.

Annotation :—**Consd.** *Re* Smith, *Ex p.* Smith, [1918–19] B. & C. R. 69, D. C.

5028. —— —— ——.]—In June, 1907, debtor was adjudicated bkpt. He was subsequently convicted of a misdemeanour under Debtors Act, 1869 (c. 62), & sentenced to imprisonment. In 1909 he was released from prison. In Mar., 1917,

f. —— *Whether bankrupt fit & proper person to be discharged—Notwithstanding acquittal on criminal charge.*]—Although the fact that insolvent had been acquitted on a criminal charge under Insolvency Law must be taken into consideration in an application for rehabilitation, such acquittal does not relieve the ct. from the necessity of determining whether in all the circumstances appt. is a fit & proper person to be rehabilitated.—*Ex p.* HEYDENREICH (1917), T. P. D. 657.—**S. AF.**

5024 i. —— *Amount of bankrupt's assets—Neglect of assignee to give notice.*]—The other statutory provisions being complied with, a discharge cannot be refused because of the neglect of the assignee to give notice, as required by 1864 Act, s. 11 (1), or because insolvent had no estate.—*Re* THOMAS (1868), 15 Gr. 196.—**CAN.**

g. —— *Rate of interest.*]—Where 25 per cent. is charged upon money advanced on bills, the ct. will not deal with the case as if the opposition were by ordinary trade creditors, more particularly when, besides the high rate of interest, there are several parties indorsers on the bills.—*Re* BYRNE (1869), I. R. 4 Eq. 53.—**IR.**

5026 i. —— *Facts other than those in official receiver's report.*]—In dealing with an application for a certificate the ct. is not restricted to the specific charges made in the official assignee's report. If upon the examination of bkpt. there is evidence that he has been guilty of any offence, it is the duty of the ct. to investigate the facts. But before doing so bkpt. should be clearly informed of the charge made against him which it is proposed to investigate, & should be given a fair opportunity of answering it.—SCOTT FELL *v.* LLOYD (1911), 13 C. L. R. 230.—**AUS.**

k. *As regards one partner—Where partnership sequestrated.*]—Where a partnership estate has been sequestrated, the ct. cannot rehabilitate the partnership estate so far as one partner only is concerned.—*Ex p.* GERSTLE (1903), T. S. 881.—**S. AF.**

Sect. 3.—*Discretion of court: Sub-sects.* 1 *&* 2. *Sect.* 4.]

an application by him for his discharge was refused because of the conviction. In Feb., 1918, an application was made under 1914 Act, s. 108, to review, rescind, or vary the order, & that the application for the discharge of bkpt. might be reheard & granted, bkpt. alleging good conduct since his bkpcy. as a "special reason" under s. 26 (2) of the Act:—*Held:* bkpt.'s conduct did not constitute a "special reason" in fact, even if it could do so, & from a commercial point of view, was not of such an unblemished character as to constitute a "special reason."—*Re* SMITH, *Ex p.* SMITH (1918), 88 L. J. K. B. 113; [1918–19] B. & C. R. 69, D. C.

See, also, Nos. 4975, 4976, 5008, 5009, *ante.*

Report by official receiver.]—*See* Nos. 4973, 5017, *ante,* &, *generally,* Part VI., Sect. 5, *ante.*

SUB-SECT. 2.—INTERFERENCE WITH DISCRETION BY APPELLATE COURT.

5029. Fraud by bankrupt proved.]—Where fraud on the part of bkpt. has been proved, the Ct. of Appeal will not mitigate the sentence of a comr. refusing a certificate on that ground.—*Re* FRESTON, *Ex p.* FRESTON (1861), 31 L. J. Bcy. 1; 5 L. T. 267; 7 Jur. N. S. 1173; 10 W. R. 25, L. JJ.

See 1914 Act, s. 26 (2), (3) (*l*).

5030. Leniency of court below.]—Where all the facts have been brought to the notice of the registrar, & he has exercised his discretion as to the terms on which bkpt. should obtain his discharge, the Ct. of Appeal will not interfere with such decision, on an allegation that the punishment imposed was too lenient, & unless it is perfectly clear that the decision was wrong.—*Re* CHASE, *Ex p.* COOPER (1886), 3 Morr. 228, C. A.

5031. ——.]—Where a county ct. judge in the exercise of his discretion has suspended the discharge for a particular period, the Divisional Ct. will not interfere, merely because it thinks that bkpt. was very leniently dealt with.—*Re* HEDLEY, *Ex p.* BOARD OF TRADE (1895), 64 L. J. Q. B. 460; 72 L. T. 470; 43 W. R. 464; 39 Sol. Jo. 428; 2 Mans. 186; 15 R. 366, D. C.

Annotation:—**Mentd.** *Re* Atherton (1912), 28 T. L. R. 339.

5032. Decision of court below based on unfounded facts in official receiver's report.]—Although a Ct. of Appeal in bkpcy. will not readily interfere with the exercise of the discretion of a county ct. judge refusing the discharge of bkpt., yet if the decision of such judge is founded solely on the report of the official receiver, & on appeal the statements contained in such report are proved to be unfounded, & are capable of explanation, the Ct. of Appeal will vary the order of the county ct. & will grant to bkpt. his order of discharge, subject to such conditions as in the nature of the case it may think fit.—*Re* SULTZBERGER, *Ex p.* SULTZBERGER (1887), 4 Morr. 82, D. C.

5033. Wrong conclusion of fact by court below.]—Though the registrar has, under 1883 Act, s. 28, a judicial discretion as to granting, or refusing, or suspending a bkpt.'s order of discharge, & the Ct. of Appeal will not readily interfere with the exercise of his discretion, if he has taken a right view of the facts, yet if, in the opinion of that ct., he has come to a wrong conclusion of fact with regard to bkpt.'s conduct, they will vary his decision by absolutely refusing an order of discharge when he has only suspended it.—*Re* PAYNE, *Ex p.* CASTLE MAIL PACKETS CO. (1886), 18 Q. B. D. 154; 35 W. R. 89; 3 T. L. R. 67; 3 Morr. 270, C. A.

Annotations:—**Mentd.** *Re* Hedley, *Ex p.* Board of Trade (1895), 2 Mans. 186; *Re* Stevens, *Ex p.* Board of Trade (1898), 67 L. J. Q. B. 932, D. C.

5034. ——.]—Where the county ct. judge finds that bkpt. has been guilty of misconduct under 1883 Act, s. 28, & imposes a penalty, the Ct. of Appeal will not be inclined, except upon very grave grounds, to interfere with the amount of punishment awarded, but if the judge comes to a wrong decision, contrary to the facts, that no misconduct has been committed, the ct. on an appeal is bound to express its opinion & act upon it.—*Re* STAINTON, *Ex p.* BOARD OF TRADE (1887), 4 Morr. 242, D. C.

Annotation:—**Mentd.** *Re* Shirley, *Ex p.* Board of Trade (1892), 9 Morr. 147.

SECT. 4.—AGREEMENTS NOT TO OPPOSE.

5035. Bond given in consideration of.]—A bond given to a creditor of bkpt., in order to induce him to withdraw a petition, which he had preferred against the allowance of the certificate, is void by 5 Geo. 2, c. 30, s. 11.—SUMNER *v.* BRADY (1791), 1 Hy. Bl. 647; 126 E. R. 369.

5036. Bill of exchange given in consideration of—Debt included in schedule.]—If a bill of exchange is given by an insolvent debtor after his discharge, for a debt included in his schedule, & in pursuance of an agreement made before his discharge, for withdrawal of an intended opposition, debtor cannot be held to bail upon it.—GOULD *v.* WILLIAMS (1835), 4 Dowl. 91; 1 Har. & W. 344.

Annotation:—**Consd.** Hall *v.* Dyson (1852), 17 Q. B. 785.

PART XVIII. SECT. 3, SUB-SECT. 2.

l. *In general.*]—S. & Co., bkpts., filed, in addition to their schedule, a special balance sheet, & were repeatedly examined, first before one judge of the Bkpt. Ct., & afterwards, on his decease, by his successor, both of whom permitted bkpts. to obtain their certificates. On a petition to the Ct. of Appeal to suspend the granting of their certificates:—*Held:* when applt. in bkpcy. relied on facts & figures which might have been brought before the ct. below, at the final examination, or which, if brought forward below, were disregarded by the judge, the Ct. of Appeal in Ch. would require a very strong case to induce them to remit the case.—*Re* SCOTT & SCOTT (1859), 12 Ir. Jur. 52.—**IR.**

m. *Offence committed by insolvent—"Special reasons" for mitigation found by court below.*]—Where a judge of the Ct. of Insolvency, on an application by insolvent for a certificate of discharge, has found that insolvent has committed an offence, but that "special reasons" exist for mitigating the discretion to refuse the certificate, the full ct. may on appeal consider the evidence &, although the "special reasons" may be insufficient, ascertain whether those reasons may not be supplemented & rendered sufficient.—*Re* FREIZER (1901), 27 V. L. R. 335.—**AUS.**

n. *Creditor suing out commission—On promise of payment in full.*]—Where a trader had requested one of his creditors to sue out a commission of bkpcy. against him, & upon the promise of being afterwards paid his debt in full the creditor sued out the commission, & the judge below had refused to grant bkpt. his certificate, the Ct. of Review refused to interfere.—*Re* DETLOR, *Ex p.* DETLOR (1845), 1 O. S. 278.—**CAN.**

o. *Discharge confirmed under consent to discharge—No meeting of creditors called to consider consent.*]—Where a county ct. judge confirmed the discharge of insolvent, under a consent to discharge, executed by the required proportion of creditors, but no meeting of creditors had been called by the assignee to take the consent to discharge into consideration:—*Held:* the judge was wrong in confirming the discharge, & the decision must be reversed.—*Re* SEELYE (1880), 19 N. B. R. 549.—**CAN.**

PART XVIII. SECT. 4.

5036 i. *Bill of exchange given in consideration of.*]—Deft. was the attorney of S., who petitioned for his discharge as an insolvent debtor. Pltfs., creditors of S., opposed his discharge, & for the purpose of inducing them to withdraw their opposition, insolvent's father-in-law accepted a bill of exchange, which was drawn & indorsed to pltfs. by deft.:—*Held:* the consideration for the bill was illegal, & the decree obtained by pltfs. reversed.—M'DONNELL *v.* HARDY (1842), 2 Craw. & D. 384; Ir. Circ. Rep. 401.—**IR.**

5037. —— 1849 Act.]—A bill of exchange was drawn by bkpt. upon & accepted by deft. Bkpt. indorsed the bill to H., who indorsed to pltf. The bill was given to H. on consideration of H. not opposing bkpt.'s discharge :—*Held :* the bill was not void under 1849 Act, s. 202.—TAYLOR *v.* WILSON (1850), 5 Exch. 251 ; 19 L. J. Ex. 241 ; 15 L. T. O. S. 69 ; 14 Jur. 336 ; 155 E. R. 108.

Annotations :—**Distd.** Hall *v.* Dyson (1852), 17 Q. B. 785 ; Reeves *v.* Hawkes (1861), 6 L. T. 53. **Refd.** Humphreys *v.* Welling (1862), 1 H. & C. 7.

5038. —— Effect of agreement to pay debt.]—A security given to induce a creditor to forbear opposing bkpt.'s certificate, is absolutely void under 1849 Act, s. 202, & a *bonâ fide* holder for value of a bill given for such purpose cannot recover ; but an agreement to pay a debt discharged by the certificate is not absolutely void under s. 204. A bill accepted by bkpt. in blank before the granting of his certificate, & drawn & indorsed afterwards, is not a security within s. 202, & a *bonâ fide* holder for value may sue bkpt. on such a bill.—GOLDSMID *v.* HAMPTON (1858), 5 C. B. N. S. 94 ; 27 L. J. C. P. 286 ; 31 L. T. O. S. 248 ; 4 Jur. N. S. 1108 ; 6 W. R. 768 ; 141 E. R. 37.

Annotations :—**Apld.** Reeves *v.* Hawkes (1861), 6 L. T. 53. **Refd.** *Re* Christie, *Ex p.* Priest (1860), 1 L. T. 450 ; Reed *v.* Wiggins (1862), 13 C. B. N. S. 220.

5039. Promissory note given in consideration of—Debt included in schedule.]—To an action by the payee against the maker of a promissory note, deft. pleaded that before the time of the making he was indebted to pltf. & others, & filed his petition in the Insolvent Debtors' Ct., & delivered a schedule, including his debt to pltf., & a day was appointed for his examination, that pltf. threatened to oppose his discharge, unless deft. would give him promissory notes to the amount of his debt, & thereupon deft., to induce pltf. to abandon his opposition, made & delivered to him promissory notes, one of which was that declared upon, & that deft. afterwards, by order of the ct., was discharged from the debt in respect of which the last-mentioned note was given, which discharge remained in full force :—*Semble :* the plea was bad.—HESELTINE *v.* SIELY (1852), 18 Q. B. 443 ; 21 L. J. Q. B. 305 ; 19 L. T. O. S. 109 ; 16 Jur. 725 ; 118 E. R. 167.

See, also, No. 5237, *post.*

5040. Bill of exchange accepted in consideration of.]—Bkpt. accepted a bill in favour of a creditor, who had threatened to oppose him in obtaining his certificate :—*Held :* under 1849 Act, s. 202, the bill was void, & the creditor could not recover on it.—REED *v.* WIGGINS (1862), 13 C. B. N. S. 220 ; 1 New Rep. 61 ; 32 L. J. C. P. 131 ; 7 L. T. 423 ; 11 W. R. 148 ; 143 E. R. 88.

5041. Guaranteeing payment of goods sold.]—In order to induce a creditor to sign the certificate of bkpt., A. gave him an undertaking that, in consideration that the creditor would sell goods to bkpt., he, A., would guarantee payment to a certain extent at any time during the dealings between him & bkpt. :—*Held :* the guarantee was void by 6 Geo. 4, c. 16, s. 125.—HANKEY *v.* COBB (1841), 1 Q. B. 490 ; 1 Gal. & Dav. 47 ; 10 L. J. Q. B. 196 ; 5 Jur. 891 ; 113 E. R. 1220.

5042. Money paid under—Right to recover.]—A., bkpt., in order to induce B., a creditor, to sign his certificate, paid him a sum at the time of signing it, & gave him a promissory note for a further sum, which was afterwards paid. A. afterwards made a demand upon B. for the sum so paid him, upon which B., before any action brought, paid both sums over to A.'s assignees. In an action by A. against B. :—*Held :* the payment to the assignees was a good answer, & A. was not entitled to recover.—SIEVERS *v.* BOSWELL (1841), 3 Man. & G. 524 ; 4 Scott, N. R. 165 ; 11 L. J. C. P. 14 ; 133 E. R. 1250.

5043. —— —— Part-performance.]—Defts., acting as solrs. for petitioning creditor, & with his authority, entered into an agreement with pltf. that, in consideration of a payment to them of £40 by pltf., they waived their claim for costs, & undertook not to appear at bkpt.'s public examination, & not to oppose his order of discharge. The money was paid to defts., & they did not appear at the public examination of bkpt. Before any application by bkpt. for an order of discharge, pltf. demanded the return of the money paid :—*Held :* pltf. was not entitled to recover the money back, because the contract was an illegal contract, &, where there had been a partial carrying into effect of an illegal purpose in a substantial manner, & something still remained to be performed, the money paid under the illegal contract could not be recovered.—KEARLEY *v.* THOMSON (1890), 24 Q. B. D. 742 ; 59 L. J. Q. B. 288 ; 63 L. T. 150 ; 54 J. P. 804 ; 38 W. R. 614 ; 6 T. L. R. 267, C. A.

Annotations :—**Consd.** Barclay *v.* Pearson, [1893] 2 Ch. 154 ; Hermann *v.* Charlesworth (1905), 74 L. J. K. B. 620, C. A. **Foll.** Apthorpe *v.* Neville (1907), 23 T. L. R. 575. **Refd.** *Re* Cronmire, *Ex p.* Waud, [1898] 2 Q. B. 383, C. A. ; Bonnard *v.* Dott, [1906] 1 Ch. 740, C. A. ; Tingley *v.* Müller, [1917] 2 Ch. 144, C. A. **Mentd.** Pethermal Chetty *v.* Muniandy Servai (1908), 24 T. L. R. 462, P. C. ; Gordon *v.* Metropolitan Police Chief Comr., [1910] 2 K. B. 1080, C. A.

5039 i. *Promissory note given in consideration of—Note of third party.*]—A note of a third party given by insolvent to a creditor, in order to obtain his consent to the discharge of insolvent, is null & void.—PREVOST *v.* PICKEL (1872), 17 L. C. J. 314.—**CAN.**

5039 ii. ——.]—In a suit for money due on three promissory notes, two of them executed by deft. & T. in favour of pltf., the third by deft. alone, the defence was that pltf. agreed to give up the three notes sued upon, & to take in lieu thereof a single note signed by T., while a petitioner in insolvency, in favour of deft., & by deft. indorsed to pltf. :—*Held :* as the consideration for the making of that note by T. was deft.'s withdrawing his opposition in the Insolvency Ct., the arrangement was contrary to the policy of Insolvency Act, & void.—AGAR CHAND *v.* VIRARAGHAVALU CHETTI (1866), 3 Mad. 172.—**IND.**

p. *Preference to one creditor in consideration of.*]—An agreement, by which insolvent who has obtained his personal, but not his final, discharge, without notice to the official assignee or his other creditors, settles the claim of one creditor, & by which that creditor agrees not to oppose his final discharge, is void as in fraud of creditors & as inconsistent with the policy of Insolvent Debtor's Act, & in a suit on a bond containing such an agreement, evidence is admissible on behalf of the obligor to prove that a recital in it that all the other creditors have been settled with, was untrue..

Though no creditor is bound to oppose the final discharge of insolvent, yet a private agreement by a creditor with the insolvent, by which, in consideration of a money payment, the creditor binds himself not to oppose, is void as opposed to the policy of Insolvent Debtor's Act & as in fraud of creditors.—NAOROJI NUSSERWANJI THOONTHI *v.* KAZI SIDICK MIRZA (1896), I. L. R. 20 Bom. 636.—**IND.**

q. —— *Secret inducement to acquiesce in dividend.*]—*Held :* a creditor, who had been secretly induced by a sum of money to acquiesce in a dividend which he had previously opposed, was subject to the penalties of Scottish 1856 Act, which imposed penalties on creditors who entered into secret or collusive agreements for facilitating bkpt.'s discharge, although he had stipulated & obtained an assurance when receiving the money that it should not come from the other creditors, & although he returned the amount with interest immediately on being told that his conduct in accepting it was a breach of the law, & was censured.—CARTER *v.* MCLAREN (1871), L. R. 2 Sc. & Div. 120.—**SCOT.**

SECT. 5.—THE ORDER.

SUB-SECT. 1.—IMMEDIATE UNCONDITIONAL DISCHARGE.

A. When it must be granted.

Discretion of court generally.]—*See* Sect. 3, *ante*.

5044. Misconduct not amounting to misdemeanour—Or to offence within 1861 Act, s. 159.]—The Ct. of Bkpcy. has no discretionary power to refuse or suspend an order of discharge in any case where bkpt.'s conduct does not amount to a misdemeanour or to an offence within 1861 Act, s. 159.—*Re* MEW & THORNE (1862), 31 L. J. Bcy. 87; 6 L. T. 732; 8 Jur. N. S. 980; 10 W. R. 790, L. C.

Annotations:—**Consd.** *Re* Drinkwater, *Ex p.* Drinkwater (1862), 7 L. T. 300, L. JJ. **Folld.** *Re* Taylor, *Ex p.* Crabtree (1864), 33 L. J. Bcy. 33, L. C.; *Re* Clayton, *Ex p.* Clayton (1869), 5 Ch. App. 13. **Consd.** *Re* Hamilton, *Ex p.* Hamilton (1878), 9 Ch. D. 694. **Mentd.** *Re* Goodier, *Ex p.* Goodier (1870), 22 L. T. 426.

5045. *S. P. Re* DRINKWATER, *Ex p.* DRINKWATER (1862), 1 New Rep. 39; 32 L. J. Bcy. 20; 7 L. T. 300, L. JJ.

See 1914 Act, s. 26.

5046. Resolution by creditors that bankrupt not to blame—For failure to pay 10s. in the pound.]—Where a special resolution of creditors under 1869 Act, s. 48, has been properly passed, stating that in their opinion bkpt. cannot justly be held liable for his failure to pay 10*s.* in the pound, & desiring his discharge, & the terms of the sect. are in other respects strictly complied with, the ct. has no discretionary power to refuse bkpt.'s application for discharge.—*Re* HAMILTON, *Ex p.* HAMILTON (1878), 9 Ch. D. 694; 38 L. T. 620; 26 W. R. 697.

Annotation:—**Mentd.** *Re* Dempster, *Ex p.* Chisney (1878), 38 L. T. 887.

See 1914 Act, s. 26.

See, further, Nos. 5064, 5252, *post*.

B. When it may be granted.

Discretion of court generally.]—*See* Sect. 3, *ante*.

5047. No offence under 1861 Act, s. 159.]—W., a bkpt., proposed to set aside £200 a year for the payment of his debts, & upon condition of his so doing his order of discharge was granted. W. again became bkpt., & at the time of his second bkpcy. arrears of payments to the amount of £200 were due to the assignees under the first bkpcy.:—*Held:* the ct. would not annex conditions to the second order of discharge to provide for future payments under the first, no offence under s. 159 having been proved.—*Re* WILSON (1869), 20 L. T. 119; 17 W. R. 493.

5048. No offence under Debtors Act, 1869, (c. 62).]—Except in cases of offences under the above Act, the ct. has conferred upon it unlimited discretion as to granting, refusing or suspending the order, or as to imposing conditions. Such discretion must be exercised judicially.—*Re* WING (1888), 4 T. L. R. 619.

5049. —— Power to take bankrupt's conduct into consideration.]—Except in cases of offences under the above Act, the ct. has conferred upon it unlimited discretion as to granting, refusing or suspending the order as to imposing conditions, & it has full power to take bkpt.'s conduct into consideration.—*Re* GREPE (1889), 6 T. L. R. 19.

5050. No offence under 1883 Act, s. 28.]—Under the above sect. the ct. has an unlimited discretion to grant or refuse bkpt. his discharge, or to suspend his discharge, or to grant a conditional discharge, except in the cases in which that discretion is expressly limited by the proviso to the sect.—*Re* BARKER. *Ex p.* CONSTABLE, *Re*

PART XVIII. SECT. 5, SUB-SECT. 1. —A.

r. *No general misconduct.*]—B. in 1861 voluntarily sequestrated his estate, having debts £300, assets practically *nil*. At the first & only meeting, neither insolvent nor any creditor attended, & no creditor was proved in the estate. In 1867 insolvent's father died in Tasmania, having devised & bequeathed to him property of the value of £6,000 & appointed him exor. He then, without the knowledge of his assignee or creditors, went to Tasmania, & subsequently returned to Victoria with money, & without the intervention of his assignee, advertised for his former creditors, & paid all such as he was able to find. Having done this, he informed his official assignee thereof, who then required him to account to him for all the after acquired property, & pay a commission upon it, which he refused to do. On application for his certificate, which was opposed by the official assignee:—*Held:* insolvent was not liable to a refusal or suspension of his certificate for non-attendance at his first & only meeting, or for leaving the country without the consent of his creditors, or for refusing to assist the assignee in realising his after acquired estate, & he had not been guilty of general misconduct, within 7 Vict. No. 19, s. 17, by having taken upon himself the administration of his own estate.—*Re* BABTIE (1868), 5 W. W. & A'B. 13.—**AUS.**

s. *Charge of misconduct disposed of in criminal proceedings.*]—Where insolvent, who had been acquitted on a charge of not keeping proper books applied for his rehabilitation:—*Held:* as the facts disclosed were the same as those investigated at the criminal trial, the application should be granted.—*Ex p.* SUSSER (1907), T. S. 989.—**S. AF.**

t. ——.]—Insolvent sued an insurance co. to recover the amount for which his store had been insured. The claim was dismissed with costs as being fraudulent. He was thereupon prosecuted criminally on a charge of fraud, but was found not guilty. In an application for rehabilitation:—*Held:* as the ground of objection had been disposed of in the criminal proceedings, the rehabilitation should be granted.—*Ex p.* SHEEN (1914), T. P. D. 586.—**S. AF.**

w. ——.]—*Ex p.* RIFKIND (1915), T. P. D. 284.—**S. AF.**

x. *Failure of objections made to discharge—Objections merely of preliminary character.*]—T., an insolvent, made a voluntary assignment, which he delivered to the *interim* assignee on Mar. 1, who called a meeting of creditors for Mar. 15, at which he was appointed assignee of the estate. On Mar. 29 insolvent filed with the assignee a deed of composition & discharge, & an advertisement was thereupon published & continued for one month, giving notice of application for confirmation of the discharge. The application was made on May 18, & objections were made on the grounds, (1) insolvent had not deposited the deed with the assignee for the purpose contemplated, nor had the assignee pursued the course prescribed by Insolvent Act, 1869, s. 97; (2) one month's notice has not expired, from the first meeting of creditors of insolvent before the filing of & acting upon the deed of composition & discharge, as required by s. 36; (3) no dividend could be declared until three months after notice of the appointment of the assignee:—*Held:* the objections taken being merely of a preliminary character, on failure of the objections, insolvent was not entitled to his discharge without further inquiry.—*Re* TUCKER (AN INSOLVENT) (1871), 8 N. S. R. 300.—**CAN.**

y. *On bankrupt passing final examination.*]—The ct. has not power to refuse bkpt. his certificate, when once he has passed his final examination.—*Re* SCOTT & SCOTT (1859), 12 Ir. Jur. 52.—**IR.**

z. *Consent of creditors—Although no assets.*]—The fact that insolvent has no assets will not prevent a consent to his discharge, executed by the statutory majority of his creditors, from operating as an absolute discharge from his liabilities, which should be confirmed by the county ct. judge.—*Re* HANINGTON, *Ex p.* CLEMENTSON (1880), 20 N. B. R. 413.—**CAN.**

a. —— —— *& no assignment executed.*]—Under 1864 Act, s. 9, a consent to a discharge is operative even without an assignment, provided insolvent files an affidavit that he has no estate or effects to assign.—*Re* PERRY, 2 C. L. J. N. S. 75.—**CAN.**

PART XVIII. SECT. 5, SUB-SECT. 1. —B.

b. *Estate paying no dividend.*]—The ct. may grant a certificate to an arranging debtor although his estate did not pay any dividend to the creditors.—*Re* ARRANGING DEBTOR (1876), 10 I. L. T. Jo. 91.—**IR.**

c. *Opposition only from creditor charging exorbitant rate of interest.*]—Insolvent discharged, when the only creditor opposing his discharge was a money-lender who lent money to him at an exorbitant rate of interest.—*Re* HOME (1867), 1 I. L. T. Jo. 443.—**IR.**

d. *Bankrupt out of business for more than two years—Notwithstanding reckless trading.*]—Although there has been reckless trading, where bkpt. has been upwards of two years out of business, he will get an immediate certificate.—*Re* ARCHER (1859), 34 L. T. O. S. 48.—**IR.**

JONES, *Ex p.* JONES (1890), 25 Q. B. D. 285; 59 L. J. Q. B. 331; 38 W. R. 609; 6 T. L. R. 296; 7 Morr. 111, C. A.

Annotations:—**Distd.** *Re* Gould, *Ex p.* Gould (1890), 7 Morr. 215, D. C. **Mentd.** Moore *v.* Brompton County Court (1893), 69 L. T. 140, D. C.; *Re* Gaskell (1904), 20 T. L. R. 469, C. A.

5051. Grounds for granting—No debts proved.]—Upon bkpt. applying for his certificate, it appeared that not a single creditor, not even petitioning creditor, who held security for his debt, had proved a debt. The debts of the unsecured creditors were only £13 11*s.* 2*d.* & of those holding security £102 10*s.* The assets were about £40:—*Held:* an immediate certificate of the first class should be granted.—*Re* BAKER (1857), 29 L. T. O. S. 26.

5052. —— Bankruptcy caused by misfortune without misconduct—Damages incurred in action of slander—Onus of proof.]—Applt., who was in the habit of making speeches on social questions, used words at a meeting in a public place, for which an action for slander was brought in which he was ordered to pay damages & costs. As a result of the action, he was made bkpt., & applied for a certificate with his discharge under 1883 Act, s. 32 (2) (b), so that he might become a candidate at the elections. It appeared that he had no personal interest in the matter & what he did was from motives of charity.—*Held:* applt. had not discharged the *onus* of showing that "the bkpcy. was caused by misfortune without any misconduct on his part," & the certificate should not be granted.—*Re* THOMPSON, *Ex p.* THOMPSON (1919), 88 L. J. K. B. 646; [1918–1919] B. & C. R. 150, D. C.

5053. —— Punishment suffered sufficient—Second application.]—A trader was adjudged bkpt. in 1851, & his certificate was wholly refused, on the ground that bkpt. had engaged in gambling in stock within 1849 Act, s. 201. After a lapse of ten years, during which he had lived abroad, but had there been sued by a creditor holding a security provable under the bkpcy., & was imprisoned at his suit for a period of nine months, he applied for his discharge under 1861 Act, s. 160, but the comr. refused to order same, on the ground of his going & remaining abroad after the refusal of his certificate:—*Held:* he was entitled to an absolute & unconditional discharge.—*Re* MATHESON (1862), 31 L. J. Bcy. 23; 6 L. T. 203; 8 Jur. N. S. 371; 10 W. R. 256, L. JJ.

5054. —— —— ——.]—Bkpt.'s certificate of conformity having been wholly refused in Feb., 1862, application was made at the expiration of three years for the allowance, under 1861 Act, s. 160, of an order of discharge. Opposition was raised by the assignees, on the grounds that bkpt. had contracted debts without having any reasonable expectation of payment, & that he had, to a certain extent, traded upon fictitious capital, being two of the offences specified in s. 159:—*Held:* bkpt. had been sufficiently punished for any offences mentioned in s. 159, by a suspension of three years without protection, & he was entitled to an order of discharge.—*Re* FENN (1865), 13 W. R. 695.

See, also, Nos. 5238 *et seq.*, *post.*

5055. Grounds for refusing—Dealing in accommodation bills.]—That bkpt. has dealt in accommodation bills is not necessarily a circumstance affecting his title to a certificate.—*Re* HAMMOND, *Ex p.* HAMMOND (1855), 6 De G. M. & G. 699; 24 L. J. Bcy. 2; 24 L. T. O. S. 265; 3 W. R. 197; 43 E. R. 1405, L. JJ.

Annotations:—**Mentd.** *Re* Anderton, *Ex p.* Anderton (1857), 1 De G. & J. 298, L. JJ.; *Re* Laurence, *Ex p.* Laurence (1861), 30 L. J. Bcy. 33 L. JJ.

5056. —— Sequestration pending in Scotland.]—A certificate allowed against the objection of creditors in Scotland, that bkpt. was properly the object of a sequestration, & that the question of sequestration was then depending in the Ct. of Session.—*Re* CLIFFE, *Ex p.* COCKAYNE (1815), 2 Rose, 233, L. C.

Who may oppose.]—*See* Nos. 4990–4997, *ante.*

C. When it cannot be granted.

(a) In General.

Discretion of court generally.]—*See* Sect. 3, *ante.*

5057. Bankrupt guilty of offence under Debtor's Act, 1869 (c. 62), or Bankruptcy Acts.]—Under 1883 Act, s. 28 (2), the ct. is bound to refuse an order of discharge to a bkpt. who has been convicted of a misdemeanour under Debtors Act, 1869, Part II., even though bkpt. has undergone a sentence of imprisonment imposed upon him for such offence.—*Re* RICHARDSON & WEBSTER, *Ex p.* WEBSTER (1887), 3 T. L. R. 322; 4 Morr. 22.

5053 i. *Grounds for granting—Punishment suffered sufficient—Second application.*]—The duties of a junior member of a firm of graziers & dealers in stock were entirely distinct from those of keeping books, etc., which were left to a senior partner. On the firm becoming insolvent the certificates of all the partners were refused. After five years the junior partner again applied for his certificate, & it was refused, on the ground that he had not kept reasonable accounts or entries of his receipts & payments:—*Held:* assuming him to be liable for the acts of his partners, in the circumstances of the case he was sufficiently punished by being kept out of his certificate for five years, & order made for the grant of the certificate.—*Re* MCINTYRE (1885), 11 V. L. R. R. 312.—**AUS.**

f. —— *Creditors paid in full—Executing legal acquittance of debts.*]—Where the creditors have been paid in full or have executed a legal acquittance of their debts wholly outside of the Bkpcy. Ct., bkpt. may, under 1898 Act, s. 35, apply for a release of his estate &, on being satisfied of either of those facts, the ct. may make the order. It is not material whether the creditors have proved or not, or whether they are secured or unsecured.—*Re* SUTTOR, *Ex p.* SUTTOR (1901), 1 S. R. N. S. W. 13.—**AUS.**

g. —— *Payment of preferential claims—Notwithstanding balance due to wages creditor.*]—*Held:* bkpt. was entitled to his discharge, notwithstanding there was a balance due to a wages creditor, after payment to such creditor of the amount in respect of which he had a preferential claim under 1883 Act, s. 137.—*Re* FORD (1889), 8 N. Z. L. R. 156.—**N.Z.**

k. *Ground for refusing—Non-disclosure of property acquired—Insolvent within jurisdiction.*]—The non-disclosure of the acquisition of property, by insolvent, who has remained within the jurisdiction uninterruptedly from sequestration to application for certificate, is not a ground for refusal of his certificate under 7 Vict. No. 19, s. 18. *Secus* where being out of the jurisdiction he acquires property, & does not inform the assignees of it.—*Re* TYRER (1878), 4 V. L. R. 12.—**AUS.**

l. —— *Omission to state causes of insolvency—Omission not wilful.*]—Insolvent swore to an affidavit verifying the statement of liabilities & assets, but inadvertently omitted the statement of the causes to which he attributed his insolvency, but he made the statement verbally at the first meeting of creditors. The defect was not pointed out for more than a year, & after the discharge had been applied for, & insolvent then swore to another affidavit supplying the omission:—*Held:* the omission would not disentitle insolvent to his discharge, as it was not wilful.—*Re* MARTIN & ENGLISH (1880), 5 A. R. 647.—**CAN.**

m. —— *Postnuptial settlement made bonâ fide.*]—A postnuptial settlement upon his wife was made by insolvent, at a time when he was not aware of his inability to meet his liabilities, & while he had contracts on hand from which he might reasonably have expected to make a profit, though they afterwards proved unsuccessful:—*Held:* no ground for refusing the insolvent his discharge.—*Re* RUSSELL (1882), 7 A. R. 777.—**CAN.**

PART XVIII. SECT. 5, SUB-SECT. 1. —C. (a).

n. *Bankrupt guilty of misdemeanour under* 1898 *Act—Evidence sufficient to justify criminal conviction.*]—An application by bkpt. for a certificate of discharge cannot be refused upon the ground that bkpt. has been guilty of a misdemeanour under 1898 Act, unless the evidence is sufficient to justify a conviction of bkpt. by a jury for the same offence in a criminal ct.—SCOTT FELL *v.* LLOYD (1911), 13 C. L. R. 230.—**AUS.**

Sect. 5.—The order: Sub-sect. 1, C. (a) & (b), i. & ii.]

5058. ——.]—Bkpt. had committed four serious trade offences within 1883 Act, s. 28, & he had also committed two specific offences under Debtors Act, 1869:—*Held:* the ct. had no discretion, but must altogether refuse to grant bkpt. any order of discharge.—*Re* ZAPPERT (1888), 4 T. L. R. 264.

5059. —— **Onus of proof of offence.**]—The jurisdiction of the ct. under 1890 Act, s. 8 (2), to grant or refuse a discharge is absolute, except in so far as it is fettered by the proviso. The proviso depends upon proof of the facts, & the burden of proof rests with those who wish to bring the proviso into force.—*Re* VAN LAUN, *Ex p.* INTERNATIONAL ASSETS CO., LTD. (1907), 23 T. L. R. 371; 14 Mans. 281, C. A.

5060. —— **What offence—Offence committed before passing of Act—1883 Act, (s. 28).**]—*Held:* the *quasi*-penal provisions of 1883 Act, s. 28 (2), (3), were retrospective, *i.e.*, they applied to acts done by debtor before the Act came into operation, if the proceedings were instituted under that Act.—*Re* ROGERS, *Ex p.* ROGERS (1884), 13 Q. B. D. 438; 33 W. R. 354; 1 Morr. 159, D. C.

Annotations:—**Refd.** *Re* Binko (1885), 1 T. L. R. 239. **Mentd.** *Re* Freeman (1909), 25 T. L. R. 365.

5061. —— —— **Offence committed subsequent to Act—1861 Act, s. 159.**]—*Held:* the above sect. was not retrospective, & an offence created by that clause must, in order to justify the refusal or suspension of the order of discharge, have been committed subsequent to the passing of the Act.—*Re* WHITE, *Ex p.* WHITE (1864), 33 L. J. Bcy. 22; 9 L. T. 702; 12 W. R. 390; 10 Jur. N. S. 189, L. C.

Annotation:—**Distd.** *Re* Salaman, *Ex p.* Salaman (1885), 54 L. J. Q. B. 238, C. A.

5062. —— —— **Offence committed before adjudication & connected with bankruptcy—1887 Act, s. 2.**]—The proviso to 1887 Act, s. 2 (3) is restricted to misdemeanours committed in a matter connected with or arising out of the bkpcy., & does not apply to misdemeanours committed after the adjudication.—*Re* BROCKELBANK, *Ex p.* DUNN & RAEBURN (1889), 23 Q. B. D. 461; 58 L. J. Q. B. 375; 61 L. T. 543, 37 W. R. 537; 5 T. L. R. 444; 6 Morr. 138, C. A.

Annotations:—**Refd.** *Re* Jones, *Ex p.* Jones (1890), 24 Q. B. D. 589, D. C. **Mentd.** R. *v.* Dibdin, [1910] P. 57, C. A.

5063. —— —— **Meaning of "has committed."**]—The words "has committed" any misdemeanour in 1890 Act, s. 8 (2), mean "has been tried & convicted." The Ct. of Bkpcy., on an application by bkpt. for discharge, has no jurisdiction to try whether bkpt. has been guilty of criminal offences, but is confined to the power of trying whether he has been guilty of the "bkpcy. offences" specified in s. 8 (3).—*Re* WOOD, *Ex* p. LESLIE & CO., LTD. (1915), 59 Sol. Jo. 334; [1915] H. B. R. 53, C. A.

(*b*) *Offences barring immediate unconditional Discharge.*

i. *Assets under ten Shillings in the Pound.*

5064. What debts included in calculating—Debts existing at date of receiving order—Though subsequently released.]—A liability existing at the date of the receiving order is an unsecured liability within 1890 Act, s. 8 (3) (*a*), although it has been subsequently released; & where at the date of the receiving order the assets are not of a value equal to 10*s.* in the pound, on the amount of bkpt.'s unsecured liabilities, including liabilities subse-

o. *No reasonable explanation of loss of assets.*]—*Held:* a circumstance showing that insolvent not entitled to his final certificate.—HOOD *v.* DODDS (1873), 19 Gr. 639.—**CAN.**

p. *Failure to pay dividend.*]—*Held:* insolvents were not entitled to a discharge under 1875 Act, s. 65, as the facts did not show that their failure to pay a dividend of 50 cents in the dollar was caused by circumstances arising more than one month after the mailing of the declaration of insolvency, for which they could not be justly held responsible within the 3rd proviso to that sect.—*Re* GALBRAITH & CHRISTIE (1880), 5 A. R. 358.—**CAN.**

q. *Failure to pay composition.*]—The following proposal of an arranging trader was agreed to by his creditors:—Payment of all his debts in two instalments of 10*s.* each, payable in six months & twelve months respectively, to be secured by his promissory notes, his property to vest in the official assignees for realisation in default of payment of the said instalments. The trader did not pay the first set of promissory notes, & the assignees sold & distributed his assets. The trader having applied for his certificate, & his creditors opposing:—*Held:* he was not entitled to his certificate.—*Re* ARRANGING TRADER (1871), 5 I. L. T. 125.—**IR.**

PART XVIII. SECT. 5, SUB-SECT. 1.—C. (b) i.

r. *General rule.*]—In order to obtain a certificate of discharge, insolvent must show that his estate has paid, or will pay, a dividend of not less than 7*s.* in the pound to all creditors. The fact that the creditors have been paid the requisite dividend is not sufficient, unless it is shown that they have been paid out of the insolvent's estate.—*Re* FLEMING (1886), 12 V. L. R. 719.—**AUS.**

s. *Circumstances for which bankrupt cannot justly be held responsible.*]—Loss on a contract through any weather or a flood, or loss through cattle being poisoned, or through a bank refusing to continue an overdraft, will not satisfy the ct. in dispensing with the payment of 7*s.* in the pound required by Insolvency Stat., 1871 (No. 379) s. 138.—*Re* MONAGHAN (1884), 10 V. L. R. 9.—**AUS.**

t. ——.]—Where a grazier & dealer in stock became insolvent through losses incurred by the death of a very valuable entire horse & by bad seasons from drought:—*Held:* the failure of the estate to pay 7*s.* in the pound had arisen from circumstances for which insolvent could not justly be held responsible, & condition imposed by Insolvency Stat. 1871 (No. 379) s. 136, dispensed with.—*Re* MCINTYRE (1885), 11 V. L. R. 312.—**AUS.**

w. —— *Failure of companies in which insolvent held shares.*]—In 1888 insolvent owed no debts, & on a fair valuation was worth about £650,000. He was largely interested in shares in cos., & at that time was possessed of assets other than shares sufficient to pay the uncalled capital on all shares then held by him. Subsequently some of the cos. went into liquidation, & nine-tenths of the claims on the insolvent estate were in respect of shares held by insolvent in one of the cos. Real & other securities, in which insolvent was largely interested also fell largely in value between the time of insolvent valuing his property & the date of his insolvency, a period of between five & six years. The value of the assets in the estate was very small:—*Held:* the failure of insolvent estate to pay 7*s.* in the pound arose from circumstances for which he could not be justly held responsible within Insolvency Act, 1890, s. 139.—*Re* DAVIES (1894), 20 V. L. R. 499.—**AUS.**

x. —— ——.]—Insolvent became insolvent owing to depreciation in value of shares held by him in a co. At the time when insolvent first became possessed of the shares the investment was one which a prudent man was justified in making, & which would not be considered rash or speculative:—*Held:* insolvent's estate was entitled to a dispensation with the condition of paying 7*s.* in the pound.—*Re* DAVIES (1896), 22 V. L. R. 40.—**AUS.**

y. —— *Costs of election petition successfully brought against bankrupt.*]—D. stood as a candidate at a Parliamentary election for North M., & his expenses were provided. On June 28, 1892, he was informed that the Roman Catholic Bishop of M. was about to issue a pastoral, & he requested that it should not be issued till after the election. The pastoral was issued on June 29. On July 7 D. was nominated; the election took place on July 15, & D. was returned. A petition was presented to declare the election void on the grounds of undue influence & intimidation, but before it was heard, a petition against the return of the candidate for South M., on similar grounds, was decided on Nov. 30, & the election was declared void. On Dec. 15, when the petition against D.'s return came to be heard, an application was made by D.'s counsel to stay further proceedings, D. offering to give up the seat, but the judges declined to accede to the application. The case was tried, the trial lasting for eight days, & D. was unseated, & ordered to pay the costs. The costs amounted to over £1,800, & being unable to pay he was adjudicated a bkpt. He had substantially no other creditors, the total liabilities being £2,061, & the assets £227. On an application by D. for his certificate of conformity:—*Held:* the inability of D. to pay 10*s.* in the pound arose from other circumstances for which he could not be justly held responsible, & he was entitled to his certificate of conformity.—*Re* DAVITT, [1894] 1 I. R. 517.—**IR.**

quently released, the ct. cannot grant an immediate unconditional discharge, unless bkpt. satisfies the ct. that the fact that the assets are not of such value has arisen from circumstances for which he cannot justly be held responsible.—*Re* DE BERNALES (1902), 18 T. L. R. 505.

See 1914 Act, s. 26 (2) (ii), (3) (*a*).

See, also, Nos. 5046, 5059, *ante,* No. 5252, *post.*

ii. *Omission to keep proper Books.*

See 1914 Act, ss. 26 (3) (*b*), 158.

5065. What must be considered—Intention to conceal.]—The omission by a trader to keep proper books of account, to constitute an offence against the law of bkpcy. must be wilful & with intent to conceal the true state of his affairs.—*Re* MCCALLUM (1866), 14 L. T. 172.

5066. —— —— Omission to keep books evidence of.]—An intention to conceal the true state of his affairs will be inferred from a trader's omission to keep proper books of account.—*Re* WARBURTON (1869), 20 L. T. 235.

5067. —— Time at which omission began—Inspection of books by court.]—In judging of bkpt.'s intention to conceal the true state of his affairs by omitting to keep proper books of account, the ct. will look at the books themselves with reference to the time when these omissions began.—*Re* HARTMANN, *Ex p.* HARTMANN (1867), 15 L. T. 640.

5068. What books must be kept—Cash-book.]—No certificate will be granted immediately where bkpt. has kept no cash-book.—*Re* SPARROW (1850), 14 L. T. O. S. 450.

5069. What are proper books of account.]—No books are satisfactorily kept or can be called proper books of account, unless the accounts are entered up in consecutive order, each order according to its priority; & unless they are regularly balanced from time to time, so that at any time, the real state of a trader's affairs may at once appear, & so that in the event of bkpcy., he may be in a condition to make a full & true disclosure of his affairs, to the ct. & his creditors, which the law requires at his hands.—*Re* WARBURTON (1869), 20 L. T. 235.

5070. —— Object of requiring books to be kept.]—One object of requiring bkpt. to keep books, is, that the ct. may be enabled to see, & also the creditors may be enabled to see, in case of bkpcy., what his transactions have been, & to acquire that knowledge of them without a prolonged & expensive examination by accountants. Another object is to force upon bkpt., the trader, the contemplation of his own position, & to deprive him of being able to make the excuse, "True, I carried on my business after I ceased to be solvent, & in fact I was not aware that that was so."—*Re* HEAP, *Ex p.* BOARD OF TRADE (1887), 4 Morr. 314, D. C.

5071. What is keeping books properly—Ledger.]—A ledger is not satisfactorily kept, unless the accounts are entered continuously, according to their proper priority & without any intervening blank leaves. There ought also to be a regular index.—*Re* TRACEY (1849), Fonbl. 13.

5072. —— As trader.]—A solr., who enters into trade, is bound to keep books as a trader. It is not sufficient that he has kept accounts after the manner of solrs.—*Re* CARTER, *Ex p.* CARTER (1850), Fonbl. 83; 15 L. T. O. S. 118.

5073. —— So as to show position at once—Without prolonged investigation.]—In order that a trader may fulfil the requirements of 1883 Act, s. 28 (3) (*a*), his books must be kept in such a way as to show at once, without the necessity of a prolonged investigation by a skilled accountant, the state of his business.—*Re* REED & BOWEN, *Ex p.* REED & BOWEN (1886), 17 Q. B. D. 244; 55 L. J. Q. B. 244; 34 W. R. 493; 2 T. L. R. 458; 3 Morr. 90, C. A.

Annotations:—**Refd.** *Re* Hulsekopf & Marsden (1888), 4 T. L. R. 515. **Mentd.** *Re* Pinfold, *Ex p.* Pinfold (1891), 61 L. J. Q. B. 161; *Re* Morris, James *v.* London & County Banking Co. (1899), 47 W. R. 324, C. A.

5074. —— Must be posted up to date.]—A trader,

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z. —— *Intentional ignorance of partner in business affairs of partnership.*]—Intentional ignorance of the circumstances of a trading firm, or as to how its affairs were situated, or wilful inaction in relation to the business carried on, furnishes no exculpation for a member of the firm, seeking a certificate of conformity, where a failure to pay a dividend of not less than 10*s.* in the pound has arisen from circumstances for which in other respects bkpt. ought justly to be held responsible.—*Re* SPOTTEN & CO., *Ex p.* BARKLIE (1878), 12 I. L. T. 15.—**IR.**

a. *Application made before audit meeting.*]—The ct. refused to grant a certificate of conformity to bkpt., who had failed to pay 10*s.* in the pound, before the audit meeting was held, on the ground that sufficiently substantial grounds were not shown.—*Re* PARKER (1874), 8 I. L. T. Jo. 109.—**IR.**

PART XVIII. SECT. 5, SUB-SECT. 1. —C. (b) ii.

5065 i. *What must be considered—Intention to conceal.*]—The offence of not keeping reasonable accounts or entries should be gauged, as to the punishment therefor, according to its being a probable concealment of fraud. Where insolvent had not made entries of two amounts, received on the winding up of his business, but there was no evidence of an intention to conceal, his certificate was suspended only & not refused.—*Re* SCHLIEFF (1880), 6 V. L. R. 51.—**AUS.**

b. —— *Non-injury to creditors.*]—The mere fact that insolvent's creditors were not injuriously affected by the non-keeping of accounts does not make it less an offence, but should merely lessen the amount of the punishment.—*Re* MCNALLY (1886), 12 V. L. R. 254.—**AUS.**

c. —— *Nature of business.*]—The judge in insolvency refused insolvent his discharge on the grounds that he had kept no books of account showing receipts & disbursements of cash, & other books suitable for his trade:—*Held:* as some three months only had intervened between 1864 Act & the application for discharge, & considering the inconsiderable nature of his business, insolvent should not have been so severely dealt with.—*Re* PARR (1867), 17 C. P. 621.—**CAN.**

5068 i. *What books must be kept—Cash book.*]—A trader who does not keep a cash book is not entitled to a discharge under 1875 Act.—GILBERT *v.* GIROUARD (1878), 2 P. & B. 148.—**CAN.**

5068 ii. —— —— *Account books.*]—Under 1875 Act, ss. 56, 57, a judge has no power to grant insolvent his discharge, where he has failed to keep a cash book & account books suitable for his trade, even although such omission may not be due to any fraudulent intention.—*Re* GOODING (1880), 5 A. R. 643.—**CAN.**

5069 i. *What are proper books of account—Bank account.*]—A bank account kept by a bank for a customer is not a sufficient account to comply with Insolvency Stat., 1871 (No. 379), s. 138 (1).—*Re* MONAGHAN (1884), 10 V. L. R. 9.—**AUS.**

5072 i. *What is keeping books properly—"Reasonable" accounts.*]—Certificate suspended, insolvent not having kept reasonable accounts. Reasonable accounts need not be formally correct or technical, but should be such as to enable a trader to understand his own position.—*Re* BELL (1870), 1 V. R. 2.—**AUS.**

5072 ii. —— *Where no commercial business.*]—In order absolutely to disentitle insolvent to his discharge on the ground of failure to keep proper books of account, where the case is not one of a commercial business, the party opposing the discharge must show that there were no books; or, if there were, in what respect they were defective.—*Re* RUSSELL (1882), 7 A. R. 777.—**CAN.**

5073 i. —— *So as to show position at once.*]—Insolvent's books were kept in such a manner that they would not show the true state of his affairs. The cash book had never been balanced, & no balance sheet was ever made out; bills were discounted which did not appear in any of the books, & goods were transferred from his wholesale to his retail place of business without entry in the books that were kept:—*Held:* it was not essential, on the one hand, that the books should have been kept in the most approved form, nor were they sufficient, on the other, however carefully kept in some respects, if they failed to exhibit insolvent's exact position.—*Re* HILL (1882), 7 A. R. 694.—**CAN.**

Sect. 5.—*The order: Sub-sect.* 1, *C.* (*b*) *ii., iii., & iv.*]

neglecting for twelve months to post up his books, & ignorant of the true state of his affairs, with a growing deficiency, incurred losses in a series of improvident adventures:—*Held:* he was guilty of wilful omission to keep proper accounts.—*Re* RIEBER (1868), 19 L. T. 24.

5075. —— ——.]—Bkpt. had kept the usual books, but had been guilty of neglect in writing them up, it being impossible to discern the financial position of the firm therefrom. The insolvency of the firm was due in great measure to this omission to keep proper books. The books were written up by the trustee subsequent to the failure. Bkpt. pleaded that superintending his business did not give him time to balance his books, & that the materials for writing them up were ready at hand:—*Held:* he had omitted to keep proper books of account.—*Re* BADART FRÈRES (1885), 1 T. L. R. 601.

5076. —— —— **& balanced.**]—It is not sufficient that there should be books; they must be properly kept, & balanced from time to time, so that at any time the real state of a trader's affairs may at once appear upon them.—*Re* SMART (1849), 14 L. T. O. S. 137.

5077. —— —— ——.]—Bkpts.' books had been well kept so far as they recorded the business transactions of the firm, but they had not been balanced, & bkpts. kept no capital account & made out no balance sheet:—*Held:* bkpts. had omitted to keep proper books of account.—*Re* ESDAILE & PEATY (1887), 3 T. L. R. 823.

5078. —— —— ——.]—Bkpt's. books did not sufficiently disclose his business transactions & financial position. The creditors' & debtors' accounts in the ledger had not been fully written up, & the books had not been properly balanced at any time. Bkpt. alleged that he had no knowledge of book-keeping:—*Held:* bkpt. had omitted to keep proper books of account, & if not able to keep books himself, he ought to have employed a proper book-keeper for the purpose & to have seen the balance sheets were made out from time to time.—*Re* HULSEKOPF & MARSDEN (1888), 4 T. L. R. 515.

5079. In regard to what transactions books must be kept—Speculations outside ordinary trade.]—Bkpt., who carried on business as a hatter, bought some houses with the intention of selling them at a profit for building purposes, & also incurred liabilities in promoting a hotel co. He had kept proper books of account in relation to his business as a hatter, but he had kept no books in respect of his purchase of houses or of his transactions in relation to the hotel co.:—*Held:* (1) bkpt. was not required to keep any books relating to the building speculations; (2) the omission to keep such books could not be taken into account as a reason for refusing or suspending his order of discharge.—*Re* MUTTON, *Ex p.* BOARD OF TRADE (1887), 19 Q. B. D. 102; 56 L. J. Q. B. 395; 56 L. T. 802; 35 W. R. 561; 3 T. L. R. 623; 4 Morr. 180, C. A.

Annotation:—**Folld.** *Re* Cosedge (1888), 4 T. L. R. 562.

5080. —— **Isolated transaction—First transaction.**]—If an isolated transaction, which if repeated would be a transaction in a business, is undertaken with the intent that it should be the first of several transactions, it is a first transaction in an existing business, & if the business is one in which it is usual and proper to keep books of account, the omission to keep such books with respect to the transaction is a fact, on proof of which the ct. must either refuse, suspend, or attach conditions to bkpt.'s order of discharge, in accordance with 1883 Act, s. 28 (2), (3) (*a*).—*Re* GRIFFIN, *Ex p.* BOARD OF TRADE (1890), 60 L. J. Q. B. 235; 39 W. R. 156; 7 T. L. R. 146; 8 Morr. 1, C. A.

Annotation:—**Mentd.** A.-G. *v.* Plymouth Corpn. (1908), 99 L. T. 793.

5081. When excused—Illness.]—Where the not keeping proper books was occasioned by illness of bkpt., which had rendered him incapable of paying proper attention to his accounts, & the creditors did not oppose, & no grounds appeared on the face of the proceedings to warrant the ct. in refusing or suspending the certificate, it was granted as of the first class.—*Re* FOWLER (1853), 22 L. T. O. S. 67.

5082. Falsification of books.]—Where bkpt. had made misrepresentations & false entries in his books for the purpose of concealment & fraud, his certificate was suspended for twelve months, & protection refused:—*Qu.:* whether the case fell within the offences enumerated in 1849 Act, s. 256.—*Re* STEPHANOFF, *Ex p.* STEPHANOFF (1857), 26 L. J. Bcy. 88; 29 L. T. O. S. 317; 3 Jur. N. S. 967, C. A.

5083. ——.]—Bkpt. was refused a certificate on the ground of falsification of books, but was granted protection, if the unconditional consent of the opposing creditors were given.—*Re* KNIGHT, *Ex p.* KNIGHT (1857), 26 L. J. Bcy. 57; 5 W. R. 552, C. A.

5084. ——.]—Bkpt. falsified the books of the firm, not with the view of any pecuniary advantage to himself, but in order to conceal from his partners a state of embarrassment in which the partnership affairs were involved, but which was conceived by him to be temporary only. Bkpt. believed at the time that the concern would ultimately turn out a profitable one, but that his partners, if they had known the true state of its affairs, would have abandoned it:—*Held:* his certificate had been

5079 i. *In regard to what transactions books must be kept—Speculations outside ordinary trade.*]—Insolvent, who had carried on a very extensive business as a merchant, kept a bookkeeper, & books well kept as mercantile books, in which there was amongst others a "private account." In that account he mixed money, the separate property of his wife, with money of his own, but there was no account in the books showing the state of accounts between him & his wife. He had large dealings with his brother, & there were complicated transactions of business & accommodation acceptances between them; but the books showed no account of such dealings. He purchased extensively, & afterwards sold, shares in an insurance co., but the books showed no record of such transactions. He also purchased real estate, & paid a deposit on it, of which there was no entry in the books:—*Held:* (1) he had "not kept reasonable accounts or entries of his receipts & payments"; (2) such omission was not attributable to ignorance or carelessness, so as to be sufficiently punished by suspension of his certificate, & certificate refused.—*Re* MCDONALD (1880), 6 V. L. R. 45.—**AUS.**

5081 i. *When excused.*]—On an application by bkpt., whose estate did not realise 10*s.* in the pound, for a certificate of conformity, the official assignee reported (*inter alia*) that the books of bkpt. had been imperfectly kept, & that such fact might be attributed to his late irregular habits:—*Held:* although the irregularity imputed to bkpt. would have been a ground for withholding his certificate, had it been shown that, as a result, property of the creditors entrusted to bkpt. had been improperly dealt with, yet, such not being shown, bkpt. was, upon the facts stated in the report of the official assignee, entitled to an immediate certificate of conformity.—*Re* HARRIS (1874), 8 I. L. T. 121.—**IR.**

5082 i. *Falsification of books.*]—The Ct. of Bkpcy. will grant a certificate to bkpt., although he may have destroyed, mutilated, altered, or falsified his books, prior to the committal of an act of bkpcy., where he subsequently & immediately confesses the fraud, & passes his final examination to the satisfaction of the ct., by making a full disclosure of his affairs, unless such mutilation, etc., be committed in contemplation of bkpcy., or with intent to defeat the object of Bkpt. Acts, & with intent to defraud his creditors.—*Re* CHAPMAN & BRADFORD (1850), 2 Ir. Jur. 220.—**IR.**

properly refused, but, in the circumstances, an order for protection should be made, so far as it might be available.—*Re* NICHOLSON, *Ex p.* NICHOLSON (1859), 1 De G. F. & J. 270; 29 L. J. Bcy. 1; 45 E. R. 362, C. A.

See 1914 Act, s. 154.

See, also, Nos. 5244, 5288, 5290, *post.*

iii. *Trading with Knowledge of Insolvency.*

See 1914 Act, s. 26 (3) (*c*).

5085. What constitutes insolvency.]—A man must be taken to be insolvent, who is not able to meet his debts.—*Re* FOXWELL, *Ex p.* PEARSE (1832), 2 Deac. & Ch. 451.

5086. What constitutes trading with knowledge of insolvency—Trader in difficulties—Reasonable expectation to retrieve position.]—A trader is not bound to leave off trading, merely because he is in difficulties. The question in each case is whether he has continued trading after there ceased to be any reasonable prospect of his retrieving himself.—*Re* JOHNSON, *Ex p.* JOHNSON (1851), 4 De G. & Sm. 25; 20 L. J. Bcy. 6; 15 Jur. 185; 64 E. R. 718.

Annotations:—**Consd.** *Re* Mortimore, *Ex p.* Mortimore (1861), 3 De G. F. & J. 599, L. JJ. **Refd.** *Re* Lawrence, Mortimore & Schrader (1861), 4 L. T. 184. **Mentd.** *Re* Dornford, *Ex p.* Dornford (1851), 4 De G. & Sm. 29; *Re* Rufford, *Ex p.* Rufford (1852), 2 De G. M. & G. 234, L. JJ.; *Re* Barnard & Rosenthal, *Ex p.* Evans (1862), 6 L. T. 519, L. JJ.

5087. —— —— ——.]—M., a tanner, employed as his factors S. & Co., a firm in high repute, one of the members of which was his brother, & they were in the habit of accommodating him with money to a large amount. He never took stock & did not accurately know the state of his affairs. In 1857 there was a panic in the leather trade & his stock suffered heavy depreciation, from which it never recovered. M. fully believed himself to be solvent, though he was aware that but for the accommodation afforded him by S. & Co., he must have stopped payment, & he went on trading until July, 1860, when S. & Co. stopped payment. M. then investigated his affairs & found that he had been insolvent ever since the end of 1858. He then at once stopped payment & presented a petition for arrangement with his creditors, under 1849 Act, ss. 211-223:—*Held:* the trader had not delayed the presentation of his petition "longer than was excusable," inasmuch as he continued to trade in the belief that with the assistance of S. & Co., he would be able to carry it on with ultimate success, though, if he had investigated his affairs, it would have appeared that his debts exceeded his assets for more than two years before his stoppage.—*Re* MORTIMORE, *Ex p.* MORTIMORE (1861), 3 De G. F. & J. 599; 30 L. J. Bcy. 17; 3 L. T. 828; 7 Jur. N. S. 320; 9 W. R. 423; 45 E. R. 1011, L. C. & L. JJ.

5088. —— Knowledge that assets insufficient—Credit obtained by exaggeration.]—The facts of a trader having been, for more than three years before his bkpcy., in such a condition that all his assets, if realised, would be less than the amount of his debts, & nevertheless continuing to trade, are not decisive against the allowance of his certificate, but render it incumbent on him to show a justification, or some fair & reasonable excuse for such conduct, at least if any creditor under the bkpcy. has suffered by it.

Where no such explanation was given, &, in addition to the above facts, it appeared that bkpt. had obtained credit from the opposing creditor by exaggerated statements, on which the creditor relied, of the value of wines comprised in a security:—*Held:* a proper case for suspending the certificate.—*Re* DORNFORD, *Ex p.* DORNFORD (1851), 4 De G. & Sm. 29; 20 L. J. Bcy. 7; 16 L. T. O. S. 553; 15 Jur. 278; 64 E. R. 720.

Annotations:—**Refd.** *Re* Rufford, *Ex p.* Rufford (1852), 2 De G. M. & G. 234, L. JJ.; *Re* Lawrence, Mortimore & Schrader (1861), 4 L. T. 184; *Re* Salaman, *Ex p.* Salaman (1885), 14 Q. B. D. 936, C. A.

5089. —— —— Banker continuing to take deposits.]—Bankers continued to trade for two years after they were hopelessly insolvent:—*Held:* their certificates had been properly refused, but by the consent of the assignees & of the creditors opposing the certificate, protection was granted to them.

If bankers continue to receive deposits, knowing that if the business were wound up, they could not pay 5*s.* in the pound, that is a trading which is utterly unjustifiable. *Semble:* the effects of the misconduct of a banker are such as to distinguish his case from that of other traders upon his application for a certificate.—*Re* RUFFORD, *Ex p.* RUFFORD (1852), 2 De G. M. & G. 234; 21 L. J. Bcy. 32; 19 L. T. O. S. 279; 42 E. R. 862, L. JJ.

Annotations:—**Refd.** *Re* Lawrence, Mortimore & Schrader (1861), 4 L. T. 184; *Re* Shotter, *Ex p.* Shotter (1861), 6 L. T. 136, L. JJ. **Mentd.** *Re* Wooldridge, *Ex p.* Wooldridge (1855), 24 L. J. Bcy. 17, L. JJ.

5090. —— —— Belief that assets sufficient on careful realisation.]—A debtor does not trade after knowing himself to be insolvent, who believes that a careful, prudent, & unhurried realisation of his assets will produce 20*s.* in the pound for his creditors, although he may know that a forced sale at breaking-up prices will not produce that result.—*Re* BROWN (JOHN) & CO. (1906), 22 T. L. R. 291.

5091. —— —— Intermeddling bonâ fide for benefit of creditors.]—A person, who intermeddles with his estate when to his knowledge he is insolvent, is not thereby guilty of misconduct, if he has acted *bonâ fide* & with the intention of benefiting his creditors.—*Re* FREEMAN (1909), 25 T. L. R. 365.

iv. *Contracting Debts without Expectation of being able to pay.*

See 1914 Act, s. 26 (3) (*d*).

5092. In general—What must be proved.]—In order to subject a bkpt. to the penalties of 1861 Act, s. 159, as having contracted debts without

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PART XVIII. SECT. 5, SUB-SECT. 1. —C. (b) iii.

5086 i. *What constitutes trading with knowledge of insolvency—Trader in difficulties—Reasonable expectation to retrieve position*]—A trader, after discovering that he could not pay in full, continued his business, in the hope, which was not shown to have been absurd or unreasonable, that he would thereby be able to do so, & in the course of the business so continued contracted some new debts, but was unsuccessful, & found it necessary to assign:—*Held:* he was not thereby disentitled to his discharge.

In such a case it may or may not be his duty to discontinue his trade, according to circumstances; continuing may be a fraud, but is not necessarily so.—*Re* HOLT & GRAY (1867), 13 Gr. 568.—**CAN.**

PART XVIII. SECT. 5, SUB-SECT. 1. —C. (b) iv.

5092 i. *In general.*]—Contracting debts without intending to pay or having at the time any reasonable or probable expectation of being able to pay same is an offence which will be punished under Insolvency Stat., 1871 (No. 379), s. 138 (1), by suspension or refusal of a certificate according to its degree.—*Re* MONAGHAN (1884), 10 V. L. R. 9.—**AUS.**

5092 ii. ——.]—The words in 11 & 12 Vict. c. 21, s. 51, relating to debts contracted "without having any reasonable or probable expectation at the time when contracted of paying them" are pointed, not at the case of a man who incurs a debt knowing that he cannot play his debts generally, but at that of a man who incurs a debt knowing that he cannot repay that debt. The words in the same sect., "if it shall appear that insolvent's whole debts so greatly exceeded his means of providing for the payment thereof during the time when same were in course of being contracted, reference being had to his actual & expected property as to show gross

Sect. 5.—The order: Sub-sect. 1, C. (b) iv.]

reasonable expectation of being able to pay same, it must be shown that there are particular subsisting debts, which at the time when they were contracted he could not reasonably have expected to be able to pay, & it is not enough to show that he contracted in the aggregate a greater amount of debts than he could reasonably expect to pay.—*Re* CALDWELL, *Ex p.* BRUNDRIT (1867), 3 Ch. App. 26; 16 W. R. 66, L. J.

Annotations:—**Apld.** *Re* Brown (1906), 22 T. L. R. 291. **Reid.** *Re* Rieber (1868), 19 L. T. 24; *Re* Scharrer (1888), 4 T. L. R. 627.

5093. —— ——.]—A trader was acquitted of the charge of contracting debts without reasonable expectation of being able to pay them, there being no proof of any specific debt so contracted.—*Re* RIEBER (1868), 19 L. T. 24.

5094. —— **Meaning of "without reasonable probability."**]—The words in 1849 Act, s. 223 "without reasonable probability at the time of contract of being able to pay them" mean without a reasonable probability, reasonably supposed by the trader to exist at the time of contract, that he would be able to pay.

Where a merchant, who was habitually accommodated by his factors with money to a large amount, continues to trade, though he is aware that but for the accommodation afforded him by his factors, he must have stopped payment, he is not guilty of contracting debts without a reasonable probability of being able to pay them, since, having regard to his reasonably grounded expectation that the factors would enable him to meet his engagements, he may reasonably believe that he would be able to pay.—*Re* MORTIMORE, *Ex p.* MORTIMORE (1861), 3 De G. F. & J. 599; 30 L. J. Bcy. 17; 3 L. T. 828; 7 Jur. N. S. 320; 9 W. R. 423; 45 E. R. 1011, L. C. & L. JJ.

5095. —— **Effect of payments.**]—A man who, owing £400, has paid off £200 by half-yearly instalments in the two years immediately preceding his bkpcy., cannot be held to have contracted the original debt without reasonable expectation of being able to pay.—*Re* MCCALLUM (1866), 14 L. T. 172.

5096. —— ——.]—Bkpt. who pays to his relations from time to time a portion of the debts due to them with the interest thereon, & during the same period receives from them in advance more than he pays, whilst his indebtedness to his other creditors is constantly increasing, is not guilty of contracting debts without a reasonable or probable ground of expectation of being able to pay them.—*Re* RYLEY, *Ex p.* RYLEY (1866), 14 L. T. 707.

5097. —— ——.]—L. had been in business as a merchant for about twenty-seven to twenty-eight years. He had been in the habit of raising money by drawing against consignments & from bankers, but he did not raise money upon accommodation bills. He contracted a debt of £40,000 or the bulk of it, ten months previous to his bkpcy., but afterwards he made payments amounting to £63,298, & his partners abroad made payments of £115,000:—*Held:* (1) although bkpt. might have stopped payment earlier, yet he could not be charged with contracting debts without reasonable expectation of payment; (2) there might be circumstances proved in aggravation of a statutory offence, but there must be clear proof of the statutory offence before those aggravated circumstances could be brought in adversely to bkpt.—*Re* LYALL, *Ex p.* LYALL (1868), 16 W. R. 1222.

5098. Exceeding fixed income.]—The mere fact that a man, who has a fixed income, has exceeded it, & so incurred debts, is not sufficient to show that he could not have had at the time when any of his debts were contracted any reasonable or probable ground of expectation of being able to pay same.—*Re* CALDWELL, *Ex p.* BRUNDRIT (1867), 3 Ch. App. 26; 16 W. R. 66, L. J.

Annotations:—**Mentd.** *Re* Rieber (1868), 19 L. T. 24; *Re* Scharrer (1888), 4 T. L. R. 627; *Re* Brown (1906), 22 T. L. R. 291.

5099. ——.]—Bkpt.'s income consisted of an annuity to be paid to him & his wife & children, at the uncontrolled discretion of the trustees under his father's will. Bkpt. had anticipated his income by nearly one year's receipts. Since the bkpcy., the annuity was paid to bkpt.'s wife. At the time that bkpt. had no income to receive, he incurred debts exceeding in amount the realisable value of his property:—*Held:* the debts were contracted without reasonable expectation of payment.—*Re* LAMBERT (1868), 20 L. T. 715.

5100. Increase on debts after omission to keep proper books.]—Bkpt. subsequent to an admitted deficiency omitted to keep proper books of account:—*Held:* an increase of debts in such circumstances was a contracting of them without reasonable ground of expectation of being able to pay.—*Re* ATKINSON (1867), 17 L. T. 356.

5101. Damages in action for malicious damage.]—A claim for damages in an action for malicious damage pending at the date of the adjudication, & subsequently converted into a debt by the verdict of the jury, does not constitute a "debt or money due" from bkpt. within 1861 Act, s. 159.—*Re* BOSWALL, *Ex p.* GLASS & ELLIOTT (1862), 6 L. T. 28; *affd.* on another point, 31 L. J. Bcy. 73, L. JJ.

Annotations:—**Mentd.** *Re* Delamere (1862), 31 L. J. Bcy. 67; *Re* Clayton, *Ex p.* Clayton (1869), 5 Ch. App. 13; *Re* Goodier, *Ex p.* Goodier (1870), 22 L. T. 426.

5102. Damages in divorce suit.]—Damages & costs recovered against co-resp. in the Divorce Ct. are no ground of opposition to an order of discharge under 1861 Act.—*Re* LAURENCE (1863), 9 L. T. 173.

5103. ——.]—A sum awarded as damages in a divorce suit is not a debt contracted without reasonable or probable ground of expectation of being able to pay it.—*Re* GRIFFITHS, *Ex p.*

misconduct in contracting same," apply not to this or that debt, or class of debts, but to all the debts contracted for some years past, & in the circumstances of the case afford ground not for excepting any specified debt under s. 51, but for deferring the discharge under s. 47.—*Re* COWIE'S PETITION (1880), I. L. R. 6 Calc. 70; 7 C. L. R. 19.—**IND.**

5092 iii. —— *What must be proved.*]—When the ground set up for refusing a certificate of insolvency & final discharge is "contracting debts without a reasonable or probable expectation of paying them," in order to succeed it is necessary to show that the debts were fraudulently contracted, without hope of being able to pay.—*Re* HOGSETT'S INSOLVENCY (1860), 4 Nfld. L. R. 527.—**NFLD.**

5092 iv. —— —— *Inability to pay all debts.*]—An inability to pay all debts will not sustain an objection to the granting of insolvent's certificate, that he contracted debts "without intending to pay or having any reasonable or probable expectation of being able to pay the same."—*Re* AARONS (1880), 6 V. L. R. 56.—**AUS.**

5092 v. —— —— ——.]—An objection that insolvent had contracted debts without any reasonable or provable expectation of being able to pay them, is not sustained by showing a general inability to pay all his debts.—*Re* WALTERS (1866), 3 W. W. & A'B. 14.—**AUS.**

5092 vi. —— —— *By bankrupt in rebuttal.*]—In order to escape the liability to have his certificate refused for having contracted a debt without reasonable expectation of being able to pay it, insolvent when he contracted the debt need not have had a good expectation of being able to pay all he owed, but only the particular debt then contracted.—*Re* MASON (1866), 3 W. W. & A'B. 28.—**AUS.**

GRIFFITHS (1864), 33 L. J. Bcy. 44 ; 10 L. T. 705 ; 10 Jur. N. S. 785, L. C.

Annotation :—**Refd.** *Re* Goodier, *Ex p.* Goodier (1870), 22 L. T. 426.

5104. ——.]—After an order *nisi* had been made in a divorce suit, dissolving the marriage, & ordering co-resp. to pay damages & costs, co-resp. made away with his property, & when the order became absolute he was utterly without means to pay them, & immediately afterwards was made bkpt. on his own application. He owed only one other debt of trifling amount for money borrowed some years before :—*Held :* the damages & costs were not a debt "contracted" by him within 1861 Act, s. 159, & he could not be dealt with as having contracted any of his debts without reasonable expectation of being able to pay them.—*Re* CLAYTON, *Ex p.* CLAYTON (1869), 5 Ch. App. 13 ; 21 L. T. 342 ; 18 W. R. 55, L. J.

5105. ——.]—Damages & costs having been awarded in a divorce suit against bkpt., he presented a petition & was adjudicated bkpt., his liabilities exceeding £2,000, & there being no assets : —*Held :* he had incurred debts without reasonable expectation of being able to pay them.—*Re* FINLAYSON (1886), 3 T. L. R. 245.

5106. Damages in action for breach of promise.]—Damages & costs recovered in an action for breach of promise of marriage form no ground of opposition to bkpt.'s order of discharge.—*Re* PEARSE (1863), 9 L. T. 349.

5107. ——.]—Damages in an action for breach of promise of marriage do not constitute such a debt as will bring deft. within the penal operation of 1861 Act, s. 159.—*Re* BILLINGHAM (1865), 13 L. T. 25.

Vexatious or frivolous defences, *see* Nos. 5176–5183, *post.*

5108. Money borrowed to meet costs of defence to divorce proceedings—Not attributable to ordinary expenditure.]—A debt originating in special circumstances, being contracted with a view to a special emergency, & not attributable to the ordinary expenditure & style of living of bkpt., *e.g.*, a sum borrowed to pay the expenses of defending a divorce suit, ought not to be taken into account in estimating whether bkpt. has contracted debts without reasonable ground of expectation of being able to pay them.—*Re* GRIFFITHS, *Ex p.* GRIFFITHS (1864), 33 L. J. Bcy. 44 ; 10 L. T. 705 ; 10 Jur. N. S. 785, L. C.

Annotation :—**Refd.** *Re* Goodier, *Ex p.* Goodier (1870), 22 L. T. 426.

5109. Costs incurred in defending action.]—In order that bkpt.'s order of discharge may be refused under 1861 Act, s. 159, on the ground that he could not have had, when any of his debts were contracted, any reasonable or probable ground of expectation of being able to pay same, it is necessary that the debts in question should be strictly debts arising out of contract, & it is not enough that they be debts provable in the bkpcy. ; & the costs payable by unsuccessful deft. to a patent suit are not a debt contracted by deft.—*Re* GOODIER, *Ex p.* GOODIER (1870), 22 L. T. 426.

Annotation :—**Refd.** *Re* Duffield, *Ex p.* Peacock (1873), 8 Ch. App. 682, L. JJ.

5110. Costs incurred in bringing action.]—The fact that bkpt. has brought an unsuccessful action, the costs of which he is unable to pay, is not sufficient cause to justify the ct. in refusing his discharge on the ground that such bkpt. has contracted a debt without having any reasonable ground of expectation of being able to pay it.—*Re* WILLIAMS (1884), 1 Morr. 91.

5111. Overdrawing current account at bank.]—Overdrawing an account current at a banker's, by a person in insolvent circumstances, does not in itself amount to contracting a debt without reasonable or probable ground of expectation of being able to pay same.—*Re* BAILLIE & HARRISON, *Ex p.* HARRISON (1866), 2 Ch. App. 195, L. JJ.

5112. Increasing overdrafts after losses on time bargains.]—A sharebroker who had met with losses on time bargains, & who had increased the balances against him at two banks shortly before his failure :—*Held :* guilty of contracting debts without reasonable expectation of being able to pay them.—*Re* WILSON (1866), 14 L. T. 492.

5113. Accepting accommodation bills.]—Where bkpt. has gone on for some years on a system of accommodation bills, although his accounts have been well kept & his conduct otherwise becoming, the ct. will nevertheless mark its disapprobation by suspending the certificate.—*Re* BARR (1848), 10 L. T. O. S. 444.

5114. ——.]—Bkpt. had been in the habit of accepting accommodation bills for a Scottish firm, which failed, receiving a commission of 1 per cent. on such acceptances :—*Held :* a suspension of the certificate for two years was not too severe a sentence.—*Re* WHITE, *Ex p.* WHITE (1853), 3 De G. & J. 75 ; 44 E. R. 1197, L. JJ.

Annotation :—**Refd.** *Re* Lawrence, Mortimore & Schrader (1861), 4 L. T. 184.

5115. ——.]—A. accepted accommodation bills without consideration, to an amount far beyond

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f. *Damages in action for libel.*]—M. was sued by F. for libel, & the action resulted in a verdict for pltf. for £3,500 damages. Pltf.'s costs were taxed at £303 13*s.* 11*d.* On the petition of F., M. was adjudicated bkpt. The total debts proved (including the debt of £3,803 13*s.* 11*d.*) amounted to £4,167 19*s.* 6*d.*, & the total assets realised amounted (after payment of costs) to £1,470 9*s* 8*d.* This included two endowment policies of insurance effected by M. for the benefit of two members of his family, which had been given up, & had realised £766. The estate had paid a dividend of 7*s.* 6*d.* in the pound :—*Held :* bkpt. was not entitled to his certificate.—*Re* M'HUGH, [1904] 2 I. R. 118.—**IR.**

5110 i. *Costs incurred in bringing action.*]—W. brought an action against a co., to recover damages for negligence, in consequence of a bicycle purchased by him from them having broken down, whereby he was injured. He obtained a verdict for £120, which was set aside by the King's Bench, & judgment was entered for defts. W. appealed to the Ct. of Appeal, but his appeal was dismissed with costs. He paid to his solrs. £150 on foot of their costs, leaving £251 due to them, for which they issued a writ, & recovered judgment. The co. taxed their costs in the action at £440. W. was adjudicated bkpt. He had no assets, & was a clerk in Belfast, earning 30*s.* a week. On the application of bkpt. for a certificate of conformity :—*Held :* the failure to pay a dividend of 10*s.* in the pound did not arise from circumstances for which bkpt. should not be justly held responsible.—*Re* WILLIAMSON, [1904] 2 I. R. 125 ; 37 I. L. T. 224.—**IR.**

5113 i. *Accepting accommodation bills.*]—Debts amounting to more than £5,000 appeared on the schedule of insolvent who, personally, owed but one of the debts ; the remainder was due on accommodation bills accepted by him for his father :—*Held :* the opposition to insolvent's discharge failed because it was not shown that insolvent, when he accepted the bills, had any idea that he or his father would not be able to meet them.—*Re* MARA (1868), 3 I. L. T. Jo. 153.—**IR.**

5113 ii. —— *Starting in business without capital.*]—Insolvent started in business without any capital of his own. The firm, which supported him, & furnished him with goods, induced him to accept accommodation bills to a large amount :—*Held :* a ground for refusing the certificate, as "contracting debts without intending, etc., to pay."—*Re* BRYANT (1867), 4 W. W. & A'B. 7.—**AUS.**

g. *Discounting bill—Given in renewal of former bills.*]—Insolvent, at a time when his affairs were hopelessly involved, discounted with a bank a bill made by M. in favour at the time M. was in good credit. The bill was in renewal of former bills which had been discounted & was of a smaller amount : —*Held :* this was not "contracting a debt without having any reasonable or probable expectation of being able to pay same."—*Re* LLOYD (1879), 2 N. S. W. S. C. R. N. S. 114.—**AUS.**

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his means or expectations, for a firm in large business, to whom he was under considerable obligations, & whom he believed to be perfectly solvent. A. became bkpt. through the failure of the firm :—*Held:* his conduct amounted to a contracting of debts without reasonable or probable ground of expectation of being able to pay same, & his order of discharge must be absolutely refused.—*Re* BARKER, *Ex p.* BARKER (1864), 33 L. J. Bcy. 13 ; 9 L. T. 672 ; 12 W. R. 321, L. C.

Annotations :—**Follid.** *Re* Harris (1864), 13 W. R. 275. **Consd.** *Re* McKerrow (1865), 13 L. T. 645. **Follid.** *Re* Mee, *Ex p.* Mee (1866), 35 L. J. Bcy. 41. **Distd.** *Re* Lyall, *Ex p.* Lyall (1868), 16 W. R. 1222.

5116. ——.]—A bill accepted for the accommodation of another person may in bkpcy. constitute a debt contracted without any reasonable or probable ground of expectation of being able to pay same.—*Re* MEE, *Ex p.* MEE (1866), 1 Ch. App. 337 ; 35 L. J. Bcy. 41 ; 14 L. T. 318, L. C.

5117. —— **Onus of justifying on bankrupt.**]—Though the Insolvency Ct. will not make the mere fact that there are accommodation bills a reason for refusing a discharge, they are *primâ facie* debts to be explained, & debtor must show that they are debts which have been contracted without detriment to his other creditors, & that they have not been the cause of his bkpcy. ; otherwise the ct. will refuse the discharge.

Where an insolvent's own debts, for which he has had consideration, remain unpaid, the rendering himself liable for the debts of others, for which debts he has had no consideration, is an offence.—*Re* AUGARDE (1852), 19 L. T. O. S. 327.

5118. —— ——.]—If bkpt. has dealt in accommodation bills, that is a circumstance requiring a full & satisfactory explanation, & although every transaction must be judged of according to its particular circumstances, the main point for consideration is how far bkpt. had reason to believe he could discharge his liability upon such bills on their becoming due.—*Re* HAMMOND, *Ex p.* HAMMOND (1855), 6 De G. M. & G. 699 ; 24 L. J. Bcy. 2 ; 24 L. T. O. S. 265 ; 3 W. R. 197 ; 43 E. R. 1405, L. JJ.

Annotations :—**Consd.** *Re* Shuttleworth (1855), 24 L. T. O. S. 315. **Apld.** *Re* Snowdon (1865), 12 L. T. 740. **Reid.** *Re* Laurence, *Ex p.* Laurence (1861), 30 L. J. Bcy. 33. **Mentd.** *Re* Anderton, *Ex p.* Anderton (1857), 1 De G. & J. 298.

5119. —— **Relying on guarantee of bank & drawer.**]—Nearly the whole of the existing liabilities of bkpt. were in respect of accommodation bill transactions. Bkpt. had no means of meeting any claim which might arise on the bills, & had relied solely on the guarantee of the bank & the drawers :—*Held:* the practice of accepting accommodation bills at a commission was an extremely dangerous & hazardous way of doing business, of which the ct. did not approve, & bkpt. had been guilty of contracting debts without a reasonable expectation of payment.—*Re* HUGHES (1887), 3 T. L. R. 520.

5120. Goods bought on credit—Knowledge of insolvency.]—A trader who, within three months of his bkpcy., being, & of necessity knowing that he is, hopelessly insolvent, obtains goods on credit, is guilty of contracting debts without any reasonable prospect of being able to pay for them, *i.e.*, without the expectation which any reasonable man in such a position would entertain.—*Re* FRYER, *Ex p.* FRYER (1864), 10 L. T. 197.

Annotation :—**Distd.** *Re* Lyall, *Ex p.* Lyall (1868), 16 W. R. 1222.

5121. —— —— **Sale below cost price.**]—Circumstances in which bkpt. was not considered to have contracted a debt without any reasonable or probable ground of being able to pay same, though he obtained goods on credit whilst insolvent, & soon afterwards sold them for less than their cost price.—*Re* MARKS (1866), 1 Ch. App. 334 ; 14 L. T. 318, L. C.

Annotations :—**Consd.** *Re* Ainsworth, *Ex p.* Bayley (1867), 3 Ch. App. 244, L. JJ. ; *Re* Hartmann, *Ex p.* Hartmann (1867), 15 L. T. 640 ; *Re* Lyall, *Ex p.* Lyall (1868), 16 W. R. 1222.

5122. —— **Consigned to creditor for larger amount.**]—A trader purchasing goods on credit, & consigning them to a person abroad to whom he is indebted in a much larger amount beyond the security held by the consignee, cannot reasonably expect to realise from the sale of the goods anything towards the liquidation of the debts so contracted, & contracts debts without reasonable or probable ground of expectation of being able to pay for them.—*Re* HARTMANN, *Ex p.* HARTMANN (1867), 15 L. T. 640.

5123. Expenses connected with justifiable speculation.]—The only transactions of bkpt. during the time within which the debts had been contracted related to the purchase of a colliery & a mine. They were *bonâ fide* contracts & appeared likely to have afforded to bkpt. a considerable sum of money :—*Held:* the above transactions not being rash or hazardous transactions, the expenses incurred therewith were not debts contracted without reasonable expectation of being able to pay same.—*Re* DOWNHAM, *Ex p.* DOWNHAM (1863), 11 W. R. 577, L. C.

5124. Misappropriation of client's money—By solicitor—Knowledge of insolvency.]—If a solr., who is insolvent, misapplies the money of a client by appropriating it to his own purposes, he contracts a debt without any reasonable prospect of being able to pay it, & the ct. will visit such conduct with its severest censure, & a suspension of his order of discharge.—*Re* SPARHAM, *Ex p.* SPARHAM (1863), 9 L. T. 548.

5125. —— **By auctioneer.**]—An auctioneer, employed for the purpose of conducting sales by auction, received the money arising from such sales, & appropriated same to his own use. The auctioneer having become bkpt. :—*Held:* bkpt. was amenable to a charge of contracting debts without reasonable probability of being able to pay same, & his order of discharge should be suspended for two years.—*Re* ENGLEHEART (1864), 12 W. R. 387.

5126. Liability on guarantees—Insufficient assets.]—Bkpt. attributed his failure to his having been called upon to pay two debts of £3,063 & £1,288 for which he had given his personal guarantees. Bkpt's. assets were not of a value equal to 10*s.* in the pound on the amount of his

k. —— *Director of bank.*]—The granting of insolvent's certificate was opposed on the ground that he had contracted debts without any probable expectation of being able to pay them. Insolvent was director of a bank established for purposes of discount; he procured discounts from it on his bills recklessly, heedlessly & irregularly & without the concurrence of his fellow directors :—*Held:* where a man had been engaged in extensive work & was possessed of large property it would be unjust to conclude that he had contracted debts without a reasonable expectation of being able to pay them, when the very debts due to him arising out of his trade more than balanced his liabilities.—*Re* SPARK (1844), Res. & Eq. Jud. 1. —**AUS.**

5120 i. *Goods bought on credit—Knowledge of insolvency.*]—Where a party buys goods on credit, knowing his affairs to be in a bad state, although he may have no intention of defrauding the creditor, yet in the eyes of the law he does a wrong, &, if he subsequently declares insolvency, the ct. may, in its discretion, suspend for a period, his discharge.—*Ex p.* TEMPEST & DUCHESNAY, *et vir.* (1867), 11 L. C. J. 57.—**CAN.**

unsecured liabilities:—*Held:* (1) bkpt. must have reasonable or probable ground of expectation of being able to pay the debt himself, & it was not enough to show that the security held by the creditor was sufficient; (2) bkpt. came within 1890 Act, s. 8 (3) (*d*); & his discharge must be suspended for the minimum period of two years.—*Re* ADAMS (1903), 19 T. L. R. 640.

5127. Debt incurred with knowledge that capital to pay same not easily realisable.]—*Qu.:* whether a statement by the official receiver in his report, that bkpt. had contracted certain debts, & that such debts were incurred to an extent which could not be justified in the case of a man who knew that his capital was not easily realisable, is sufficient to support the conclusion that such bkpt. has contracted debts without having at the time of contracting them any reasonable or probable ground of expectation of being able to pay same.—*Re* SHARP, *Ex p.* SHARP (1893), 10 Morr. 114, D. C.

5128. Debts contracted in course of business—Small in amount & necessary for trading purposes.]—Bkpt. contracted a few small debts necessary to carry on his business. What they were, or the circumstances in which they were obtained was not disclosed:—*Held:* the ct. would attach no importance to the debts.—*Re* HEAP, *Ex p.* BOARD OF TRADE (1887), 4 Morr. 314, D. C.

5129. —— Business commenced on capital borrowed on mortgage of whole assets.]—Two partners, who had no capital of their own, commenced business by means of borrowed money, assigning to the lender as security their leasehold premises, the goodwill of their business, & all their existing & after-acquired stock-in-trade, fixtures, furniture, & book-debts, giving him power to take possession at any time. They contracted debts in carrying on the business, & became bkpts. The mtgee. took possession under his deed, & his security was insufficient. The registrar granted bkpts. a discharge, on condition of their consenting to judgment being entered up against them by the trustee for the whole of the debts provable in the bkpcy.:—*Held:* (1) bkpts. had contracted debts without having at the time of contracting them any reasonable or probable ground of expectation of being able to pay them; (2) the registrar's decision was right.—*Re* WHITE, *Ex p.* WHITE (1885), 14 Q. B. D. 600; 54 L. J. Q. B. 384; 33 W. R. 670; 2 Morr. 42, C. A.

5130. —— Bankrupt taking over & continuing insolvent business—Increase of indebtedness.]—Two young men took to a family business of calico printing which was at the time insolvent. They carried it on upon a large scale from Nov. 1864, to June, 1867, without taking stock. At the end of that time they took stock, & found that the result of their business was a loss of £10,000 for the whole period. They then called their creditors together & became bkpt. Up to that time they deposed that they had believed they were carrying on business at a profit. One of them admitted that in Jan., 1867, he had believed the firm insolvent. From Jan. to June the excess of liabilities over assets had increased by £4,000, & many debts contracted during that period, chiefly for drugs employed in the printing, remained unpaid:—*Held:* (ROLT, L.J., *dubitante*) there was not sufficient ground for holding that bkpts. had contracted debts without reasonable expectation of being able to pay them.—*Re* AINSWORTH, *Ex p.* BAYLEY (1867), 3 Ch. App. 244; 16 W. R. 291, L. JJ.

v. *Rash and hazardous Speculations.*

See 1914 Act, s. 26 (3) (*f*).

5131. In general.]—*Semble:* a speculation is not "rash & hazardous" within 1861 Act, s. 159, unless it is not only dangerous, but such as no reasonable man would enter into.—*Re* DOWNMAN, *Ex p.* DOWNMAN (1863), 3 De G. J. & Sm. 471; 32 L. J. Bcy. 49; 8 L. T. 225; 9 Jur. N. S. 811; 46 E. R. 717, L. C.

Annotation:—**Follod.** *Re* Hartmann, *Ex p.* Hartmann (1867), 15 L. T. 640.

5132. ——.]—Rash & hazardous speculation is such as no reasonable man, or no man of ordinary commercial prudence in similar circumstances, would venture to embark in.—*Re* FRYER, *Ex p.* FRYER (1864), 10 L. T. 197.

5133. ——.]—A trader starting with capital & making a profit on his purchases & sales can hardly be considered guilty of rash & hazardous speculation.—*Re* WARBURTON (1869), 20 L. T. 235.

5134. ——.]—All commerce is in its nature to some extent speculative, & speculation is hazardous. The offence mentioned in 1861 Act, s. 159, cannot consist merely of hazardous speculation; rash speculation is of the essence of the offence.—*Re* HEYN, *Ex p.* HEYN (1867), 2 Ch. App. 650; 17 L. T. 91; 15 W. R. 1158, L. JJ.

5135. ——.]—A speculation which no reasonably careful man would enter into, having regard to all the circumstances of the case, including his own means, is a rash & hazardous speculation (LOPES, L.J.).—*Re* KEAYS, *Ex p.* KEAYS (1891), 9 Morr. 18, C. A.

5136. Allegation must be specific.]—In alleging that debtor has brought on his bkpcy. by rash & hazardous speculations, it is necessary to specify such speculations, so that the ct. may apply its mind to all the circumstances surrounding them, & it is not sufficient to allege generally that the whole of debtor's trading was speculative.—*Re* BROWN (JOHN) & Co. (1906), 22 T. L. R. 291.

5137. —— Cannot be cured by affidavit in support.]—An insufficient allegation of gambling in a petition to stay a certificate is not cured by the affidavit in support of it.—*Re* CAMPBELL, *Ex p.* PERRING (1835), 5 L. J. Bcy. 17, Ct. of R.

5138. Insuring in lottery.]—Insuring in a lottery is not gaming within 5 Geo. 2, c. 30, s. 12, which will prevent bkpt.'s certificate being allowed.—LEWIS *v.* PIERCY (1788), 1 Hy. Bl. 29; 126 E. R. 18.

Annotations:—**Mentd.** Watts *v.* Hart (1797), 1 Bos. & P. 134; *Ex p.* Hill (1802), 2 Bos. & P. N. R. 191, n.; Walker *v.* Barnes (1814), 5 Taunt. 778.

5139. Betting & gambling.]—Betting & gambling & Stock Exchange transactions come within the words "rash & hazardous speculations & unjustifiable extravagance in living," in 1883 Act,

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5128 i. *Debts contracted in course of business—Liabilities reduced.*]—Debts incurred in the usual course of business by a trader shortly before his bkpcy. are not incurred in an objectionable manner, where the effect has been to enable debtor to reduce his liabilities to those with whom the debts were incurred.—*Re* ALLEN (1892), 11 N. Z. L. R. 133.—**N.Z.**

l. *Speculating in exchange.*]—In Dec., 1890, insolvent was bkpt. to the extent of over 16 lakhs, & had on hand large forward contracts which then showed a further probable loss. In that position he entered into large speculative sales of exchange, having then no assets with which to meet any loss:—*Held:* insolvent was guilty of gross misconduct in contracting debts, having no reasonable or probable expectation, at the time when they were contracted, of paying them.—*Re* HORMARJI ARDESIR HORMARJI (1892), I. L. R. 17 Bom. 313.—**IND.**

m. *Dealing in gold-mining shares.*]—The purchase of gold-mining shares is a rash & hazardous speculation, but where the case is not a gross one, it can be dealt with sufficiently, if need be, when bkpt. applies for his discharge.—*Re* ALLEN (1892), 11 N. Z. L. R. 133.—**N.Z.**

n. *Speculating in exchange—After incurring heavy losses.*]—On June 30,

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s. 28 (3) (*d*).—*Re* BARLOW, *Ex p.* THORNBER (1886), 3 T. L. R. 218; 3 Morr. 304, C. A.

5140. —— Winnings exceeding losses.]—A loss by gaming invalidates a certificate, although bkpt. on the same day wins more than the sum lost.—*Re* JONES, *Ex p.* NEWMAN (1827), 2 Gl. & J. 329; *sub nom.* ANON. 5 L. J. O. S. Ch. 129.

Annotation:—**Mentd.** *Re* Campbell, *Ex p.* Perring (1835), 5 L. J. Bcy. 17, Ct. of R.

5141. What transactions within 1849 Act, s. 201—Dealing in railway stock.]—*Held:* within the above sect.—*Re* MATHESON, *Ex. p.* MATHESON (1852), 1 De G. M. & G. 448; 21 L. J. Bcy. 18; 18 L. T. O. S. 295; 42 E. R. 625, L. JJ.

Annotation:—**Folld.** *Re* Copeland, *Ex p.* Copeland (1852), 2 De G. M. & G. 914, L. JJ.

5142. —— Dealing in shares converted into stock—Dealing aggregated—How loss calculated.]—Where all the calls upon the shares in a railway co. had been made, & a resolution had been passed that such of the shares as had been paid up should be converted into stock:—*Held:* they were stock within the above sect. *Semble:* the shares would have been within the sect., even if they had not been converted into stock.

A loss of the amount prescribed by the sect., arising upon an aggregate of contracts during the year, falls within the sect.

In calculating the amount of loss, sums paid by way of commission upon continuations are to be included, & the time of the resale is that of the loss.—*Re* COPELAND, *Ex p.* COPELAND (1852), 2 De G. M. & G. 914; 22 L. J. Bcy. 17; 20 L. T. O. S. 286; 17 Jur. 121; 42 E. R. 1129, L. JJ.

5143. —— Dealing in foreign stock & railway shares.]—*Held:* not within the above sect., but reckless trading in the circumstance.—*Re* BUCKLAND (1852), 18 L. T. O. S. 248; Fonbl. 250.

5144. —— Time bargains in foreign funds.]—A trader purchased Turkish scrip, to be paid for on the account day, & lost by the speculation upwards of £400:—*Qu.:* whether the transaction was within the above sect.—*Re* WADE, *Ex p.* WADE (1856), 8 De G. M. & G. 241; 25 L. J. Bcy. 6; 26 L. T. O. S. 211; 2 Jur. N. S. 218; 4 W. R. 227; 44 E. R. 383, L. JJ.

5145. —— ——.]—A trader, who became bkpt., had had dealings in consols & in Turkish scrip, by which he had purchased for the account, no intention existing, on his part, that either stock should be transferred to him. On account day he paid the differences, & so carried the transactions forward to the next account day. He had thus, several times, lost more than £20 in one day:—*Held:* the transactions were not within the above sect.—*Re* RYDER, *Ex p.* RYDER (1857), 1 De G. & J. 317; 26 L. J. Bcy. 69; 29 L. T. O. S. 336; 3 Jur. N. S. 1159; 44 E. R. 746, L. JJ.

5146. —— Time bargains in mining shares.]—*Qu.:* whether gaming or wagering, or buying or selling stock within the above sect.—*Re* MELLOR, *Ex. p* MELLOR (1855), 8 De G. M. & G. 248; 26 L. T. O. S. 212, n.; 44 E. R. 386, L. JJ.

5147. Losses on time bargains.]—The bkpcy. of a sharebroker, who has met with losses on time bargains, is to be attributed to rash & hazardous speculation.—*Re* WILSON (1866), 14 L. T. 492.

5148. —— In foreign funds.]—Stockjobbing in foreign funds, is gambling (DALLAS, C.J.).—ROSSUM *v.* TAYLOR (1823), cited 26 L. T. O. S. at p. 111.

Annotations:—**N.F.** Wells *v.* Porter (1836), 2 Bing. N. C. 722. **Mentd.** *Re* Wade (1855), 26 L. T. O. S. 111.

5149. Solicitor engaging in speculation—Transactions outside business.]—A solr., who had no capital of his own, bought land in the City of London by means of money which he borrowed on the security of mtges. of the land, his intention being to sell at an advanced price. He afterwards borrowed more money on a further mtge. for the purpose of building on the land. The land was valued by professional valuers at considerably more than the amount borrowed. He was unable to sell or let the property, & he became bkpt.:—*Held:* (1) he had been guilty of "rash & hazardous speculations"; (2) the registrar was right in granting him an order of discharge subject to the condition that, after setting aside out of his earnings £300 a year for the maintenance of himself & his family, he should pay over to the official receiver the balance of his earnings, until he should have paid 10*s.* in the pound on all the debts which had been, or might be, proved in the bkpcy.—*Re* SALAMAN, *Ex p.* SALAMAN (1885), 14 Q. B. D. 936; 54 L. J. Q. B. 238; 52 L. T. 378; 1 T. L. R. 310 2 Morr. 61, C. A.

Annotations:—**Refd.** *Re* Cosedge (1888), 4 T. L. R. 562. **Mentd.** *Re* Keays, *Ex p.* Keays (1891), 9 Morr. 18, C. A.

5150. —— ——.]—Whenever a solr., who is engaged in practice, enters into another business which involves speculation, he will, in the event of subsequent bkpcy., run great risk of being held to have been rash in so doing.

In 1885 bkpt., who was a solr. in practice & was possessed of about £34,000, agreed with a person, who had purchased the life interest of certain estates in a liquidation, to lend £5,000 for the purpose of developing the estates, & the business was subsequently carried on in partnership, the original purchaser having entire control of the business, & the solr. exercising no supervision & keeping no accounts. The project turned out to be an entire failure & the parties became bkpt.:—*Held:* bkpt. had entered into hazardous speculations, & he had been most rash in doing so.—*Re* KEAYS, *Ex p.* KEAYS (1891), 8 T. L. R. 124; 36 Sol. Jo. 111; 9 Morr. 18, C. A.

5151. —— —— Incurring large debts with small assets.]—Bkpt., a solr., entered into building speculations with R., bkpt. being then possessed of an estimated surplus of £4,631. Bkpt. attributed his failure to liabilities contracted & heavy payments made on behalf of R., who died suddenly, leaving the houses then being built unfinished, & to losses & expenses in connection with different building agreements, & to loss of his professional business. Bkpt. knew that R. was a man of straw, but thought that in good hands, R., who seemed to have a good character for honesty, might prosper:—*Held:* bkpt. had been guilty of rash & hazardous speculation, never having had capital enough to justify his entering upon the transactions.—*Re* COSEDGE (1888), 4 T. L. R. 562.

5152. —— —— ——.]—Where a solr. has engaged in hazardous speculation, incurring large debts with small assets, it is the duty of the ct.

1890, insolvent nominally possessed four lakhs of rupees, the saleable value of which was about 2½ lakhs. With his finances in that state insolvent speculated in exchange, & in six months he had lost his four lakhs of nominal capital, & 19 or 23 lakhs of rupees besides:—*Held:* insolvent was guilty of rash & reckless speculation.—*Re* HORMARJI ARDESIR HORMARJI (1892), I. L. R. 17 Bom. 313.—**IND.**

o. *Trading on fictitious capital—Relying on funds to be supplied by bank.*] —Insolvents entered into a large railway contract with the Govt., relying entirely upon funds to be supplied by a bank which was to participate in the profits, receiving all the payments made by the Govt.:—*Held:* this was a trading on fictitious capital, but would be sufficiently punished by suspending the certificate for a year.—*Re* WRIGHT & HIGGINS (1881), 7 V. L. R. 7.—**AUS.**

to be slow in granting him a discharge & thus removing the restrictions upon his right to practise as a solr. (COZENS-HARDY, M.R.).—*Re* DALZELL (1908), 25 T. L. R. 9 ; 16 Mans. 203, C. A.

5153. Capital inadequate—Large speculations.]—A trader commencing business with a small capital, & embarking in speculations to a very large amount & such as no reasonable man would embark in, will be regarded as having become insolvent by reason of rash & hazardous speculation.—*Re* HARTMANN, *Ex p.* HARTMANN (1867), 15 L. T. 640.

5154. —— Improvident speculations—Omission to keep proper books of account.]—*Re* RIEBER, No. 5074, *ante.*

5155. —— Goods purchased on credit—Consignments abroad—Loss falling on creditors.]—A trader, who has no real capital of his own, cannot be allowed to speculate in consignments abroad of goods obtained upon credit, where the chance of gain is entirely his own, & where the adventure, if unsuccessful, must result in a total loss to the creditors supplying the goods.

A trader without adequate capital embarking in speculative consignments abroad of goods purchased upon credit, & obtaining advances thereon with which he paid previous purchases made for the like purpose, will be regarded as guilty of rash & hazardous speculation.—*Re* FRYER, *Ex p.* FRYER (1864), 10 L. T. 197.

5156. —— —— —— ——.]—A merchant, at the end of 1865, held invoices for eight hundred bales of cotton, of the value of £29,000, for which he had accepted bills. At that time he knew himself to be, if not insolvent, at all events in a critical position, having nothing but the cotton to meet the bills. He stopped payment in June, 1866, & became bkpt., having in the meantime given or confirmed orders for one thousand, one hundred more bales of cotton, of the value of £35,000. He had scarcely any assets besides his cotton, which was pledged beyond its value, & his unsecured debts were £58,000 :—*Held :* although dealing in cotton was within the limits of legitimate commerce, still, as such dealing was notoriously hazardous, bkpt., having regard to the state of his affairs at the end of 1865, was bound to exercise the greatest caution as to extending his liabilities for cotton, & the subsequent orders for the one thousand one hundred bales, which appeared not to have been requisite for keeping his business together, must be considered as having been given in order to take the chance of a rise in price, with a certainty that the loss, in case of a fall, would have to be borne by his creditors, & this was "rash & hazardous speculation."—*Re* HEYN, *Ex p.* HEYN (1867), 2 Ch. App. 650 ; 17 L. T. 91 ; 15 W. R. 1158, L. JJ.

5157. No capital—Trading without calculation of profit or loss.]—A trader, without capital, undertook extensive contracts for building ships, & neglected, by his own admission, to make any previous calculation as to the probability of their being profitable or otherwise :—*Held :* his insolvency, so occasioned, was fairly attributable to rash & hazardous speculation.—*Re* GARDNER (1867), 16 L. T. 70.

5158. Bankrupt solvent at time of transactions—Goods bought for home trade—Imprudent sale abroad.]—A trader when undoubtedly solvent, but shortly before bkpcy., bought goods to a very great extent. He alleged that he wanted them for the home trade, but soon afterwards he consigned them to his brother-in-law in America, where they were sold at an enormous loss :—*Held :* not a rash & hazardous speculation, as that expression did not include a venture which, though imprudent, was made when bkpt. was possessed of property in excess of his liabilities.—*Re* BARNARD & ROSENTHAL, *Ex p.* EVANS (1862), 31 L. J. Bcy. 63 ; 6 L. T. 519, L. JJ.

Annotation :—**Mentd.** *Re* Wilson (1866), 14 L. T. 492.

5159. Opening business—Knowledge & experience.]—The insolvency of a man embarking in a business which, from experience, he must be supposed to understand, can hardly be said to be attributable to rash & hazardous speculation.—*Re* MCCALLUM (1866), 14 L. T. 172.

5160. —— ——.]—Bkpt. commenced a stockbroking business with about £4,000, in 1884. She subsequently received about £8,000 from friends, who she stated did not wish to be treated as creditors. The business proving unfortunate was closed in 1885, & bkpt. had since been dependent upon her earnings by teaching. She attributed her failure to the irregularities of her late manager :—*Held :* having regard to the fact that bkpt. had £4,000 in her hands, at the time she entered into stockbroking business & that £8,000 further was available for the business, it could not be said that she had engaged in rash & hazardous speculation.—*Re* WALKER (1887), 3 T. L. R. 362.

5161. Engaging in several trades.]—A cotton spinner had engaged in several other trades & undertakings of different kinds. It was not shown that he was at the time insolvent :—*Held :* the number & variety of these undertakings did not constitute a case of reckless trading.—*Re* WAKEFIELD, *Ex p.* WAKEFIELD (1850), 4 De G. & Sm. 18 ; 64 E. R. 715.

Annotations :—**Consd.** *Re* Staner, *Ex p.* Staner (1852), 2 De G. M. & G. 263, L. JJ. **Mentd.** *Re* Rufford, *Ex p.* Rufford (1852), 2 De G. M. & G. 234, L. JJ. ; *Re* Hammond, *Ex p.* Hammond (1855), 6 De G. M. & G. 699, L. JJ. ; *Re* Lawrence, Mortimore & Schrader (1861), 4 L. T. 184.

5162. Lending without cover—Accepting bills for customer.]—A country banker accepted to a large amount bills, drawn upon him by a person who failed to remit other good bills according to his agreement, without any security whatever. The banker afterwards became bkpt. :—*Held :* his insolvency was attributable to rash & hazardous speculation.—*Re* BRAGINTON, *Ex p.* BRAGINTON (1866), 14 L. T. 277 ; 14 W. R. 593, L. C.

Annotation :—**Mentd.** *Re* Hartmann, *Ex p.* Hartmann (1867), 15 L. T. 640.

5163. —— Clients' speculation on Stock Exchange.]—The bulk of bkpt.'s business consisted of gambling on the Stock Exchange as a stockbroker on behalf of clients, who were simply speculating for the differences & had no intention of making *bonâ fide* investments, & the bkpcy. was caused by such clients not paying up their differences at the time, owing to sudden & heavy falls in the markets in which the operations were carried on. Bkpt.'s discharge was absolutely refused by the county ct. judge, on the grounds (1) to buy for a client, who was intending to pay or receive the differences, was a transaction of a more rash & hazardous nature than to buy for one who was intending to take up & pay for the shares ; & (2) contracts for differences were immoral, & it was the duty of the ct. to discourage them :—*Held :* (1) the risk of a purchase by a stockbroker for a client did not

p. *When excused—No concealment from creditors.*]—The ct. will not refuse a certificate to a trader who, although he has been reckless in trading, & has acted improperly in making a settlement upon his wife on marriage, does not appear on the whole to have concealed anything from the creditors, but to have acted on a mistaken view of his own affairs.—*Re* BRADLEY (1867), 1 I. L. T. Jo. 47.—IR.

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depend upon whether the bargain was a bargain for differences, or whether it was a purchase for investment, but depended entirely upon whether the client had the means to pay the difference which might be expected to result; (2) it was not the duty of the Bkpcy. Ct. to take into consideration the general morality of transactions for differences, &, in the absence of any proof of particular misconduct, to punish debtor with the view of striking a blow at gambling in general; (3) having regard to the fact that the debts due to creditors other than those engaged in Stock Exchange transactions were of very small amount, & that the offence of bkpt. consisted mainly in his not obtaining proper cover & carrying on business in a somewhat careless manner, the case would be sufficiently met by a suspension of the order of discharge for three years.—*Re* JENKINS, *Ex p.* JENKINS (1891), 39 W. R. 430; 8 MORR. 36, D. C.

See, further, Sub-sect. 2, *post.*

5164. —— To mining company with undeveloped mines—Loan of money borrowed by bankrupt director.]—The managing director of a co., who borrows money from a relative & lends it together with his own to the co., whose mines are undeveloped, & which afterwards becomes insolvent, is guilty of rash & hazardous speculation.—*Re* YOUNG, *Ex p.* YOUNG (1885), 2 Morr. 37, C. A.

Annotation:—**Mentd.** *Re* Keays, *Ex p.* Keays (1891), 9 Morr. 18, C. A.

5165. Allowing debtor to increase indebtedness—After violations of good faith.]—Bkpt. executed orders for coals for W., & W. drew upon him for the amount, but being unable to take up the bills, bkpt. was obliged to provide for them by the payment of cash. Bkpt. also, being insolvent at the time, remitted large cash advances to W. to prevent, as he alleged, his own suspension. About the time that he called his creditors together, he engaged in fresh transactions incurring further indebtedness:—*Held:* he had engaged in rash & hazardous speculations, & it was rash & hazardous to continue confidence in W. after his repeated violations of good faith.—*Re* YOUNG (1869), 20 L. T. 235.

5166. —— With knowledge of debtor's pecuniary difficulties.]—A trader, after he knew that one of his debtors, who owed him about £32,000, was in pecuniary difficulties, allowed him, in the course of eighteen months, to increase his debt to £65,000, & to the extent of £11,000 this increase was due to accommodation bills. The trader then stopped payment, & presented a bkpcy. petition. The debt of £65,000 was apparently irrecoverable:—*Held:* debtor had been guilty of rash & hazardous speculations.—*Re* ROGERS, *Ex p.* ROGERS (1884), 13 Q. B. D. 438; 33 W. R. 354; 1 Morr. 159, D. C.

5167. Raising money by drawing against consignments from bankers.]—*Re* LYALL, *Ex p.* LYALL, No. 5097, *ante.*

vi. *Extravagance.*

See 1914 Act, s. 26 (3) (*f*).

5168. Principles guiding court—Position of bankrupt—Amount of expectation.]—In considering the question whether bkpt. has been guilty of unjustifiable extravagance in living, the ct. will have regard to his position & the amount of expectation which he might fairly entertain from it.—*Re* RYLEY, *Ex p.* RYLEY (1866), 14 L. T. 707.

5169. Keeping up appearances.]—The supposed necessity of keeping up external appearances in certain occupations & professions, in order to command confidence & acquire business, is no justification for unjustifiable extravagance in living, under 1861 Act.—*Re* STEVENS (1863), 7 L. T. 649.

Annotation:—**Distd.** *Re* Sparham, *Ex p.* Sparham (1863), 9 L. T. 548.

5170. ——.]—A man has no right, when his business can no longer support it, to go on living in the style usual during the time such business was a profitable one merely for the sake of keeping up appearances, which in such circumstances is only another term for living on his creditors.

A man is bound not to keep up appearances, but to pay his debts, & if his profits will not allow of his living at the particular rate he has been accustomed to live at, then his plain duty is to reduce his scale of living, & not to go on living out of the money of his creditors (CAVE, J.).—*Re* STAINTON, *Ex p.* BOARD OF TRADE (1887), 4 Morr. 242, D. C.

Annotation:—**Mentd.** *Re* Shirley, *Ex p.* Board of Trade (1892), 9 Morr. 147, D. C.

5171. Damages recovered in divorce suit.]—A sum awarded against bkpt. as damages in a divorce suit is not attributable to unjustifiable extravagance in living.—*Re* GRIFFITHS, *Ex p.* GRIFFITHS (1864), 33 L. J. Bcy. 44; 10 L. T. 705; 10 Jur. N. S. 785, L. C.

Annotations:—**Consd.** *Re* Goodier, *Ex p.* Goodier (1870), 22 L. T. 426. **Refd.** *Re* Leigh (1865), 13 W. R. 502.

5172. Necessary journeys on business—Reasonable expenses of.]—Reasonable expenses of necessary journeys on business:—*Held:* not sufficient to sustain a charge of unjustifiable extravagance in living.—*Re* COLLINGWOOD (1866), 13 L. T. 761.

5173. Living beyond income.]—Bkpt.'s income consisted of an annuity to be paid to him & his wife & children, at the uncontrolled discretion of the trustees under his father's will. Bkpt. had anticipated his income by nearly one year's receipts, & at the time that bkpt. had no income to receive, he incurred debts exceeding in amount the realisable value of his property. At the same time, the debts for household expenses all remained unpaid:—*Held:* bkpt. had been guilty of unjustifiable extravagance in living, & a discharge granted on condition that bkpt. paid an annual sum to the assignee until 10*s.* in the pound had been paid to the creditors.—*Re* LAMBERT (1868), 20 L. T. 715.

5174. What rate of expenditure legitimate—Indebtedness increasing from year to year.]—Bkpt., the amount of whose indebtedness for several years prior to his bkpcy. has been constantly increasing, until at the date of the adjudication it reaches the sum of £5,000, is not justified in living at the rate of £500 a year, & so doing, lays himself open to the charge of unjustifiable extravagance in living.—*Re* SPARHAM, *Ex p.* SPARHAM (1863), 9 L. T. 548.

5175. —— While trading at loss.]—Bkpt. swore that his private domestic expenditure did not exceed £1,600 *per annum*, & that £1,900 more was absorbed in petty expenses, gratuities & interest on loans, there being no record of any of the latter items:—*Held:* unjustifiable extravagance in living in view of the fact that bkpt. had for some considerable time been trading at a loss.—*Re* BADART FRÈRES (1885), 1 T. L. R. 601.

q. —— ——.]—Bkpts. who submit the state of their affairs to their creditors, when unable to meet their engagements, are not chargeable with reckless trading.—*Re* PREAGER (1856), 27 L. T. O. S. 26; 8 Ir. Jur. 251.—IR.

vii. *Frivolous or vexatious Actions or Defences.*

See 1914 Act, s. 26 (3) (*g*).

5176. Unjustifiable action—Unfounded claim.]—Where insolvent makes a claim, which turns out unfounded, & has put defts. to great expense in defending it, he being their debtor, he will be guilty of vexatious litigation.—*Re* BARNES (1857), 29 L. T. O. S. 400.

5177. Unjustifiable defences—Many pleas without substantial defence—Creditors real defendants.]—A trader, when in difficulties, & when sued, placed himself in the hands of the bulk of his creditors, who defended the action in his name, &, in order to gain time for an arrangement, pleaded twenty pleas, without having any substantial defence :—*Held :* bkpt. was not disentitled to his certificate for having vexatiously defended the action.—*Re* JOHNSON, *Ex p.* JOHNSON (1851), 4 De G. & Sm. 25 ; 20 L. J. Bcy. 6 ; 16 L. T. O. S. 346 ; 15 Jur. 185 ; 64 E. R. 718.

Annotations :—**Consd.** *Re* Dornford, *Ex p.* Dornford (1851), 4 De G. & Sm. 29. **Distd.** *Re* Rufford, *Ex p.* Rufford (1852), 2 De G. M. & G. 234. **Consd.** *Re* Lawrence, Mortimore & Schrader (1861), 4 L. T. 184. **Mentd.** *Re* Mortimore, *Ex p.* Mortimore (1861), 3 De G. F. & J. 599, L. JJ.; *Re* Barnard & Rosenthal, *Ex p.* Evans (1862), 6 L. T. 519, L. JJ.

5178. —— Sham pleas.]—Bkpt. is not justified in pleading sham pleas in an action, although it might be possible that he had a defence in equity.—*Re* POWNALL (1851), Fonbl. 221.

5179. —— Subsequent submission to verdict—Action for slander.]—Where bkpt. was charged with having vexatiously defended an action for slander & afterwards agreed to a verdict, the ct. suspended his certificate for two years without protection for three months.—*Re* SMITH (1857), 29 L. T. O. S. 147.

5180. —— Solicitor defendant—Moral justification necessary.]—A solr. who defends an action brought against him by a client, ought to be able to show grounds of defence not merely available at law, but affording a moral justification of the defence.

A solr. removed by *certiorari* an action for money due brought against him by a client in the county ct. to a Duchy Ct. of Common Pleas, & it appeared that he had no good defence. On judgment being recovered against him, he was adjudicated bkpt. on his brother's petition :—*Held :* his certificate was properly suspended for twelve months.—*Re* BLACKHURST, *Ex p.* BLACKHURST (1858), 3 De G. & J. 39 ; 27 L. J. Bcy. 24 ; 31 L. T. O. S. 32 ; 4 Jur. N. S. 1065 ; 44 E. R. 1184, L. JJ.

5181. —— All parties agreeing to reference—Award against bankrupt.]—A defence to an action brought for the recovery of an amount due for the maintenance of a wife who had voluntarily left her husband, such action being by consent of all parties referred to an arbitrator, & ultimately decided in favour of pltfs., is not a frivolous or vexations defence within 1861 Act, s. 159.—*Re* KEENE (1865), 13 W. R. 475.

5182. —— Result doubtful—Third parties willing to assist.]—A suit was instituted by B. against G. to restrain the latter from infringing B.'s patent, & for an account & other consequential relief. The validity of the patent had been already established at law in an action against another infringer. G. defended the suit, & at the hearing issues were directed to try the validity of the patent. On the trial a verdict was found in favour of G. B. moved for a new trial, & the motion, though resisted by G., was successful. The new trial took place, & a verdict was found in favour of B. G. moved for a new trial, & his motion was refused by the Master of the Rolls & also by the Lord Chancellor on appeal. A decree was then made granting a perpetual injunction against G., & he was ordered to pay the costs of the suit. An inquiry as to damages was also directed. During the proceedings, G. executed an assignment for his creditors, & the defence of the suit was then carried on at the cost of other persons who were interested in contesting the validity of the patent, though it was conducted in the name of G. After the decree was made, G. became a bkpt. The costs of the suit, including those of the trials at law, amounted to more than £12,000. G. had scarcely any other debts, but his assets were only about £50 :—*Held :* bkpt.'s defence of the suit was not frivolous or vexatious.—*Re* GOODIER, *Ex p.* GOODIER (1870), 22 L. T. 426.

Annotation :—**Mentd.** *Re* Duffield, *Ex p.* Peacock (1873), 8 Ch. App. 682 L. JJ.

5183. —— Action founded on tort.]—An action founded on tort is not an action to recover money due within 1861 Act, s. 159, & a vexatious defence to such an action is no ground for refusing the order of discharge.—*Re* TAYLOR, *Ex p.* CRABTREE (1864), 4 New Rep. 75 ; 33 L. J. Bcy. 33 ; 10 L. T. 361 ; 10 Jur. N. S. 529 ; 12 W. R. 768, L. C.

Annotations :—**Distd.** *Re* Griffiths, *Ex p.* Griffiths (1864), 10 L. T. 705, L. C. **Foll.** *Re* Billingham (1865), 13 L. T. 25. **Refd.** *Re* Goodier, *Ex p.* Goodier (1870), 22 L. T. 426.

See, also, Nos. 5108-5110, *ante.*

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r. *In general.*]—Vexatious litigation is a proper subject of inquiry as to bkpt.'s conduct as a trader.—*Re* WALL (1870), I. R. 4 Eq. 203.—**IR.**

5176 i. *Unjustifiable action—Debt fraudulently contracted.*]—Where a party brings an action that appears of a very frivolous character, & pltf., when the cause is in the list, withdraws the record, & he is afterwards arrested for the costs of the day, for which he seeks to be discharged by the Insolvent Ct., it will not be deemed to be a debt fraudulently contracted.—*Re* CONROY (1867), 1 I. L. T. Jo. 8.—**IR.**

5176 ii. ——.]—A party bringing a frivolous or unfounded action, which puts deft. to costs, fraudulently contracts a debt under Insolvent Act.—*Re* CARPENTER (1864), 16 Ir. Jur. 20. —**IR.**

5176 iii. —— *Mistaken identity—Negligence of debtor.*]—Insolvent, who brought an unfounded action, & neglected to accept an interview with deft. with a view to define his identity, & whose costs in the action caused his insolvency, was remanded for twelve months.—*Re* ARDREY (1867), 1 I. L. T. Jo. 459.—**IR.**

5176 iv. —— *Filing bill to reopen settled account—Approval of master in Chancery.*]—Bkpt. stated & settled with his partner an account which the Ct. of Ch. decreed ought not to be re-opened. The master in Ch. had been in opinion that the account should be reopened :—*Held :* bkpt., who filed a bill for an account, was not guilty of wanton litigation.—*Re* SIM (1862), 14 Ir. Jur. 282.—**IR.**

5177 i. *Unjustifiable defences—Creditor failing to recover full amount sued for.*]—Where a creditor sued insolvent for a large amount, but failed to recover the entire amount claimed, without any reason being given for that failure :—*Held :* insolvent could not be found guilty of raising a frivolous or inequitable defence.—*Re* WRIGHT & HIGGINS (1881), 7 V. L. R. 7.—**AUS.**

5178 i. —— —— *False pleas & unfounded cross action.*]—Insolvent pleaded false pleas to an action of debt, & brought an unfounded cross action. Both actions having been referred to arbn., the creditor recovered less than he sued for :—*Held :* not a vexatious defence.—*Re* M'CARTHY (1863), 15 Ir. Jur. 137.—**IR.**

s. —— *Action for more than amount due—Consent for judgment.*]—When deft. is served with a writ for more than he owes, & he brings it to an attorney, & tells him to defend it, or give a consent for judgment as he thinks proper, & he gives it to counsel, who takes a frivolous demurrer & afterwards a consent for judgment is given for the sum really due, he will not be remanded for a vexatious defence.—*Re* MURPHY (1870), 4 I. L. T. Jo. 276.—**IR.**

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viii. *Undue Preference.*

See 1914 Act, s. 26 (3) (*i*).

5184. Need not be fraudulent & void under 1883 Act, s. 48.]—Upon an application for an order of discharge, although bkpt. may not have committed any act amounting to a preference which would be deemed fraudulent & void under the above sect., yet, if he has pursued conduct for the purpose of giving an advantage to one creditor over others, such conduct will constitute an "undue preference" within s. 28, (3) (*f*), which will justify the ct. in suspending the order of discharge.

If a debtor interferes in any way between his creditors, so as to give any one of them a preference over the others, he is guilty of giving that creditor an undue preference (LORD ESHER, M.R.).—*Re* SKEGG, *Ex p.* SKEGG (1890), 25 Q. B. D. 505; 59 L. J. Q. B. 546; 63 L. T. 90; 39 W. R. 72; 7 Morr. 240, C. A.

Annotations:—**Consd.** *Re* Bottomley, *Ex p.* Bottomley (1893), 10 Morr. 262; *Re* Bryant, *Ex p.* Bryant, [1895] 1 Q. B. 420, C. A.; *Re* Freeman (1909), 25 T. L. R. 365.

5185. Reducing overdraft at bank—By deposit of acceptances—& of proceeds of sales.]—Bkpt., a young man, had traded for about four years as a cattle dealer, & had kept no books of account, except pocket memorandum books, the usual method of book-keeping in his business. He had begun business on a small borrowed capital. Being pressed by his bank manager to reduce his overdraft, he got acceptances from his debtor & lodged them with the bank, which received the proceeds. He sold two hundred & fifty sheep to his father & paid in the cheque received to his bank account. A fair price was paid for the sheep:—*Held:* he had not been guilty of fraudulent preference.—*Re* SHOTTER (1861), 31 L. J. Bcy. 5, L. JJ.

5186. Service of three writs by mortgagees—Writs of second & third mortgagees handed to solicitor of first mortgagee & appearance entered—Judgment signed by default by first mortgagee.]—Debtor, on whose premises there were three mtges., having been served with three writs in separate actions brought by the three mtgees. to recover their mtge. debts, handed the two writs issued by the second & third mtgees. to the solrs. of the first mtgee., who thereupon entered appearances for him to those two writs, & signed judgment by default in the action by the first mtgee.:—*Held:* such conduct on the part of debtor was an undue preference within s. 28 (3) (*f*).—*Re* SKEGG, *Ex p.* SKEGG (1890), 25 Q. B. D. 505; 59 L. J. Q. B. 546; 63 L. T. 90; 39 W. R. 72; 7 Morr. 240, C. A.

Annotations:—**Consd.** *Re* Bottomley, *Ex p.* Bottomley (1893), 10 Morr. 262; *Re* Bryant, *Ex p.* Bryant, [1895] 1 Q. B. 420, C. A.; *Re* Freeman (1909), 25 T. L. R. 365.

5187. Part payment to holder of bill of sale—Conditional agreement by holder to withdraw.]—Petitioner, a commission agent, married a widow, who carried on a business, over the stock-in-trade of which C. held a bill of sale given before the marriage as security for money advanced. C. later required payment of part of the debt, & threatened to put the bill of sale in force, if it were not paid. Petitioner not being able to pay the amount, a bailiff was put into possession. Petitioner, wishing to effect a compromise with his creditors, requested C. to become a guarantee for payment of a composition. C. refused, unless she were paid the sum already asked for, &, in case of non-payment, again threatened to proceed to a sale. Petitioner thereupon borrowed a sum of money & remitted the sum demanded to C., who consented to become such guarantee, & to withdraw her bill of sale, provided the creditors would accept the composition. Before the proposed arrangement could be carried out, a petition was filed against petitioner by other creditors, under which he was declared a bkpt. A certificate having been refused, on the ground that the payment to C. was a fraudulent preference:—*Held:* (LORD CRANWORTH, L.J.) there did not appear to have been any fraudulent preference in the bill of sale which was given to C., as it was given by the wife before the marriage, & C. had at one time a bailiff actually in possession of the goods.—*Re* HUNT (1852), 18 L. T. O. S. 230, L. JJ.

5188. Paying separate creditors in full—Within three months of bankruptcy—Estate insufficient to pay other creditors in full.]—Bkpt., who was indebted to the exors. of his partner, & also to joint creditors of the firm, within three months of his bkpcy. paid some of his own separate creditors in full. The estate had paid 15*s.* in the pound, & was expected to pay more:—*Held:* bkpt. had been guilty of undue preference. *Semble:* even if the creditors would certainly have been paid in full, it was not the less "undue preference."—*Re* BRYANT, *Ex p.* BRYANT, [1895] 1 Q. B. 420; 64 L. J. Q. B. 417; 72 L. T. 133; 59 J. P. 196; 11 T. L. R. 176; 2 Mans. 37; 14 R. 192, C. A.

See, also, Nos. 5197, 5212, 5213, *post.*

ix. *Fraud, Fraudulent Breach of Trust, etc.*

See 1914 Act, s. 26 (3) (*l*).

5189. Distinguished from extravagance, etc.]—On questions of bkpts.' certificates cases tainted with fraud or dishonesty are to be carefully distinguished from those which are affected merely by extravagance, carelessness, or wildness of speculation.

Bkpt. had contracted liabilities when hopelessly insolvent, & had dealt largely in accommodation bills; he had also obtained a bill of exchange in circumstances amounting to an engagement not to negotiate it, which he had nevertheless done, & had moreover, after a meeting of his creditors, at

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t. *Before* 1864 *Act.*]—The judge in insolvency refused insolvent his discharge on the ground that he had made a preferential assignment in 1857:—*Held:* not sufficient, for there was no law against it when made. *Semble:* such assignment, being valid when made, could be impeached, under 1864 Act, s. 9 (6), only upon the grounds that by it insolvent had fraudulently retained & concealed some portion of his estate, or had been guilty of evasion, etc., in his examination as to his effects.—*Re* PARR (1867), 17 C. P. 621.—**CAN.**

w. *Causing goods to be taken in execution.*]—Under Insolvent Act it is fraud for insolvent to cause his goods to be taken in execution to the prejudice of his general creditors, even though the preferred claim be a just one, & is an act of fraud for which some punishment should be awarded, though not necessarily to the extent of a perpetual refusal of insolvent's discharge.—*Re* JONES (1868), 4 P. R. 317.—**CAN.**

x. *Giving preferential security for advances.*]—Insolvent, having entirely disregarded the provisions of Insolvent Act, as to keeping proper books of accounts, had no means of knowing his actual financial condition, & being refused accommodation by parties from whom he had been accustomed to receive it, gave them preferential security for their existing & future advances, the result of which was that the goods purchased from other creditors, & not paid for, were levied on for the exclusive benefit of the creditors so preferred.

The judge in insolvency having granted a discharge suspending its operation for one year, his decision was reversed.—*Re* HUTCHINSON (1877), 3 R. & C. 40.—**CAN.**

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5189 i. *Distinguished from unfavourable conduct, etc.*]—*Held:* the facts, though unfavourable to insolvent, were distinguishable from acts or other misconduct constituting fraud, & unless the latter were shown, insolvent was entitled to the benefit of Insolvent Acts.—*Re* SMITH (1867), 4 P. R. 89.—**CAN.**

which it was understood that he was not to deal with his estate, given to one of them a security without the privity of the others:—*Held:* the comr.'s sentence, suspending the certificate for three years without protection, could not be mitigated further than by giving protection after an imprisonment of two months.—*Re* BROWN, *Ex p.* BROWN (1858), 3 De G. & J. 369; 44 E. R. 1310, L. JJ.

Annotation:—**Consd.** *Re* Lawrence, Mortimore & Schrader (1861), 4 L. T. 184.

5190. Misrepresentation—As to being trader—Engaging in trade subsequently.]—A man, not a trader, fraudulently contracted a debt, representing himself to the creditor to be a trader; he subsequently became a trader, & the debt was proved under his bkpcy.:—*Held:* bkpt. had committed an offence disentitling him to a certificate, &, having represented himself as a trader in the transaction, he could not be heard to say that he was not so for the purpose of protecting himself from the consequences. *Semble:* the offence need not be committed during the trading to render bkpt. amenable to 1849 Act, s. 256.—*Re* LESLIE, *Ex p.* LESLIE (1856), 25 L. J. Bcy. 37; 27 L. T. O. S. 225; 2 Jur. N. S. 822; 4 W. R. 706, L. JJ.

5191. —— As to being owner of business—Liabilities incurred on failure of business.]—W., a chemist, allowed S., an uncertificated bkpt., to carry on business as a jeweller in the name of W., but for his own benefit, W. making himself liable for the debts. Some persons, to whom S. applied for goods, asked W. whose the business was, to which he replied that it was his, & that S. was carrying it on for him. S. absconded, carrying away all the goods belonging to that business, & W. shortly afterwards became bkpt., almost all his debts being debts contracted by S. in the jewellery business:—*Held:* the representation by W. that the business was his, was not a fraud disentitling him to a certificate.—*Re* WILDBORE, *Ex p.* WILDBORE (1860), 2 De G. F. & J. 621; 45 E. R. 761, L. JJ.

5192. —— Obtaining loan on "salted" invoices—Sale of goods below cost price.]—A trader purchased goods of a manufacturer, & after the invoice had been made out, he added to the invoice an amount more than double that of the sum charged by the manufacturer as the cost price of the goods, & upon the invoice so added to, or fabricated, he procured a loan of money to two-thirds of the fabricated price. The custom of the trade was to "salt" invoices to the extent of 5 per cent. on the amount charged as cost price, to meet the incidental expenses of shipment, & the trader represented to the lender that this invoice had only been so "salted." The goods were shipped to Australia, & sold for an amount less than the true cost price. The trader having become bkpt., his certificate was refused for this & other acts of misconduct.—*Re* JOHNSON, *Ex p.* JOHNSON (1861), 30 L. J. Bcy. 38; 5 L. T. 228, L. JJ.

5193. —— Buying foreign bills on change—Implied representation to pay cash.]—A trader bought foreign bills on change on Tuesday, & on the Saturday following filed a declaration of insolvency, & became bkpt. on the Monday following, the bills not having been paid for. By the custom of merchants there was an implied representation by the purchaser of foreign bills that he had ready money to pay for them, & that they were to be paid for in cash, three days' grace being allowed. No satisfactory reason having been given for such a representation having been made:—*Held:* the bills were to be looked upon as procured by misrepresentation, & the transaction furnished a ground for refusal of the certificate.—*Re* SIMOND, *Ex p.* SIMOND (1857), 26 L. J. Bcy. 49; 29 L. T. O. S. 19; 3 Jur. N. S. 424, L. JJ.

5194. —— Passing off accommodation bills as trade bills.]—Where a bkpt. has systematically passed off accommodation bills as ordinary trade bills, it will be considered misconduct sufficient to justify a refusal of his certificate.

This ct. when sitting in bkpcy. & dealing with the commercial interests of the country, although it has not generally been severe upon cases of mere imprudence or extravagance, has set its face most resolutely against every description of fraud or false or fraudulent misrepresentation. It has felt it to be its painful duty to deal rigorously with cases involving these latter elements as the public interests require that they should be dealt with (TURNER, L.J.).—*Re* LAURENCE, *Ex p.* LAURENCE (1861), 30 L. J. Bcy. 33; 5 L. T. 105; 10 W. R. 22; 7 Jur. N. S. 1218, L. JJ.; *affg.* S. C. *sub nom. Re* LAURENCE, MORTIMORE & SCHRADER, 4 L. T. 184.

5195. —— False statements in prospectus—Knowledge of falsity.]—In June, 1887, from a statement prepared by bkpt.'s brother, with whom he was trading in partnership, it appeared that during the two previous years they had incurred a loss of £1,199, & they were advised by their solr. that the proper course was to call their creditors together. On the suggestion of another solr., however, the books of the firm were handed over to an accountant nominated by him, & the

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5189 ii. ——.]—A balance due on foot of large transactions will not be held to be a debt fraudulently contracted.—*Re* PREAGER (1856), 27 L. T. O. S. 26; 8 Ir. Jur. 251.—**IR.**

a. *Distinguished from gambling.*]—Gambling is not fraud within 1864 Act. *Qu.:* whether gambling is fraud at all under that Act.—*Re* JONES (1868), 4 P. R. 317.—**CAN.**

b. *Fraud before 1864 Act.*]—*Qu.:* whether fraud committed before 1864 Act was fraud within the Act, so as to be a valid ground of opposition to a discharge.—*Re* PARR (1867), 17 C. P. 621.—**CAN.**

c. ——.]—Fraud in contracting debts before 1864 Act is not to be excluded from consideration on an application to confirm the discharge.—*Re* OWENS (1866), 12 Gr. 560.—**CAN.**

5190 i. *Misrepresentation—Contracting debts by false pretences—What must be proved.*]—An objection, that insolvent had contracted debts by means of false pretences & misrepresentations, ought to allege who the creditors were that had been cheated & the nature of the particular false representations by which credit had been fraudulently obtained; & the evidence in support of such an objection ought to be the same as would sustain an information for obtaining goods by false pretences. Mere exaggeration of the value of the property does not amount to proving the offence.—*Re* WALTERS (1866), 3 W. W. & A'B. 14.—**AUS.**

5190 ii. —— *Discounting forgery.*]—Discounting a forgery comes within 5 Vict. No. 17, s. 73, as "contracting a debt fraudulently by means of a false pretence" & is an act of fraudulent insolvency.—*Re* THOMAS (1864), 1 W. W. & A'B. 40.—**AUS.**

d. —— *Trading on fictitious capital—What must be proved.*]—To render insolvent guilty of having traded with "fictitious capital" within Insolvency Stat., 1871 (No. 379), s. 138 (7), insolvent must have made some false statement or acted in some way so as to produce a false opinion about his capital.—*Re* MONAGHAN (1884), 10 V. L. R. 9.—**AUS.**

5195 i. —— *In statement of affairs—Obtaining forbearance from opposing creditors.*]—On Apr. 18, 1891, insolvent called a meeting of creditors & laid a not very candid or truthful statement of his affairs before them. Nothing was then arranged, & the meeting was adjourned for a week, in order that a committee should examine insolvent's position, etc. It was understood & arranged that in the meantime no steps should be taken against insolvent, & that he should keep his affairs in *statu quo.* Insolvent swore that he understood he was to make no large payments, but that he was to keep the firm going. During that week insolvent paid R3,193 due on a bill to one of the banks & R472 on re-draft account, a few insignificant current expenses & R1,000 to his solrs., who were preparing a trust-deed,

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accountant drew up a balance sheet showing an average net profit of 12 per cent. for three years, & a prospectus was thereupon issued founded on the accountant's report, the business being converted into a limited liability co. After carrying on business for three months the co. went into liquidation & the brothers were shortly afterwards adjudicated bkpt.:—*Held:* (1) bkpt. must have known that the prospectus in which he joined was totally false, & by putting forward statements in the prospectus, which he knew to be untrue, he was guilty of fraud, & the county ct. judge was fully justified in absolutely refusing his discharge; (2) (CHARLES, J.) even if bkpt. were not fully aware of the true state of affairs, he had in the circumstances placed himself in the position of a person who was guilty of fraud, in that he had made himself a party to the issuing of a prospectus for the purpose of obtaining money, being utterly regardless whether the statements contained in it were true or not.—*Re* DUCE & DUCE, *Ex p.* DUCE (1889), 6 Morr. 290, D. C.

5196. Fraudulent suppression—Of assets.]—A secreting by bkpt. of his goods, with intent to cheat his creditors, is a concealment sufficient to avoid his certificate within 1842 Act, s. 38, although a full disclosure of the concealment is made to the comrs. before bkpt.'s last examination.—COURTIVRON *v.* MEUNIER (1851), 6 Exch. 74; 20 L. J. Ex. 104; 15 J. P. 660; 15 Jur. 275; 155 E. R. 459.

Annotation:—**Distd.** Nash *v.* R. (1864), 4 B. & S. 935.

5197. —— —— Meaning of "fraud."]—Bkpts., A., B., C. & D., carried on business under the style of A. & Sons, & in June, 1902, A. & Sons transferred a portion of their assets to a co., which was then registered under the name of A. & Sons, Ltd. The consideration for the transfer was a sum payable by a debenture issue to the wife of A., in respect of a debt due to her from the firm, & as to the balance in shares of £10 each. The majority of the shares were transferred to bkpts.' wives, & to their mother. The co. did not take over the liabilities of the firm, but bkpts. contended that these were amply provided for by assets which they retained. Bkpts. had intended to place their assets out of the reach of their creditors, & to benefit themselves:—*Held:* the word "fraud" in 1890 Act, s. 8 (3) (*l*) meant common law fraud, & did not refer to certain transactions which were deemed to be fraudulent for the purposes of bkpcy. law, & as the transfer by bkpts. of their business had not been reported as a fraud in the specific language of Debtors Act, 1869 (c. 62), although it might have been so reported, bkpts. had not been guilty of fraud within 1890 Act, s. 8 (3) (*l*), but their dealings with their property, & preferring certain creditors over others amounted to gross misconduct on their part, & their discharge must be suspended.—*Re* ROWLEY (J.) & SONS (1903), 19 T. L. R. 602.

5198. —— Previous debts.]—A trader owing £6,000 removed from a provincial city to London, where he recommenced business, & incurred new debts, & did not inform his new creditors of the state of his pecuniary circumstances. In less than nine months he became bkpt. The comr. having adjourned the grant of certificate for eighteen months, without protection for six months, on appeal, by arrangement, the order was varied by granting the certificate at the end of eighteen months from the adjudication.—*Re* WOOLDRIDGE, *Ex p.* WOOLDRIDGE (1855), 24 L. J. Bcy. 17, L. JJ.

5199. —— Change of ownership of property.]—Bkpt. had, a short time before his bkpcy., represented to his bankers that he was the owner of three ships in the course of building abroad. Some time afterwards, his account with them being largely overdrawn, they prepared an agreement for him to sign, whereby he agreed to mortgage the ships to them for the floating balance. He had previously, however, sold the ships to his brother, subject to an agreement for the payment to himself of any profit on a resale. He signed the proposed memorandum without mentioning the fact of the sale:—*Held:* although the bankers made no further advance on the security of the memorandum, bkpt. had been guilty of a suppression, which could not be overlooked on the question of his certificate, & it had been rightly suspended for three years without protection.—*Re* HOLDERNESS, *Ex p.* HOLDERNESS (1859), 1 De G. F. & J. 260; 28 L. J. Bcy. 20; 33 L. T. O. S. 266; 5 Jur. N. S. 904; 45 E. R. 358, L. JJ.

5200. Buying goods on credit—Subsequent sale below cost price.]—Bkpt. had systematically bought goods at low prices & on short credit, & immediately sold them at still lower amounts:—*Held:* bkpt.'s

to be carried before the creditors:—*Held:* the conduct of insolvent in making the payments did not amount to the offence obtaining forbearance from the opposing creditors by making false representations to them.—*Re* HORMARJI ARDESIR HORMARJI (1892), I. L. R. 17 Bom. 313.—**IND.**

f. —— *As to consideration for discounting promissory note.*]—Where insolvent induced S. to discount a certain promissory note for him in consideration of S receiving cession of a certain mtge. bond in favour of insolvent which was, *ex facie*, a *kusting brief* & in the faith that it was so, whereas insolvent had waived his preference in the bond in favour of a second mtge. over the property, the ct. granted insolvent's certificate on condition that he should not thereby be discharged as to his future effects in respect of his debt to S.—*Re* BUYSKES (1845), 3 M. 305.—**S. AF.**

g. —— *As to amount of assets.*]—Where a trader, all whose property was heavily mortgaged, & who had large over-due debts which he could not pay, obtained credit from Montreal merchants, concealing his true position, falsely alleging that he was worth $4,000 more than he owed, & that he had no engagements he could not meet:—*Held:* such fraud as disentitled him to his discharge.—*Re* OWENS (1866), 12 Gr. 560.—**CAN.**

5196 i. *Fraudulent suppression—Of assets—Unintentional omission from schedule.*]—Where insolvent had by oversight omitted an asset from his schedule, & also omitted to inform his trustees of it:—*Held:* this did not authorise the refusal or suspension of his certificate on the ground that he had not made a full & fair disclosure of his property or that he had, with intent to defraud, made a material omission from his schedule.—*Re* AARONS (1880), 6 V. L. R. 56.—**AUS.**

k. *Purchasing goods when insolvent—Concealment from creditors.*]—A purchase of goods by persons unable to pay their debts in full is not fraudulent within Insolvent Act, 1864, s. 8, or a reason for refusing the discharge, unless such inability is concealed from the creditor with intent to defraud him.—*Re* GARRATT & Co. (1869), 28 U. C. R. 266.—**CAN.**

5200 i. *Buying goods on credit—Concealing existence of trade securities.*]—On an application for an order of discharge under Debtors & Creditors Act, 1876, s. 184, it appeared that debtor had obtained goods on credit from certain creditors, after having executed a bill of sale of his business premises, present & future stock-in-trade, & book debts. He did not inform the creditors of the fact that the bill of sale was in existence. The district ct. judge, being of opinion that debtor had been guilty of deceit, made an order of discharge to take effect only after one year:—*Held:* as bkpcy. laws did not impose on a trader the duty of making known to creditors the existence of such securities, & as debtor had not been guilty of any active deceit, the order of discharge should have been made to take effect immediately.—*Re* QUINN, 3 J. R. N. S. 135.—**N.Z.**

5200 ii. —— *Subsequent sale below cost prices.*]—Judgment-debtor being largely in debt & not in business of any kind nor in receipt of any income, ordered goods of the judgment-creditor by letter, & immediately after delivery thereof resold them below cost:—*Held:* debtor having bought the goods without at the time having any reasonable expectation of being able to pay for them, had fraudulently contracted the debt & had made a fraudulent disposition of his property.—CANADIAN UNDERSKIRT CO. *v.* GORMAN (1912), 11 E. L. R. 7; 6 D. L. R. 917.—**CAN.**

certificate must be refused.—*Re* HOLTHOUSE, *Ex p.* HOLTHOUSE (1851), 1 De G. M. & G. 237; 21 L. J. Bcy. 3; 18 L. T. O. S. 84; 42 E. R. 543, L. JJ.

Annotations:—**Consd.** *Re* Rufford, *Ex p.* Rufford (1852), 2 De G. M. & G. 234, L. JJ. **Apprvd.** *Re* Manico, *Ex p.* Manico (1853), 22 L. J. Bcy. 41, L. JJ. **Folld.** *Re* Underwood (1861), 4 L. T. 656. **Mentd.** *Re* Gibson, *Ex p.* Gibson (1853), 21 L. T. O. S. 9.

5201. —— ——.]—Bkpt. sold under cost price goods purchased on credit. Such course of dealing had been to a considerable extent in time & amount:—*Held:* it was sufficient evidence of the debts being contracted by fraud, & the certificate had been properly refused.—*Re* COLEMAN, *Ex p.* COLEMAN (1858), 3 De G. & J. 43; 44 E. R. 1185, L. JJ.

Annotation:—**Folld.** *Re* Underwood (1861), 4 L. T. 656.

5202. —— **Subsequent pledge.**]—Where a case is established of a trader having bought goods on credit, with the intent of raising money by pledging them, the ct. will visit such conduct with the utmost severity, & the circumstance of goods, which had been purchased on credit, having been pledged the next day by bkpt. is one open to suspicion; but where that circumstance was explained by uncontradicted evidence, showing that the goods had been purchased in the ordinary course of business, & had been pledged by reason of a sudden pressure requiring money to be raised forthwith, the ct. allowed bkpt.'s certificate.—*Re* MARTYN, *Ex p.* MARTYN (1852), 2 De G. M. & G. 225; 21 L. J. Bcy. 46; 21 L. T. O. S. 1; 42 E. R. 858, L. JJ.

Annotations:—**Distd.** *Re* Rufford, *Ex p.* Rufford (1852), 2 De G. M. & G. 234, L. JJ. **Consd.** *Re* Lawrence, Mortimore & Schrader (1861), 4 L. T. 184. **Distd.** *Re* Underwood (1861), 4 L. T. 656. **Mentd.** *Re* Manico, *Ex p.* Manico (1853), 3 De G. M. & G. 502, L. JJ.

5203. —— ——.]—A trader, who carried on business without capital, & in the usual course of his transactions purchased goods, & immediately pledged them to raise money for the purposes of his trade, was refused either certificate or protection; but, it appearing that the buying was not with the mere purpose of pledging, & that the pledging was made in the honest belief of being able to redeem the goods & sell at a profit:—*Held:* he had not committed any of the offences enumerated in 1849 Act, s. 256.—*Re* MANICO, *Ex p.* MANICO (1853), 3 De G. M. & G. 502; 22 L. J. Bcy. 41; 20 L. T. O. S. 300; 17 Jur. 359; 1 W. R. 135; 43 E. R. 197, L. JJ.

Annotations:—**Consd.** *Re* Coleman, *Ex p.* Coleman (1858), 3 De G. & J. 43; *Re* Lawrence, Mortimore & Schrader (1861), 4 L. T. 184. **Distd.** *Re* Underwood (1861), 4 L. T. 656; *Re* Fenn (1865), 13 W. R. 695.

5204. —— **Subsequent pledge or resale below cost price.**]—If a trader systematically purchase goods on credit with an intention of pledging or selling them under cost price for ready money, in order to keep up his credit & enable him to meet his bills falling due, he commits a fraud, for which the ct. will refuse to grant him any certificate.—*Re* UNDERWOOD (1864), 4 L. T. 656.

Annotation:—**Distd.** *Re* Fenn (1865), 13 W. R. 695.

5205. Drawing bills against future consignments—Fall in price of goods—Bankruptcy due to misfortune.]—Bkpt. had given bills in respect of sugar to come forward from planters, to whom he had made advances; sufficient sugar came forward to enable a large number of the bills to be met, &, but for a fall in the price of sugar, there would have been ample means to meet all the bills as they became due:—*Held:* the bkpcy. was due to misfortune, & there was no evidence of any fraud.—*Re* DU BOULAY (1885), 2 Morr. 49.

5206. Dealing fraudulently with money of customers—Misappropriation.]—A broker, who was a director of & broker to a co., which had been ordered to be wound up, received at a time when he was insolvent an order from a customer directed to him, & to a partner whom he knew or believed to be dead, to buy a sum of Sardinian stock. The broker contracted with L. for the stock, & received the price from the customer as for himself & his deceased partner. He did not pay L. for the stock, but allowed him interest for three months, & applied the money to his own purposes. Immediately before his adjudication of bkpcy. he sold a debenture of the co. to A. for the amount due upon it, without requiring any money for the four years' interest which was also due, & with the money paid L. part of the money, the price of the stock, & gave him a bill for the remainder, & L. then transferred the stock to the customer. The broker had previously privately appropriated the debenture to the safety of the customer, & when he sold it had no authority from the customer for so doing. The broker having become bkpt. & received a certificate, the Ct. of Appeal, for the above & other misconduct, discharged the order & suspended the certificate for five years.—*Re* BOYD, *Ex p.* WRYGHTE (1856), 26 L. J. Bcy. 33, L. JJ.

Annotations:—**Refd.** *Re* Simond, *Ex p.* Simond (1857), 26 L. J. Bcy. 49, L. JJ.; *Re* Matheson (1862), 31 L. J. Bcy. 23, L. JJ.

5207. Failure to verify returns made by partner.]—One of two partners, who were agents to a banking co., made false returns to them of the notes in the agents' possession, but without the knowledge of the other partner. On the partners becoming bkpt.:—*Held:* the last-mentioned partner ought to have seen to the accuracy of the returns, & had been guilty of negligence, imprudence & overconfidence, but it was not a case for the total refusal of his certificate.—*Re* DANCE, *Ex p.* DANCE (1859), 1 De G. F. & J. 286; 29 L. J. Bcy. 16; 45 E. R. 369, L. JJ.

Annotation:—**Consd.** *Re* Lawrence, Mortimore & Schrader (1861), 4 L. T. 184.

5208. Giving acceptances in firm name—Without knowledge of partners—Misappropriation of proceeds.]—Bkpt., a partner in a firm, had given acceptances of the firm to the amount of £20,000 without the knowledge of his partners, in order to provide funds for his own speculations outside the business:—*Held:* bkpt. had committed a gross fraud on his partners, had been guilty of a grave offence against good trading, & his discharge must be wholly refused.—*Re* ELLINGTON (1887), 4 T. L. R. 38.

5209. Assignment of part of estate—Assignee not party to fraud.]—In Nov., 1887, bkpt. effected an arrangement with his creditors for the payment of his debts in full by four equal instalments of 5*s.* in the pound, bkpt. agreeing to pay to trustees the sum of £7 10*s.* a week as a fund, out of which the instalments were to be paid as they became due. The indebtedness of bkpt. was then about £685, on account of which he actually paid about £400, but in Apr., 1889, in consequence of his making default in payment of some of the weekly instalments to the trustees, certain creditors commenced actions against him for the recovery of the balance respectively due to them. About the time such actions were commenced, bkpt. sold his rounds as a travelling draper, which were alleged to be of the value of £800, for the sum of £150, part of which he used to defend the actions, to which he was advised he had a good defence, & the remainder for the support of his family. The county ct. judge having absolutely refused any order of discharge:—*Held:* the transfer made by bkpt. not being an assignment of the whole of his property or an assignment to a person who was a

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party to a fraud, the transaction was not fraudulent, & bkpt. was entitled to an order of discharge.—*Re* CRANSTON, *Ex p.* CRANSTON (1892), 8 T. L. R. 564; 9 Morr. 160, D. C.

5210. Breach of trust.]—Where bkpt. had been guilty of breaches of trust, the ct. granted to him a certificate, with a proviso that it should not extend to protect him from claims upon him as a trustee.—*Re* WAKEFIELD, *Ex p.* WAKEFIELD (1851), cited 6 De G. M. & G. at p. 707; 17 L. T. O. S. 55; 15 Jur. 961; 43 E. R. 1408.

Annotations:—**Consd.** *Re* Jardine, *Ex p.* Jardine (1850), 16 L. T. O. S. 305. **Distd.** *Re* Rufford, *Ex p.* Rufford (1852), 2 De G. M. & G. 234, L. JJ. **Consd.** *Re* Staner, *Ex p.* Staner (1852), 2 De G. M. & G. 263, L. JJ.; *Re* Lawrenee, Mortimore & Schrader (1861), 4 L. T. 184; *Re* Wilson (1866), 14 L. T. 492. **Refd.** *Re* Hammond, *Ex p.* Hammond (1855), 6 De G. M. & G. 699, L. JJ.; *Re* Shuttleworth (1855), 24 L. T. O. S. 315.

5211. ——.]—Where bkpt. has been guilty of a fraudulent breach of trust, the ct. will wholly refuse to grant an order of discharge.—*Re* SINGLETON & TATTERSHALL, *Ex p.* SINGLETON (1885), 1 T. L. R. 335.

5212. —— Undue preference.]—A trader, when involved in difficulties & hopelessly insolvent, deposited the title-deeds of property, of which he was the surviving trustee, with his brother, who was entitled to the property for life under the will of which bkpt. was such trustee, as a security for a debt owing to the brother:—*Held:* this was a fraudulent preference.—*Re* BARTON, *Ex p.* BARTON (1861), 31 L. J. Bcy. 7; 6 L. T. 142, L. JJ.

5213. —— —— Forgery—Professional trustee.]—Bkpt. carried on business as an accountant, & filled various positions of trust, such as trustee in bkpcies., & liquidations, & liquidator in winding up of cos. In 1882 he committed a series of forgeries & was sentenced to penal servitude. The liabilities which he incurred by reason of those forgeries amounted to nearly £20,000, which had been proved against his estate. His aggregate liabilities amounted to £65,000, & the assets were returned in the statement of affairs at £54,000, but £2,500 only had been received:—*Held:* the Ct. of Bkpcy. ought to punish a man for offences committed which were connected with his bkpcy., notwithstanding he had been punished for the crime by a ct. of criminal justice, & as bkpt., a professional trustee, knowing well that, insolvent as he was, his property should be divided among his creditors rateably, had deliberately destined a very considerable portion of that property for distribution among a particular class of creditors, whom he selected for preferment, an application for an order of discharge must be absolutely refused.—*Re* WING (1888), 4 T. L. R. 619.

Annotation:—**Consd.** *Re* Grepe (1889), 6 T. L. R. 19.

5214. —— Ultra vires investment with consent of cestui que trust.]—If a trustee commits a breach of trust involving no dishonourable conduct, as where at the solicitation of his *cestui que trust*, he invests in a class of security not warranted by the deed of trust, such conduct ought not to be taken into account in considering whether the trustee, if he subsequently becomes bkpt., ought or ought not to have his discharge (CAVE, J.).—*Re* FREEMAN, *Ex p.* FREEMAN (1890), 62 L. T. 367; 7 Morr. 38, D. C.

5215. —— Misappropriation by solicitor—Acquiescence of client.]—T. & G. were partners as solrs. G. received from H. a sum of £4,000 for the purpose of being invested on good mtge. security. T. was mtgee. of the reversion of a large sum of stock, of which he was one of the trustees, & upon which he had lent £4,000. The £4,000 belonging to H. was lent by the firm to T., upon the security of a transfer of his mtge., & applied to the purposes of the partnership business. With the consent of the tenant for life, the stock was sold upon the death of the reversioner, & the proceeds were applied in payment of the reversioner's debts, & among them the £4,000, & the balance was placed to the credit of T. in the books of the firm. No fresh security was ever given to H. for his £4,000, but for twenty years the firm & T. paid him interest as if on the original security, & representing that it was so. In 1850 H. discovered the fraud, but for four years he continued to receive his interest, when T. became bkpt., & the £4,000 was lost:—*Held:* the transaction was a gross breach of duty by T. as a solr., towards his client, & one which the interests of society required should be severely visited, & the acquiescence of the client in receiving interest after the discovery of the misconduct, could not be looked upon as a condonation by reason that the interests of society were involved.—*Re* SELBY, *Ex p.* SELBY (1855), 6 De G. M. & G. 783; 25 L. J. Bcy. 13; 2 Jur. N. S. 29; 43 E. R. 1437, L. JJ.

Annotation:—**Consd.** *Re* Stainton, *Ex p.* Board of Trade (1887), 19 Q. B. D. 182.

5216. —— Misconduct of solicitor—Not amounting to fraud.]—A solr., who subsequently became bkpt., deposited a mtge. deed in circumstances which, although irregular & censurable on the part of a solr., did not amount to an act of wilful fraud:—*Held:* bkpt. should be granted a certificate, with a suspension thereof for two years from the period of adjudication.—*Re* FRESTON, *Ex p.* FRESTON (1861), 31 L. J. Bcy. 1; 5 L. T. 267; 7 Jur. N. S. 1173; 10 W. R. 25, L. JJ.

5217. —— Solicitor employed to manage affairs generally—Non-payment of balance due.]—Insolvent, an attorney, was employed generally to manage the affairs of an estate, on which he had a large claim for costs, & had recovered & paid several sums of money. Upon a final statement of accounts a sum of £48 was due from him to the client, who opposed the discharge of insolvent, on the ground that the non-payment of such sum was a breach of trust:—*Held:* the mere non-payment of the balance was not a breach of trust, but if the attorney had been employed to do any specific act, or to receive any certain sum of money, & after the satisfaction of his own costs, had failed to pay over the money to his client, such act would have been a breach of trust.—*Re* IZOD (1830), Cooke's Insolvent Debtors' Practice, 2nd ed., p. 205.

5218. —— Misappropriation by agent.]—Bkpt., a wine merchant, had acted as agent to a merchant, who alleged that bkpt., in his character of agent, had collected money & appropriated it in fraud of

5210 i. *Breach of trust.*]—The fact that insolvent had not, in his capacity as trustee of an insolvent estate, paid over money to a creditor in that estate:—*Held:* no ground for withholding his own certificate, as, notwithstanding the allowance of such certificate, his liability continued.—*Re* BUYSKES (1845), 3 M. 305.—**S. AF.**

5218 i. —— *Misappropriation by agent.*]—To justify refusal of insolvent's certificate under 7 Vict. No. 19, s. 18, for having appropriated to his own use money of D. deposited with insolvent as an agent he must have been an agent in the sense in which that word is used in popular parlance, or there must have been a series of continued transactions. He must come rather under the character of a trustee than of an agent, & the best test whether he is such a trustee or only an ordinary debtor is to enquire, was it his duty to keep the money so ear-marked that in the event of his death the ct. could say it was D.'s money, or was he warranted by all the previous transactions between D. & himself in receiving the money & treating himself merely as a debtor to D. for that amount.—*Re* NANTES (1861), 1 W. & W. 1.—**AUS.**

his principal :—*Held :* the order of discharge must be refused on account of fraud, the relationship of principal & agent being one of a fiduciary character, & the ct. being bound in the circumstances to inflict an extreme penalty.—*Re* THORNE-GEORGE (1888), 5 T. L. R. 116.

5219. Pledging short bill—Banker & customer.]—A banker, who has pledged a short bill of a customer, is excluded from a certificate.—*Re* GIBSON & STURT, *Ex p.* STURT (1851), 4 De G. & Sm. 49 ; 64 E. R. 729.

Annotation :—**Refd.** *Re* Rufford, *Ex p.* Rufford (1852), 2 De G. M. & G. 234, L. JJ.

5220. "Misconduct"—Must be under bankruptcy.]—Misconduct to stay a certificate must be misconduct under the bkpcy.—*Re* ASPINALL, *Ex p.* GARDNER (1812), 1 Ves. & B. 45 ; 1 Rose, 377 ; 35 E. R. 18, L. C.

Annotation :—**Mentd.** *Re* Wailey, *Ex p.* Alexander (1832), 1 L. J. Bcy. 79, Ct. of R.

5221. —— Committed before passing of 1849 Act.]—*Held :* bkpt.'s conduct as a trader before the above Act came into operation might be taken into account with reference to the provisions of that Act as to the allowance of the certificate.—*Re* DORNFORD, *Ex p.* DORNFORD (1851), 4 De G. & Sm. 29 ; 20 L. J. Bcy. 7 ; 16 L. T. O. S. 553 ; 15 Jur. 278 ; 64 E. R. 720.

Annotations :—**Mentd.** *Re* Rufford, *Ex p.* Rufford (1852), 2 De G. M. & G. 234, L. JJ. ; *Re* Lawrence, Mortimore & Schrader (1861), 4 L. T. 184 ; *Re* Salaman, *Ex p.* Salaman (1885), 14 Q. B. D. 936, C. A.

5222. —— May extend to conduct outside trade.]—Borrowing money by a trader from a friend, though not in the course of any dealing in trade between the borrower & lender :—*Held :* part of the borrower's "conduct as a trader" upon the question of granting his certificate.—*Re* DORNFORD, *Ex p.* DORNFORD (1851), 4 De G. & Sm 29 ; 20 L. J. Bcy. 7 ; 16 L. T. O. S. 553 ; 15 Jur. 278 ; 64 E. R. 720.

Annotations :—**Mentd.** *Re* Rufford, *Ex p.* Rufford (1852), 2 De G. M. & G. 234, L. JJ. ; *Re* Lawrence, Mortimore & Schrader (1861), 4 L. T. 184 ; *Re* Salaman, *Ex p.* Salaman (1885), 14 Q. B. D. 936, C. A.

5223. —— ——.]—"Conduct as a trader" within 1849 Act, s. 198, need not be considered only as to conduct in trade.—*Re* LESLIE, *Ex p.* LESLIE (1856), 25 L. J. Bcy. 37 ; 27 L. T. O. S. 225 ; 2 Jur. N. S. 822 ; 4 W. R. 706, L. JJ.

5224. —— —— Obtaining money on false pretences.]—A trader who obtained money on false pretences, though not in the course of his trade :—*Held :* to have misconducted himself as a trader with reference to his certificate.—*Re* STANER, *Ex p.* STANER (1852), 2 De G. M. & G. 263 ; 21 L. J. Bcy. 56 ; 19 L. T. O. S. 333 ; 16 Jur. 1124 ; 42 E. R. 873, L. JJ.

Annotation :—**Refd.** *Re* Salaman, *Ex p.* Salaman (1885), 14 Q. B. D. 936, C. A.

5225. —— Misappropriating trust money—By using it in trade.]—Misappropriation of trust money on the part of bkpt. by using it in his trade :—*Held :* such "conduct as a trader" as the ct. might consider on the question of the certificate.—*Re* JARDINE, *Ex p.* JARDINE (1850), 16 L. T. O. S. 305.

5226. —— Trading when assets deficient—Misrepresentation.]—A. carried on a business of a

5218 ii. —— ——.]—An auctioneer, entrusted by clients with property for sale, sold & paid the proceeds into his general account at his bankers. He neglected after repeated applications to render account-sales or pay over the proceeds, & by payments in course of his business his general account dwindled & he became insolvent. The comrs. refused his certificate because he had "expended for his own benefit or appropriated to his own use trust-funds or other property of which he had the charge or disposition as trustee or as an agent only" :—*Held :* the certificate was rightly refused.—*Re* PERRY (1862), 1 W. & W. 150.—**AUS.**

5218 iii. —— ——.]—A., a broker, was in the habit of effecting insurances for the Govt. with various cos. The course of business was that the policies were issued by the cos., in exchange for A.'s I.O.U. for the premiums, which were subsequently received by A. from the Govt. & paid to the cos. by A. A. became insolvent, having received certain premiums from the Govt. which he had failed to pay over to the cos. Upon objections to his obtaining his certificate :—*Held :* he had not charge of the money as "a trustee, agent, factor, or broker" within Insolvency Stat., 1871, s. 138 (12).—*Re* AARONS (1880), 6 V. L. R. 56.—**AUS.**

5218 iv. —— ——.]—P. & Co., an English firm, consigned a ship to insolvent, with instructions to collect the freight & apply it to disbursements & to remit the balance in bank bills or place it against an invoice of coals, should it be divided to purchase them. The ship arrived to insolvent's consignment & he collected the freights & made certain disbursements, & the balance to the credit of P. & Co. was £700 odd. The money received was placed by insolvent in the bank to his own account. On Feb. 24 the insolvent wrote to P. & Co. advising them to send the ship to Adelaide for a cargo adding, "In case you do not, we shall immediately remit the balance in our hands by a bank draft in London." A few days afterwards the ship sailed for Calcutta direct in ballast, & insolvent knew that he would not be authorised to purchase a cargo in Adelaide, & that there were no further disbursements to be made. On May 23 he wrote, "We regret to find that through some neglect in our office the accounts for the [ship] have not been sent forward as they ought to have been with a bank draft for the balance due to you. We beg to enclose the accounts showing the balance in your favour of £702 6*s.* In order to make up in some measure for the delay which has occurred, we shall get one of the banks to telegraph the amount to your credit in London at our expense so that you can receive the cash even before it would have been due if it had gone home by a sixty day's draft." Insolvent never remitted the money, & on Aug. 20 filed a petition for the sequestration of his estate. The insolvent afterwards applied for a certificate of conformity which the chief comr. refused on the ground that insolvent had, by not remitting P. & C.'s money "unlawfully expended for his own benefit or appropriated to his own use trust funds" within 7 Vict. No. 19, s. 18 :—*Held :* the comr. was right.—*Re* LLOYD (1879), 2 N. S. W. S. C. R. N. S. 114.—**AUS.**

5218 v. —— —— *Of "property."*]—The term "property" in Insolvency Stat., 1871 (No. 379), s. 138 (12), does not include a right or interest in property or an obligation arising thereout, but is limited to the goods, money, etc., themselves.—*Re* VAGG (1888), 14 V. L. R. 902.—**AUS.**

l. *Obtaining cash for accommodation bill—Accepted by party unable to pay same.*]—Where insolvent obtains cash for an accommodation bill accepted by a party wholly unable to pay it, although the indorsee to whom the bill is passed makes no inquiry as to the circumstances of the acceptor until after the bill is due, insolvent will be remanded for having put a fictitious bill into circulation.—*Re* CLIFFORD (1856), 30 L. T. 313.—**IR.**

5222 i. "*Misconduct*"—*May extend to conduct outside trade—Not limited by 7 Vict. No.* 19, *s.* 18.]—*Re* RUTLEDGE, FLOWER & FORSTER (TRADING AS WILLIAM RUTLEDGE & CO.) (1863), 2 W. & W. 89.—**AUS.**

5225 i. —— *Misappropriating trust money.*]—In applying 1898 Act, s. 40 (1), the words must be limited by the particular bkpcy. with which the ct. has to deal, & the only cases of unlawful appropriation which the ct. is entitled to take into consideration are unlawful appropriations which are connected with the bkpcy. or which can or may have had some effect in bringing it about.

Where money had been wrongfully retained by bkpt., & the persons wronged had been paid with money borrowed from another, who claimed to prove as a creditor in the bkpcy. :—*Held :* such conduct of bkpcy. was proper to be considered by the ct. on his application for a certificate of discharge, & any alleged condonation of the wrong by the persons wronged was no answer to the offence.—*Re* TODD (1910), 10 S. R. N. S. W. 490.—**AUS.**

m. *Fraudulent disposition of property—Fraudulent settlement.*]—J. was extrix. of P., her husband. In July, 1861, B. instituted a suit against J. as extrix. to establish a sub-partnership between himself & P. On Jan. 20, 1863, pending the suit, J. settled all her property on one of her daughters upon the occasion of her marriage. On Oct. 7 a decree was obtained by B. declaring him entitled as a sub-partner with P. & directing accounts of the sub-partnership. On Nov. 25 J. voluntarily sequestrated her estate : —*Held :* the settlement was not a *bonâ fide* one but colourable only, & certificate refused on the ground that insolvent being indebted had unjustifiably disposed of property otherwise than *bonâ fide* & for valuable consideration.—*Re* SOLOMON (1864), 1 W. W. & A'B. 45.—**AUS.**

Sect. 5.—The order: Sub-sect. 1, C. (b) ix., & D.: sub-sect. 2.]

wine merchant for three years, at the end of which time he was made bkpt. He had started with a deficiency, & his expenditure & losses during that period had very considerably exceeded his profits, & there never had been, at any time, a reasonable expectation of his getting over his difficulties. At different times in such period he had borrowed considerable sums of B., a person not conversant with business, the loans having been effected by money, bills, & notes, which had been given by B. to A. in respect of which A. deposited with B. bills of lading & wine warrants. In the course of these transactions A. made misrepresentations to B. as to the state of his affairs & the value of the securities given. B. alone opposed the granting of A.'s certificate:—*Held:* the above circumstances constituted "conduct as a trader" within 1849 Act, upon which the ct. could adjudicate in the matter of the certificate.

A trader carrying on business for two or three years with a deficiency of assets, in his application for his certificate ought to explain that circumstance, or give some fair excuse for his conduct, if any creditor has suffered by it.—*Re* DORNFORD, *Ex p.* DORNFORD (1851), 4 De G. & Sm. 29; 20 L. J. Bcy. 7; 16 L. T. O. S. 553; 15 Jur. 278; 64 E. R. 720.

Annotations:—**Distd.** *Re* Rufford, *Ex p.* Rufford (1852), 2 De G. M. & G. 234, L. JJ. **Consd.** *Re* Lawrence, Mortimore & Schrader (1861), 4 L. T. 184. **Refd.** *Re* Salaman, *Ex p.* Salaman (1885), 14 Q. B. D. 936, C. A.

5227. —— Fraudulent concealment of property—Intent to cheat creditors.]—COURTIVRON *v.* MEUNIER, No. 5196, *ante*.

5228. —— Intermeddling with estate on eve of bankruptcy—Bonâ fide intention to benefit creditors.]—*Re* FREEMAN, No. 5091, *ante*.

See, also, Nos. 5251, 5290, 5292, *post*.

D. Review and Appeals.

Interference with discretion by appellate court generally.]—*See* Nos. 5029–5034, *ante*.

5229. Jurisdiction of court.]—The Ct. of Bkpcy. has no power to review an order granting a discharge.—*Re* ATHERTON, *Ex p.* ATHERTON (1868), 3 Ch. App. 142; 37 L. J. Bcy. 6; 17 L. T. 485; 16 W. R. 294, L. J.

5230. Who may appeal—Creditor who did not oppose order.]—A creditor, who has not opposed bkpt.'s order of discharge before the comr., is not thereby precluded from appealing against it.—*Re* MONK & BROOKS, *Ex p.* BURGESS (1864), 4 New Rep. 310; 33 L. J. Bcy. 51; 10 L. T. 634; 10 Jur. N. S. 981; 12 W. R. 924, L. C.

See 1914 Act, s. 108 (2).

5231. —— Creditor who has not proved his debt.]—A creditor, who has not proved his debt when an order of discharge is granted, cannot appeal against the order.—*Re* MONK & BROOKS, *Ex p.* GREENWOOD & BATLEY (1864), 4 New Rep. 309; 33 L. J. Bcy. 50; 10 L. T. 634; 10 Jur. N. S. 981; 12 W. R. 924, L. C.

5232. —— "Person aggrieved"—Unpaid creditor.]—An unpaid creditor is a "person aggrieved" within 1883 Act, s. 104 (2) by the granting of an order of discharge to bkpt., & as such has a right of appeal against such order.—*Re* PAYNE, *Ex p.* CASTLE MAIL PACKETS CO. (1886), 18 Q. B. D. 154; 56 L. J. Q. B. 625; 35 W. R. 89; 3 T. L. R. 67; 3 Morr. 270, C. A.

Annotations:—**Folld.** *Re* Thorne-George (1888), 5 T. L. R. 116. **Refd.** *Re* Hedley, *Ex p.* Board of Trade (1895), 2 Mans. 186; *Re* Stevens, *Ex p.* Board of Trade (1898), 67 L. J. Q. B. 932.

5233. —— —— Board of Trade.]—A. became bkpt., & was granted an unconditional discharge. The Board of Trade appealed under r. 237:—*Held:* the Board of Trade was a "person aggrieved," & the appeal must be allowed.—*Re* STAINTON, *Ex p.* BOARD OF TRADE (1887), 19 Q. B. D. 182; 57 L. T. 202; 35 W. R. 667; 4 Morr. 242, D. C.

Annotation:—**Refd.** *Re* Shirley, *Ex p.* Board of Trade (1892), 9 Morr. 147.

5234. What notice required.]—Notice of appeal, from an order made by the ct. on application by bkpt. for his discharge, should be a fourteen days' notice.

Where such notice was not given & objection was taken at the hearing:—*Held:* the case should stand over for a week until the required time had elapsed.—*Re* LANDAU, *Ex p.* BROWN & WINGROVE (1887), 4 Morr. 253, C. A.

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n. —— ——.]—Insolvent prior to his insolvency executed a voluntary settlement of all his property on his wife, with the express design of evading the payment of damages & costs in an action for slander:—*Held:* the comr. was bound not only to suspend, but to refuse, the certificate.—*Re* CURLEY (1865), 2 W. W. & A'B. 1.—**AUS.**

o. —— *Assignments between members of family.*]—For the purpose of withholding a certificate assignments between members of a family on the eve of the insolvency of the assignor, not publicly visible & the details of which are very improbable, should generally be held fraudulent, although sworn by the assignees & assignors to have been honestly effected in such a way that no decided falsehood can be detected in their testimony.—*Re* ALLEN (1865), 2 W. W. & A'B. 3.—**AUS.**

p. —— ——.]—Insolvent, shortly before his insolvency, granted a sub-lease of a theatre of which he was lessee, & which formed his only available means of support, with the theatrical properties & effects, to a relative, as a trustee for him:—*Held:* he had unjustifiably made away with or disposed of otherwise than *bonâ fide* & for a valuable consideration a portion of his property, & certificate suspended.—*Re* AARONS (1880), 6 V. L. R. 56.—**AUS.**

q. —— *Must be proved clearly.*]—A charge of making away with property otherwise than *bonâ fide* should be alleged & proved very clearly.—*Re* WRIGHT & HIGGINS (1881), 7 V. L. R. 7.—**AUS.**

r. *Retention or concealment of property—Must be wilful & fraudulent.*]—*Re* RUSSELL (1882), 7 A. R. 777.—**CAN.**

s. *Giving false answers under examination.*]—An objection to the grant of a certificate to an insolvent charged him with having knowingly & wilfully given false answers & false explanations when under examination on oath:—*Held:* the offence under 7 Vict. No. 19, related to answers by insolvent to inquiries made for the discovery of assets, etc., & not to answers to protect himself from the refusal of a certificate, & objection overruled.—*Re* THOMAS (1864), 1 W. W. & A'B. 40.—**AUS.**

t. ——.]—*Semble:* the examination of insolvent in opposition to the granting of his certificate is not one in which a false answer would subject him to the refusal of his certificate.—*Re* MASON (1866), 3 W. W. & A'B. 28.—**AUS.**

PART XVIII. SECT. 5, SUB-SECT. 1.—D.

a. *Jurisdiction—Examination of insolvent.*]—Upon an appeal from a decision of a judge of the Ct. of Insolvency granting or refusing an insolvent his certificate, the Supreme Ct. has no power to examine insolvent.—*Re* AARONS (1880), 6 V. L. R. 56.—**AUS.**

5230 i. *Who may appeal—Creditor who did not oppose order.*]—A creditor, who did not appear to object to the grant of a certificate, may appeal.—*Re* WILLIAMSON *Ex p.* FITZPATRICK (1882), 3 N. S. W. L. R. 149.—**AUS.**

b. *Within what time.*]—25 Vict., No. 8, s. 5, which provided that an appeal against the granting or refusal of a certificate must be within twenty-one days:—*Held:* satisfied where the exceptions were filed on the twenty-first day was in time.—*Re* WILLIAMSON, *Ex p.* FITZPATRICK (1882), 3 N. S. W. L. R. 149.—**AUS.**

5234 i. *What notice required—Objections in writing at final examination.*]—No appeal lies against the granting of a certificate to bkpt., unless applt.'s objection be made in writing at the final examination.—*Re* WOODROFFE (1861), 14 Ir. Jur. 49.—**IR.**

c. *What court will consider—Questions raised by notice of appeal.*]—Upon an appeal to the full ct. from an order of the primary judge, made upon appeal to him from the decision of a judge of the Ct. of Insolvency granting or refusing insolvent his certificate, the ct. will only entertain questions raised by the notice of appeal. If resp. desires to raise other questions he must lodge a cross appeal.—*Re* AARONS (1880), 6 V. L. R. 56.—**AUS.**

5235. On what grounds—Surprise.]—The meeting for the final examination & discharge of bkpt. was fixed for a certain day before one of the comrs. A creditor, who intended to oppose, instructed his solr., who sent to the ct. on that morning & was there informed that the case would not be taken that day, nor was the case inserted on either of the lists of business. The creditor did not attend, but an order of discharge was made on that day by another of the comrs. Upon motion to vary or discharge that order:—*Held:* this was a case of surprise, & the case must be remitted to the ct. below, with liberty to bkpt. to renew his application there.—*Re* NEWTON, *Ex p.* JOHNSTONE (1862), 31 L. J. Bcy. 63; 6 L. T. 234, L. JJ.

5236. Costs—Against bankrupt when unsuccessful.]—On a creditor's appeal against an order of discharge being allowed, costs may be given against bkpt.—*Re* PAYNE, *Ex p.* CASTLE MAIL PACKETS CO. (1886), 18 Q. B. D. 154; 56 L. J. Q. B. 625; 35 W. R. 89; 3 T. L. R. 67; 3 Morr. 270, C. A.

Annotations:—**Folld.** *Re* Thorne-Greoge (1888), 5 T. L. R. 116. **Mentd.** *Re* Hedley, *Ex p.* Board of Trade (1895), 2 Mans. 186; *Re* Stevens, *Ex p.* Board of Trade (1898), 67 L. J. Q. B. 932.

SUB-SECT. 2.—SUSPENDED DISCHARGE.

Discretion of court generally.]—*See* Sect. 3, *ante.*

5237. On what grounds—Improper agreement by trustee—Purchase of debts by relative of bankrupt.]—Bkpt., with liabilities of about £3,500 & practically no assets, entered into an agreement with his trustee in bkpcy. to pay instalments of £30 a calendar month out of a salary of £1,200 which he had obtained since his bkpcy., until 20*s.* in the pound should be paid, & the trustee agreed, when bkpt. had paid 5*s.* in the pound, "to raise no objection & to use his best endeavours to prevent any objections by any creditors" to any application by bkpt. for his discharge. A relation of bkpt., with his knowledge & consent, bought up debts of bkpt. at rates varying from 2*s.* 6*d.* to 10*s.* in the pound from individual creditors to the extent of about £1,000 & withdrew their claims. Bkpt. had duly paid the instalments for a year, when he applied for his discharge upon his consenting to judgment for the remaining debts. The registrar suspended the discharge for two years, on the ground of the improper agreement by the trustee & the purchase of the debts:—*Held:* the registrar had rightly suspended the discharge upon those grounds in the exercise of his discretion under 1914 Act, s. 26.—*Re* SHAW, [1917] 2 K. B. 734; 86 L. J. K. B. 1395; [1917] H. B. R. 214, C. A.

See, also, No. 5039, *ante.*

5238. For what period—Not less than minimum period—Offence under 1890 Act, s. 8 (3).]—Where bkpt. is proved to have committed an offence specified in the above sub-sect., the ct. cannot suspend his discharge for less than the minimum period of two years.—*Re* OSWELL, *Ex p.* BOARD OF TRADE (1892), 9 Morr. 202, D. C.

See 1914 Act, s. 26.

5239. —— Previous bankruptcy annulled.]—Bkpt., who had been adjudicated bkpt. in 1892, applied for an order of discharge. His assets were not of a value equal to 10*s.* in the pound on the unsecured liabilities, & he had been on a previous occasion, in 1864, adjudged bkpt., but that bkpcy. was annulled in 1865 with the consent of the creditors:—*Held:* notwithstanding the annulment of the previous bkpcy., bkpt. had on a previous occasion been "adjudged bkpt." within 1890 Act, s. 8 (3) (*k*), & the discharge would be suspended for two years.—*Re* DENNY (1905), 21 T. L. R. 297.

5240. —— Extreme period.]—Suspension of discharge for five years is a severe sentence, which should be reserved for very bad cases.—*Re* SWABEY, *Ex p.* SWABEY (1897), 76 L. T. 534, D. C.

5241. —— Nominal suspension.]—In the report of the official receiver it was alleged that bkpt. had committed six of the offences specified in 1883 Act, s. 28 (3), & the discharge was absolutely refused. On appeal satisfactory explanations were afforded of all the charges, with the exception of the fact that twenty-three years previously bkpt. had made a statutory arrangement with his creditors:—*Held:* the discharge should be granted, subject to a nominal suspension of one day to meet the requirements of the Act in respect of the only offence proved against him.—*Re* SULTZBERGER, *Ex p.* SULTZBERGER (1887), 4 Morr. 82, D. C.

Annotation:—**Mentd.** *Re* Freeman (1909), 25 T. L. R. 365.

See 1914 Act, s. 26.

5242. —— Offence under 1849 Act, s. 256.]—Where a bkpt. had committed the offence of fraudulent preference enumerated in the above sect. a certificate was granted with a suspension of six months.—*Re* KING, *Ex p.* KING (1858), 27 L. J. Bcy. 11, L. JJ.

See 1914 Act, s. 26.

5243. —— Neglect in investigation of accounts.]—A father, a solr. in practice, took his son, aged twenty-four, into partnership. The son never investigated the affairs of the firm, but though he lived with & was maintained by the father, he drew out of the concern annually £300 for his own purposes. The father became bkpt., & subsequently also the son:—*Held:* the son's discharge should be suspended for three months.—*Re* HOLDEN, *Ex p.* HOLDEN (1862), 31 L. J. Bcy. 86; 6 L. T. 673, L. JJ.

5235 i. *On what grounds—Surprise—Mistake.*]—The solr. of an opposing creditor informed insolvent's solr. on the morning of the hearing, of his intention to persist in his opposition. The case was called on in the momentary absence of the creditor's solr. There being no one present to oppose, a discharge was pronounced by the judge:—*Held:* the ct. could not annul or review the order on the ground that it was improperly or fraudulently obtained.

When order for discharge has been pronounced by the lips of the judge, he has no power to set it aside on the ground that the discharge was a mistake.—*Re* LOGAN, *Ex p.* DUKE OF WELLINGTON (1859), 9 I. Ch. R. 569; 12 Ir. Jur. 41.—**IR.**

PART XVIII. SECT. 5, SUB-SECT. 2.

d. *On what grounds—Omission to keep proper books.*]—Where bkpt.'s books have been improperly kept, the certificate will be suspended.—*Re* LYNCH, *Ex p.* ARMSTRONG (1858), 7 I. Ch. R. 489.—**IR.**

f. —— ——.]—The omission to keep accounts, where there is no intent of fraudulent concealment, is only matter for suspension, not for refusal, of a certificate.—*Re* MONAGHAN (1884), 10 V. L. R. 9.—**AUS.**

g. —— ——.]—Where insolvent omits to keep books of account suitable for his trade, he is not entitled to an immediate discharge, though such failure may not be owing to any improper motive.—*Re* BULLIVANT (1880), 5 A. R. 638.—**CAN.**

k. —— *Reckless trading.*]—Reckless trading, although unaccompanied by any legal or moral fraud, is a ground for suspending protection.—*Re* BAGGOTT (1865), Bourke, 5.—**IND.**

l. —— —— *Obtaining credit fraudulently.*]—The ct. suspended certificate of bkpt. on the ground of reckless trading & obtaining credit by false representations.—*Re* BELL (1867), 1 I. L. T. Jo. 281.—**IR.**

m. —— *Extravagance—Frivolous defences.*]—Insolvent, who lived extravagantly, went on contracting debts which he was unable to pay, & filed sham defences to just actions by his creditors, was remanded for a year, although there was not any evidence of concealment, or that property had been otherwise made away with.—*Re* BARRY (1861), 13 Ir. Jur. 357.—**IR.**

n. —— *Neglect in investigation o accounts.*]—Where partners took little or no part in the business, & knew

Sect. 5.—*The order: Sub-sects.* 2 *&* 3.]

5244. —— Omission to keep proper books.]—Where the ct. came to the conclusion that, whilst an offence had been committed in that bkpt.'s books did not sufficiently show his financial position, yet the offence had no relation to the deficiency, & no trading offence had been committed, his discharge was suspended for three months.—*Re* SCHARRER (1888), 4 T. L. R. 627.

See 1914 Act, s. 26.

5245. —— From date of adjudication—Breach of trust—Misconduct—Undue preference.]—Bkpt. had within three months preceding the date of the receiving order when unable to pay his debts as they became due given an undue preference to certain of his creditors, he had also been guilty of breach of trust, & he had further been guilty of misconduct in relation to his property & affairs by selling his business within three weeks of the bkpcy. & accepting payment in bills some of which did not become due for twelve months:—*Held:* although there was proof that bkpt. had committed a breach of trust there was no evidence to show that such breach of trust had been fraudulent, & the case not being one in which a condition as to future payments ought to be imposed, the misconduct of bkpt. in selling his business & in unduly favouring certain creditors would in the circumstances be sufficiently met by a suspension of the discharge for a period of three years from the date of the order of adjudication.—*Re* FREEMAN, *Ex p.* FREEMAN (1890) 62 L. T. 367; 7 Morr. 38, D. C.

5246. —— Contracts for differences.]—A stockbroker's discharge was refused on the ground (*inter alia*) that contracts for differences were in themselves immoral:—*Held:* having regard to the particular facts, the case would be sufficiently met by a suspension of the discharge for three years.—*Re* JENKINS, *Ex p.* JENKINS (1891), 39 W. R. 430; 8 Morr. 36, D. C.

5247. —— Rash & hazardous speculation.]—Bkpt., a stockbroker with liabilities amounting to £6,037, wholly due to stockbrokers for differences, & no assets, had acted as a "bear," speculating for the fall. His losses upon one fortnightly account amounted to £11,000, & he had other contracts out of which the official assignee made a profit. When he began his operations as a "bear" he had £300 in money. He contracted to sell £863,000 worth of stock during the fortnight, & he repurchased £600,000, leaving an open & uncovered account of £200,000 & upwards. The information which he received was of such a character that he thought he could not lose, & so soon as he found himself unable to pay the brokers he declared his position to the official assignee, & made no endeavour, which he might have done, to recover himself by other speculations:—*Held:* it was in bkpt.'s favour that he stopped at a certain point, as there appeared to be no reason why he should not have lost £20,000 as readily as £6,000, but it was a very flagrant case, & the discharge would be suspended for two years.—*Re* BARTELS (1887), 3 T. L. R. 653.

5248. —— —— Bankrupt not trader.]—On an application by bkpt., who had been guilty of rash & hazardous speculations by reason of certain gambling transactions in connection with the Stock Exchange:—*Held:* in the circumstances, & taking into consideration the facts that bkpt. was not a trader & that only one of the offences specified in 1883 Act, s. 28 (3), had been reported against him, the proper order would be to suspend the order of discharge for a period of three years.—*Re* RANKIN, *Ex p.* RANKIN (1887), 5 Morr. 23, D. C.

5249. —— —— Opposition by brokers only—Notice.]—Bkpt., formerly a master mariner, had saved money with which he purchased gold-mine shares, which happened to turn out successfully. Bkpt. then invested all his earnings & winnings in other speculations on the Stock Exchange, with the result that he lost all he had, & incurred a debt to his brokers of £1,200. Bkpt.'s application for discharge was opposed by the brokers who were the only creditors:—*Held:* although bkpt. had brought on his bkpcy. by rash & hazardous speculations, the brokers knew what bkpt. was doing, & that the speculations were rash & hazardous, & looking to the fact that theirs was the only proof & the only objection the ct. would not aid them in any way, & the discharge should not be absolutely refused, but should be suspended for five months from the date when the application was heard.—*Re* ANGEL, *Ex p.* ANGEL (1891), 7 T. L. R. 510, D. C.

See 1914 Act, s. 26.

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nothing of the accounts, their certificates were suspended.—*Re* M'CARTHY & Co. (1863), 15 Ir. Jur. 178.—**IR.**

o. —— *Fraud.*]—Where the conduct of bkpt. before sequestration has been fraudulent, his certificate may be suspended.—*Re* VAGG (1888), 14 V. L. R. 902.—**AUS.**

p. —— —— *Of co-partners—Omission to notify customers.*]—Certificate suspended in the case of a partner at home, who, though innocent of the fraudulent practices, omitted to give notice to the parties intended to be defrauded.—*Re* JANSSEN *v.* REUSS (1864), Cor. 13.—**IND.**

q. —— *Error in schedule.*]—The fact that insolvent has stated in his schedule that an asset is not mortgaged, when, in fact, it is, does not authorise the refusal or suspension of his certificate.—*Re* AARONS (1880), 6 V. L. R. 56.—**AUS.**

r. —— *Action for breach of promise of marriage pending.*]—When an action is brought against husband & wife for breach of promise of marriage by the wife, the penal section of Irish Bkpt. & Insolvent Act does not apply against the husband, & the ct. will not remand him under the discretionary clause.—*Re* ROWLAND (1869), 3 I. L. T. Jo. 120.—**IR.**

5244 i. *For what period—Omission to keep proper books.*]—Where insolvent had not kept an account book showing his receipts & disbursements of cash, & the judge granted him a discharge of the second class, suspending it for four months, on appeal, the discharge was confirmed, but suspended for an additional period of four months.—*Re* MOONEY (1877), 2 R. & C. 563.—**CAN.**

5244 ii. ————.]—Where insolvent had kept certain books, which, although imperfect, were honestly meant as a business record, his discharge was only suspended for three months.—*Re* BULLIVANT (1880), 5 A. R. 638.—**CAN.**

5244 iii. —— —— *Fraudulent preference.*]—Insolvent had within three months before his assignment paid one of his creditors in full in such circumstances as amounted to a fraudulent preference, & had neglected to keep proper cash books or books of account suitable to his trade. The county judge granted a discharge suspensively, to take effect four months after the order:—*Held:* the judge had acted with extreme leniency.—*Re* LAMB (1866), 4 P. R. 16.—**CAN.**

5244 iv. —— —— *Misrepresentations.*]—Bkpts., by means of false representations, obtained credit & goods for which they were unable to pay. Their books had been mutilated, & some of them were not produced. Their certificate was suspended for one year.—*Re* JOHNSTONE (1859), 9 I. Ch. R. 556.—**IR.**

s. —— *Reckless trading.*]—A young man, who had entered into trade before he was of age, & had spent large sums in trying to extend his business, was refused his certificate for three months.—*Re* DOOLE (1870), 4 I. L. T. Jo. 291.—**IR.**

t. —— ——.]—When a trader without having capital or means to carry on the trade into which he enters, embarks in business & incurs debts, his certificate will, if he becomes a bkpt., be suspended for six months, although there is not any charge of dishonesty or concealment of property.—*Re* M'NEILLAGE (1869), 3 I. L. T. Jo. 588.—**IR.**

u. —— —— *Inability to account.*]—The certificate of a bkpt. was suspended for twelve months in the case of reckless trading, alleged making away with property, & inability to account.—*Re* MORRISSEY (1867), 1 I. L. T. Jo. 338.—**IR.**

5250. —— Trading with knowledge of insolvency.]—Bkpt. had carried on business after he was aware that he was insolvent:—*Held:* the statement that he consulted one of the largest of his creditors was not sufficient to have justified bkpt. in going on after he was insolvent & the certificate of discharge ought to have been suspended for a year from the date of his passing his last public examination.—*Re* HEAP, *Ex p.* BOARD OF TRADE (1887), 4 Morr. 314, D. C.

See 1914 Act, s. 26.

5251. Embezzlement—Discretion.]—Debtor was convicted on his own confession on Sept. 10, 1891, of having embezzled on July 27 previous, the funds of a building society of which he was secretary, & received six weeks' imprisonment. On Oct. 15 a receiving order was made against him, on which on Nov. 9 he was adjudicated bkpt. He had committed five offences under 1890 Act, one of which was fraud. The county ct. judge suspended his discharge for a period of three years:—*Held:* the county ct. judge was not obliged to refuse the discharge altogether, unless there were special reasons for determining otherwise; & though the term of suspension was probably too short, the ct. would not interfere with the judge's discretion in the circumstances.—*Re* HEDLEY, *Ex p.* BOARD OF TRADE, [1895] 1 Q. B. 923; 64 L. J. Q. B. 460; 72 L. T. 470; 43 W. R. 464; 11 T. L. R. 365; 39 Sol. Jo. 428; 2 Mans. 186; 15 R. 366, D. C.

Annotation:—**Mentd.** *Re* Atherton (1912), 28 T. L. R. 339.

5252. As from what date—Date anterior to hearing.]—Where it is proved, on the hearing of an application for an order of discharge, that the assets of bkpt. are not of a value equal to 10*s.* in the pound on the amount of his unsecured liabilities, & he does not satisfy the ct. that he is not responsible for this state of his affairs, the ct., in suspending the discharge for two years, has no power to order that the period of suspension shall run from a date anterior to the hearing of the application.—*Re* MUZEEN (1906), 22 T. L. R. 322.

See 1914 Act, s. 26.

See, also, No. 5245, *ante.*

5253. Review—Jurisdiction of court.]—*Held:* under 1861 Act, s. 168, the Ct. of Bkpcy. had no power to review an order suspending a discharge.—*Re* ATHERTON, *Ex p.* ATHERTON (1868), 3 Ch. App. 142; 37 L. J. Bcy. 6; 17 L. T. 485; 16 W. R. 294, L. J.

See 1914 Act, s. 108 (1).

5254. —— Appeal ordered to stand over—Pending application for.]—The discharge of bkpt. was suspended for five years. Subsequently the county ct. judge was informed of certain facts, which led him to conclude that his view of bkpt.'s conduct had been mistaken. Bkpt. appealed from the order suspending his discharge:—*Held:* the appeal should stand over, to enable an application for review to be made to the county ct. judge.—*Re* DOWSON, *Ex p.* DOWSON (1887), 4 Morr. 310, D. C.

5255. Notice of appeal—Who must be served.]—Two of the creditors of a bkpt. appeared before the comr. & opposed the granting of his certificate. The comr. suspended the granting the certificate for twelve months. Bkpt. appealed. Notice of the appeal had not been given to the two creditors:—*Held:* they ought to have been served with the petition of appeal.—*Re* JOHNSON, *Ex p.* JOHNSON (1851), 4 De G. & Sm. 25; 20 L. J. Bcy. 6; 16 L. T. O. S. 346; 15 Jur. 185; 64 E. R. 718.

Annotations:—**Mentd.** *Re* Dornford, *Ex p.* Dornford (1851), 4 De G. & Sm. 29; *Re* Rufford, *Ex p.* Rufford (1852), 2 De G. M. & G. 234, L. J.; *Ex p.* Mortimore (1861), 3 De G. F. & J. 599, L. C. & L. JJ.; *Re* Barnard & Rosenthal, *Ex p.* Evans (1862), 6 L. T. 519.

Interference with discretion by appellate court generally.]—*See* Nos. 5029–5034, *ante.*

Suspension of discharge—Subject to conditions.]—*See* Nos. 5275–5279, *post.*

SUB-SECT. 3.—DISCHARGE SUBJECT TO CONDITIONS.

5256. Power to annex conditions—Creditors or assignee not requesting same—Prospects of future assets.]—Where an offence has been proved under 1861 Act, s. 195, which would justify the ct. in refusing or suspending the order of discharge, if asked so to do by any creditor or the assignee, not having been asked so to do, the ct. having regard to the reasonable probability of bkpt. having future assets, will annex conditions to the order of discharge, to the effect that he should pay a certain sum *per annum*, until a fixed portion of his debts has been paid, although bkpt. had no certain source of income.—*Re* CLINTON (1869), 20 L. T. 456.

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w. —— —— *Falsification of books.*]—Bkpt. traded recklessly, falsely represented his affairs, & made fictitious entries in his books, in order to bring out a balance in his favour. On a full investigation by the assignee, it appeared that there had not been any suppression or concealment. The certificate was suspended for three years.—*Re* DIGAN & HIRD (1863), 15 Ir. Jur. 138.—**IR.**

x. —— —— *Fraudulent preference.*]—Where reckless trading & fraudulent preference by a bkpt. were shown the ct. adjourned granting his certificate for nine months.—*Re* DOYLE (1867), 1 I. L. T. Jo. 229.—**IR.**

y. —— *Misrepresentation as to position.*]—Where bkpts. made an untrue representation as to their position & circumstances, & where goods are offered to be returned when a part of them was sold at the time, although no credit was given on the faith of the representations made, & although no particular stipulations were made as to the mode of payment when the goods were sold, the ct., in order to uphold commercial integrity & truth, will suspend the certificate for twelve months.—*Re* FLEMING & HENNESSY (1867), 1 I. L. T. Jo. 568.—**IR.**

z. —— ——.]—Traders obtained forbearance by falsely representing their circumstances, & contrived to have their trade carried on by members of their family, & to place property beyond the reach of their general creditors. They made a full & true disclosure of their trade dealings, but the ct. adjourned for twelve months the granting of the certificate, & gave the opposing creditors costs out of the estate.—*Re* SCOTTS (1866), 18 Ir. Jur. 20.—**IR.**

a. —— *Fraudulent disposition of property.*]—A trader, without his partner's knowledge, disposed of partnership property for his own use:—*Held:* his certificate should be suspended for eighteen months.—*Re* SIM (1862), 14 Ir. Jur. 282.—**IR.**

b. —— —— *Assignment to relative.*]—Insolvent having determined to stop business, disposed of the stock of goods on hand to his daughter for the sum of $1,000, who continued the business for the benefit of the family, insolvent assisting as clerk. No money was paid by the daughter for the goods at the time of purchase, or subsequently, nor was any security taken, but at the time of the assignment, about a year after, insolvent handed to the assignee a note of A. for the sum of $1,000, which was never paid. After insolvent ceased to do business he collected debts due him, & lived upon them & paid nothing to his creditors. No inventory was taken or valuation made of the goods at the time of the sale, but insolvent said that the sum of $1,000 was about their value:—*Held:* the discharge in the circumstances should be of the second class & suspended for the period of two years.—*Re* MATHESON (1874), 9 N. S. R. 538.—**CAN.**

c. —— *True disclosure not made—Errors in schedule.*]—Bkpt.'s examination was adjourned *sine die*, because from several patent errors in his schedule it was to be inferred that he had not made a true disclosure. He appealed, but the fact of the errors was not brought before the ct., which sent the case back to the ct. below, upon the ground that it, if the trader fully disclosed everything, was bound, notwithstanding his misconduct to grant him a certificate at the end of three years. The schedule was amended, & grant of certificate adjourned for three years.—*Re* BOURKE (1863), 15 Ir. Jur. 199.—**IR.**

d. —— *Pledging goods at exorbitant rate of interest—Trading with capital acquired.*]—The certificate of a bkpt., who pledged goods from wholesale merchants to a usurer at an exorbitant rate of interest, & traded with the capital thus made, was suspended for two years, although he gave a full account.—*Re* BYRNE (1867), 1 I. L. T. Jo. 490.—**IR.**

Sect. 5.—*The order: Sub-sect.* 3.]

5257. —— Although entitled to suspend—Benefit of creditors.]—Bkpt. had brought on his bkpcy. by rash & hazardous speculations. He expressed a willingness to take his discharge conditional upon judgment being entered up against him for the amount of his debts:—*Held:* bkpt.'s conduct previous to his bkpcy. had made his discharge liable to be suspended, but it would be of more advantage to the creditors to grant the discharge subject to judgment being entered up against bkpt. by consent for the amount of his debts.—*Re* HADLEY (1884), 1 T. L. R. 44.

5258. —— Debts contracted without reasonable expectation of payment—Bankrupt's extravagant living.]—*Re* LAMBERT, Nos. 5099, 5173, *ante.*

Discretion of court generally.]—*See* Sect. 3, *ante.*

5259. What conditions may be annexed—Conditions tantamount to refusal—Order for future payments—No reasonable probability of bankrupt's ability to comply.]—The power given to the ct., on an application by bkpt. for discharge, of imposing a condition to make future money payments ought not to be exercised in such a manner as to make such a condition tantamount to one of absolute refusal.

Where there is no fair reason to suppose that bkpt. will come into possession of money which will enable him to make future payments, a proper course for the ct. to take is to estimate at once the punishment which bkpt. ought to undergo, & to suspend the discharge; or if the ct. is of opinion that bkpt. is not entitled to any order of discharge at all, it ought at once to refuse the order, & not grant it upon a condition with which there is no probability that bkpt. will ever be able to comply.

The discharge of bkpt. was refused by the county ct. judge with liberty to bkpt. to apply again for his discharge when he should be able to satisfy the ct. that he had paid to the official receiver a sufficient sum to make up a dividend of 4*s.* 6*d.* in the pound with costs. The amount required for such purpose would be £105, & the only means which bkpt. had was a salary of 25*s.* a week with no prospect of an increase:—*Held:* the order must be varied by striking out the condition imposed, & the discharge would be refused with liberty to bkpt. to apply again to the county ct. judge at the end of six months, with the understanding that unless cause to the contrary were shown by the official receiver, the discharge ought then to be granted.—*Re* JAMES, *Ex p.* JAMES (1891), 8 MORR. 19, D. C.

5260. —— —— —— ——.]—On an application for discharge it is not usual to refuse the discharge until debtor has paid 10*s.* in the pound, unless there is a reasonable prospect of there being some available funds or property.—*Re* MARLEY, *Ex p.* MARLEY (1900), 82 L. T. 692; 16 T. L. R. 383, D. C.

5261. —— —— ——.]—In a bkpcy. under 1883 Act, an order was made in 1886 that bkpt.'s discharge should be suspended until he had paid to the trustee such a sum, as with the dividend declared, or to be declared, would enable the trustee to pay to the creditors who had proved, or should prove, their debts 5*s.* in the pound thereon, & that the order of discharge should take effect & come into operation on the day of payment of that sum to the trustee. A dividend of 1*s.* 3*d.* in the pound having been paid to the creditors, bkpt.'s father died in 1891, having by his will bequeathed to bkpt. a legacy, the amount of which was more than sufficient to pay the remainder of the 5*s.* in the pound:—*Held:* the order was not a valid one under the Act, but, as it had been acted upon for five years, it must be treated as valid.—*Re* HAWKINS, *Ex p.* OFFICIAL RECEIVER, [1892] 1 Q. B. 890; 40 W. R. 484; 8 T. L. R. 449; 36 Sol. Jo. 365; 9 Morr. 118; *sub nom. Re* HAWKINS, *Ex p.* HAWKINS, 61 L. J. Q. B. 458; 66 L. T. 737, C. A.

5262. —— —— —— Prospects of future assets.]—In July, 1885, judgment in an action for breach of promise of marriage was recovered against bkpt. for £500 damages. In Jan., 1886, his father died, having by a will made five days before death, given substantial interests in property which was worth about £3,600 to all his children except bkpt., to whom a legacy only of £10 payable on the death of his mother was left by testator. In Apr., 1889, a receiving order was made against bkpt. on his own petition. There were practically no assets, & the only creditor was the judgment creditor, who proved for £596, being the damages, costs, & interest on her judgment debt. Shortly before the petition was filed bkpt.'s family offered, in satisfaction of her judgment, £250, which she refused. The county ct. judge granted to bkpt. an order of discharge subject to his consenting to a judgment for £250 being entered up against him, such judgment to be deemed to be satisfied if bkpt. paid to the official receiver £200 within a month:—*Held:* (1) the facts & circumstances above-mentioned were part of the "conduct & affairs" of bkpt. which would be considered by the ct. under 1883 Act. s. 28 (2), & were sufficient to warrant the judge in drawing the inference that bkpt. would probably come into possession of property in the future, & had presented his petition in order to get rid of his creditor, & enjoy subsequently-acquired property without having to pay any portion of the debt; (2) the order was valid.—*Re* BARKER, *Ex p.* CONSTABLE, *Re* JONES, *Ex p.* JONES (1890), 25 Q. B. D. 285; 59 L. J. Q. B. 331; 38 W. R. 609; 6 T. L. R. 296; 7 Morr. 111, C. A.

Annotations:—**Distd.** *Re* Goud, *Ex p.* Goule (1890), 63 L. T. 292, D. C. **Consd.** Moore *v.* Brompton County Court (1893), 69 L. T. 140, D. C.; *Re* Gaskell (1904), 20 T. L. R. 469, C. A.

5263. —— —— —— Income derived from earnings.]—It is not wise to grant a discharge, subject to a condition as to after-acquired property, unless the ct. finds bkpt. in possession of an income

PART XVIII. SECT. 5, SUB-SECT. 3.

5259 i. *What conditions may be annexed—Conditions tantamount to refusal—Order for future payments—No reasonable probability of debtor's ability to comply.*]—Insolvents had paid in Apr., 1868, to their father two promissory notes, made by them in July & Aug., 1867, at three months, for $934. The assignment was made in June. The judge made the discharge of insolvents within three years conditional upon their payment of the amount so paid:—*Held:* the order could not be upheld, for Insolvent Acts only authorised conditions within the power of insolvents to comply with.—*Re* WALLIS & WALLIS (1869), 29 U. C. R. 313.—**CAN.**

f. —— *Condition protecting unpaid creditor.*]—After paying in full all the claims with the exception of one proved against an insolvent estate, there still remained property registered in insolvent's name. The ct. granted an application for rehabilitation, which was opposed by a creditor who had not been paid, but protected the rights of such creditor by giving him leave to enforce his claim, within a fixed period, as if there had been no rehabilitation.—*Ex p.* MOLLER (1912), T. P. D. 700.—**S. AF.**

g. —— *Assignment of part of salary for benefit of creditors.*]—Circumstances in which bkpt. was ordered as a condition of obtaining his discharge, to assign for behoof of his creditors £100 *per annum* out of his salary of £500, &, in the event of the salary being reduced, to assign the excess, if any, over £400 *per annum.*—HAMILTON *v.* CALDWELL, [1916] S. C. 809.—**SCOT.**

derived by his earnings or otherwise, which is more than sufficient to keep his family in the enjoyment of the ordinary necessaries of life according to their station, or unless bkpt. is likely to succeed to considerable property.

The county ct. judge granted bkpt.'s discharge subject to the condition that he should consent to judgment being entered against him for the amount of the unsecured debts & costs, such judgment to remain in force until the creditors who had proved or might prove should have been paid 5*s.* in the pound on their debts together with the unpaid costs, the amount to be paid by annual instalments of £75 until discharged. The provision as to paying £75 *per annum* was subsequently abandoned:—*Held:* the order must be modified, & the proper order to make in the circumstances was to suspend the discharge for a period of three years from the date of the order in the ct. below.—*Re* SHACKLETON, *Ex p.* SHACKLETON (1889), 61 L. T. 648; 38 W. R. 288; 6 T. L. R. 125; 6 Morr. 304, D. C.

Annotations:—**Mentd.** *Re* Jones, *Ex p.* Jones (1890), 24 Q. B. D. 589, D. C.; *Re* Gaskell (1904), 20 T. L. R. 469, C. A.

5264. —— Condition subjecting bankrupt to indefinite delay.]—It is not the policy of the law that debtor should be kept for an indefinite time subject to a conditional order of discharge, *e.g.*, to pay over any surplus of income above a minimum allowance to the trustee; & where a debtor, against whom such an order had been made, had for ten years from the date of the order striven industriously to maintain himself & his family, but had not been able to pay any surplus to the trustee, the ct. granted him his discharge freed from the condition.—*Re* DURNFORD, *Ex p.* DURNFORD (1895), 73 L. T. 583; 44 W. R. 272; 40 Sol. Jo. 158; 2 Mans. 521, D.C.

5265. —— Condition refusing protection from particular debt.]—A condition annexed to the grant of a certificate, that it should not protect the property or person of bkpt. in respect of a particular debt, was discharged as being contrary to the policy of the bkpcy. laws, though bkpt., in contracting the debt, had been guilty of gross misconduct towards the creditor.—*Re* ANDERTON, *Ex p.* ANDERTON (1857), 1 De G. & J. 298; 26 L. J. Bcy. 54; 29 L. T. O. S. 102; 5 W. R. 483; 44 E. R. 738, L. JJ.

See 1914 Act, s. 28.

5266. —— Condition excepting particular class of creditors.]—An order was made by the county ct. judge by which he suspended bkpt.'s discharge for three months, or such further time until a sum were paid to the trustee which, with the dividend already declared, would be sufficient to make up 10*s.* in the pound to all the creditors "except those for money lent:"—*Held:* such an order excepting a particular class of creditors could not be supported, & the case must go back to the county ct. judge for rehearing.—*Re* CARNE, *Ex p.* JACKSON (1889), 6 Morr. 55, D. C.

5267. —— —— Bankrupt trustee.]—Where bkpt. had been guilty of breaches of trust, the ct. granted to him a certificate, with a proviso that it should not extend to protect him from claims upon him as a trustee.—*Re* WAKEFIELD, *Ex p.* WAKEFIELD (1851), cited 6 De G. M. & G. at p. 707; 17 L. T. O. S. 55; 15 Jur. 961; 43 E. R. 1408.

Annotations:—**Distd.** *Re* Rufford, *Ex p.* Rufford (1852), 2 De G. M. & G. 234, L. JJ. **Consd.** *Re* Staner, *Ex p.* Staner (1852), 2 De G. M. & G. 263, L. JJ. **Mentd.** *Re* Jardine, *Ex p.* Jardine (1850), 17 L. T. O. S. 305; *Re* Hammond, *Ex p.* Hammond (1855), 6 De G. M. & G. 699, L. JJ.; *Re* Shuttleworth (1855), 24 L. T. O. S. 315; *Re* Lawrence, Mortimore & Schrader (1861), 4 L. T. 184; *Re* Wilson (1866), 14 L. T. 492.

5268. —— Filing annual account—Setting aside half surplus income.]—An order of discharge was granted upon the terms of bkpt. filing an annual account of his net income &, subject to the allowance of £300, setting apart half of any surplus until he had paid £1,000 to his creditors.—*Re* HIRSCH & SPINDLER (1885), 1 T. L. R. 247.

5269. —— Consent judgment—Or order for payment out of income, earnings or after-acquired property.]—Bkpt., at the time when the action was commenced in which final judgment was obtained against him, upon which the receiving order was subsequently made, carried on business in partnership with his father & had a considerable income. During the pendency of the proceedings in the action, bkpt. paid away the money belonging to him in the business, & also received notice from his father to quit the partnership. The county ct. judge granted bkpt. his discharge, on the terms that he should pay to the trustee in the bkpcy. £700 out of his earnings or income or any after-acquired property:—*Held:* the order of the county ct. judge must be modified, & there would be an order granting to bkpt. his discharge on consenting to judgment being entered against him in the terms of 1883 Act, s. 28 (6).—*Re* CLARKSON, *Ex p.* ALLESTREE, *Re* CLARKSON, *Ex p.* CLARKSON (1885), 2 Morr. 219, D. C.

Annotations:—**Consd.** *Re* Jones, *Ex p.* Jones (1890 24 Q. B. D. 589, D. C. **Mentd.** *Re* Gaskell (1904), 20 T. L. R. 469, C. A.

5270. —— —— Or order for payment to make up dividend.]—An order was made directing that bkpts.' discharge should be allowed as soon as a sufficient sum was paid to the trustee in the bkpcy. to make up a dividend of 5*s.* in the pound:—*Held:* the proper order to be made in the circumstances was that bkpts.' discharge should be granted subject to judgment being entered against them under 1883 Act, s. 28 (6), for such amount & under such conditions as set out in the order. Form of order.—*Re* SMALL & SMALL, *Ex p.* SMALL & SMALL (1886), 3 Morr. 296, D. C.

5271. —— —— Probability of benefit therefrom by subsequent acquisition of property.]—*Semble:* the ct. ought not, as the condition upon which it grants bkpt. his discharge, to require such bkpt. to consent to judgment being entered against him for the balance of the provable debts under 1883 Act, s. 28 (6) unless there is a probability that something is likely to be gained by it, by reason of the fact of such bkpt. becoming possessed of some after-acquired property.—*Re* BULLEN, *Ex p.* ARNAUD (1888), 36 W. R. 836; 5 Morr. 243, C. A.

Annotations:—**Folld.** *Re* Goud, *Ex p.* Goule (1890), 63 L. T. 292, D. C. **Consd.** *Re* Jones, *Ex p.* Jones (1890), 24 Q. B. D. 589, D. C. **Mentd.** *Re* Gaskell (1904), 20 T. L. R. 469, C. A.

5272. —— —— ——.]—*Primâ facie* the ct. ought not, as the condition upon which it grants

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5269 i. —— *Consent judgment.*]—*Semble:* judgment will not be entered up against bkpt. as a condition of his discharge, unless he has an income more than sufficient to keep his family in the enjoyment of the ordinary necessaries of life.—ABDUL KAREEM SAHIB *v.* MADRAS OFFICIAL ASSIGNEE (1905), I. L. R. 28 Mad. 168.—**IND.**

5269 ii. —— ——.]—In Aug., 1892, insolvent was found guilty of various offences & was sentenced to imprisonment for three months, his discharge being also postponed for a further period of twelve months. In Dec., 1894, on his application for final discharge under 11 & 12 Vict. c. 21, s. 60, the official assignee applied that, before the order of discharge was made judgment should be entered up against him under s. 86 for the amount of his debts, & the comr. ordered judgment to be entered up:—*Held:* in the circumstances the discretion of the comr. had been improperly exercised & the order to enter up judgment against insolvent should be discharged.—*Re* HORMARJI ARDESHIR HORMARJI (1895), I. L. R. 19 Bom. 778.—**IND.**

Sect. 5.—*The order: Sub-sects.* 3 & 4.]

bkpt. his discharge, to make an order requiring such bkpt. to consent to judgment being entered against him for the balance of the provable debts under 1883 Act, s. 28 (6), unless it is shown that he has some expectation of coming into property in the future, which but for the order in question he would be able to enjoy without paying his debts.

On application by bkpt. for his discharge it was submitted as a reason why an unconditional order of discharge should not be granted, that bkpt. was entitled to a contingent interest in certain property under a marriage settlement executed in Scotland, which, by the law of that country, could not be touched by the creditors. It was also stated that bkpt. had failed to induce the trustees of the settlement to give up a certain policy of insurance on bkpt.'s life. The discharge of bkpt. was granted by the county ct. judge only on condition of his consenting to judgment being entered against him for the sum of £2,200:—*Held:* as by the law of Scotland bkpt. was entitled, notwithstanding his bkpcy., to enjoy what was given to him under the settlement deed, the ct. ought not to compel bkpt. indirectly, by requiring him to consent to judgment, to set aside for the creditors that which it could not compel him to hand over directly, & as beyond the settled property there was no ground to suppose that bkpt. would ever come into any after-acquired property, bkpt. was entitled to an unconditional discharge.—*Re* GOUD, *Ex p.* GOULE (1890), 63 L. T. 292; *sub nom. Re* GOULD, *Ex p.* GOULD, 7 Morr. 215, D. C.

5273. —— —— For what amount.]—It was not the meaning of the Legislature in 1890 Act, s. 8 (2) (iv), to exclude any part of the creditors from the benefit of the judgment, but what was meant to be excluded was a part of the liability.

The ct. has power under the sub-sect. to order judgment to be entered for such part of any balance of the debts as in its discretion it may think right in the particular case, & it is not bound to enter judgment for the whole amount of the balance, or even for a sum sufficient to pay 10*s.* in the pound.

Bkpt.'s discharge was granted by the county ct. judge subject to his consenting to judgment being entered against him for the sum of £600. The liabilities of bkpt. were £4,185, & his assets £100, & the county ct. judge's order was appealed from by a creditor to the amount of £1,569, on the grounds (1) there was no jurisdiction to make the order, & (2) in any event the order made was too lenient:—*Held:* the county ct. judge had power to make the order, & there was no evidence to show that he had exercised his discretion so wrongfully as to justify the ct. in interfering with his decision.—*Re* RICHARDS, *Ex p.* EVANS (1893), 9 T. L. R. 398; 10 Morr.136, D. C.

5274. —— —— Power of county court to enter judgment over £50—Registrar's fees.]—Where a county ct. grants a bkpt. his discharge subject to his consenting to judgment being entered up against him by the trustee for the balance of debts provable under the bkpcy., the county ct. has jurisdiction under 1886 Rules, r. 240, to enter up such judgment, although the amount exceeds £50, but, the rule being silent as to fees, the registrar is not entitled to any fee in respect of such judgment.—*Re* HOWE (1887), 18 Q. B. D. 573; 56 L. J. Q. B. 257; 35 W. R. 380; 4 Morr. 57.

Annotation:—**Consd.** Maule *v.* White, Maule *v.* Herbert, Maule *v.* Green (1896), 60 J. P. 567.

See, also, Nos. 5129, 5149, 5173, *ante.*

5275. To what orders conditions may be annexed —Order suspending discharge.]—Bkpt. in the course of a trading of two years' duration became liable upon accommodation bills to the sum of £59,000. On bkpt.'s applying for his certificate the comr. suspended same for two years, & then it was to be of the third class, & to have annexed a condition that neither bkpt. nor his future property should be protected from liability in respect of the bills:—*Held:* there being no evidence of fraud or misrepresentation, bkpt. was entitled to a certificate of the second class, & such a condition was improper to be annexed to the certificate.—*Re* HAMMOND, *Ex p.* HAMMOND (1855), 6 De G. M. & G. 699; 24 L. J. Bcy. 2; 24 L. T. O. S. 265; 3 W. R. 197; 43 E. R. 1405, L. JJ.

Annotations:—**Consd.** *Re* Shuttleworth (1855), 24 L. T. O. S. 315. **Folld.** *Re* Snowdon (1865), 12 L. T. 740. **Mentd.** *Re* Anderton, *Ex p.* Anderton (1857), 1 De G. & J. 298, L. JJ.; *Re* Laurence, *Ex p.* Laurence (1861), 30 L. J. Bcy. 33, L. JJ.; *Re* Lawrence, Mortimore & Schrader (1861), 4 L. T. 184.

See, now, 1914 Act, s. 28.

5276. —— ——.]—The ct. cannot under 1883 Act, s. 28, make a conditional order of discharge & also suspend the order.

The county ct. judge suspended bkpt.'s discharge for six months & also attached the condition that bkpt. should consent to judgment being entered against him under s. 28 (6):—*Held:* the order in question must be set aside, & the case remitted to the county ct. judge for reconsideration.—*Re* HUGGINS, *Ex p.* HUGGINS (1889), 22 Q. B. D. 277; 58 L. J. Q. B. 207; 60 L. T. 236; 37 W. R. 432; 6 Morr. 38, D. C.

Annotation:—**Mentd.** *Re* Gold, *Ex p.* Gold (1891), 8 Morr. 45, D. C.

See 1914 Act, s. 26 (8).

5277. —— ——.]—The ct. suspended bkpt.'s discharge for two years, subject to the condition that, after setting aside £500 a year out of his earnings for his own support, he should pay the surplus, if any, to the trustee until the creditors received 10*s.* in the pound on their debts.—*Re* DALLMEYER, *Ex p.* DALLMEYER (1906), 22 T. L. R. 445, C. A.

Annotation:—**Mentd.** *Re* Walmsley, *Ex p.* Bankrupt (1907), 98 L. T. 55, D. C.

5278. —— ——.]—The ct. has no jurisdiction to make an order suspending bkpt.'s discharge on a double condition, namely one of time & one of payment, though it may do so on either separately, —*Re* WALMSLEY, *Ex p.* THE BANKRUPT (1907), 98 L. T. 55; 52 Sol. Jo. 192; 15 Mans. 342, D. C.

5279. —— —— Separate orders.]—On Mar. 15, 1889, an order was made in the county ct. under 1883 Act, s. 53 (2), directing bkpt. to pay

k. —— *Wife's inheritance vested in estate.*]—During the insolvency of a husband married in community of property the wife became entitled to an inheritance, the amount of which was considerably less than the amount remaining due to the creditors of insolvent after the distribution of his estate. In an application for rehabilitation:—*Held:* as the wife would be liable for half of such deficiency, which half was greater than the amount of her half of the inheritance, the ct. had power to grant the rehabilitation subject to the condition that the wife's inheritance be vested in insolvent estate.—*Ex p.* VAN DER MERWE (1913), T. P. D. 372.—**S. AF.**

l. —— *Condition that mortgages registered against bankrupt's estate should remain valid.*]—In granting rehabilitation of insolvent, the ct. may, under Law 13 of 1895, s. 13, attach the condition that the mtge. bonds registered against the titles of insolvent's property prior to the insolvency shall remain valid & binding.—*Ex p.* MORRIS (1915), T. P. D. 562.—**S. AF.**

m. —— *Payment of official assignee —For time spent on improving estate.*]—The ct. may impose as a condition of discharging a sequestration order that an official assignee, who has benefited surplus & unrealised assets by expending time & trouble thereon, be paid for that benefit.—*Re* LOW, *Ex p.* LOW (1899), 20 N. S. W. B. 17.—**AUS.**

to the trustee the sum of £4 a month out of his salary for the benefit of the creditors. On July 19, 1889, bkpt.'s order of discharge was granted by the county ct. judge subject to a suspension of nine months. The discharge took effect as from Mar. 7, 1890, up to which date bkpt. paid the £4 a month, but subsequently refused to do so. Subsequently, application was made for the committal of bkpt. for non-payment under the order of Mar. 15, 1889, but the application was refused by the county ct. judge. The application was afterwards renewed, when an order was made by the judge declaring that bkpt. was still liable to continue the payments:—*Held:* the discharge of bkpt. having been suspended for nine months, the ct. had no power to direct the payments to be continued.—*Re* GOLD, *Ex p.* GOLD (1891), 8 Morr. 45.

5280. Review & appeals—Grounds for varying condition.]—Where an order of discharge has been granted subject to onerous conditions, & it appears that the creditors will benefit but slightly by the continuance of such conditions, while bkpt. will be thereby unduly oppressed, the ct. will venture to disregard the interest of the creditors & grant bkpt. an unconditional discharge.—*Re* DURNFORD, *Ex p.* DURNFORD (1895), 73 L. T. 583; 44 W. R. 272; 40 Sol. Jo. 158; 2 Mans. 521, D. C.

5281. —— —— Who should apply—Effect of failure to furnish accounts of earnings.]—Bkpt.'s discharge was granted on the condition of his consenting that judgment for £1,500 should be entered up against him, which was to be paid by annual instalments of £300 each. Bkpt. failed to pay the instalments, with the exception of the first, which was paid in 1902, instead of 1901, when it should have been paid. A relative then offered to pay £500 in satisfaction of the £1,200, which remained due. The creditors, by a majority, passed a resolution in favour of accepting the offer, & the trustee applied to the ct. for a variation of the previous order:—*Held:* (1) the application ought to have been made by bkpt. himself, & not by the trustee, but in the circumstances it might be treated as made by bkpt.; (2) although bkpt. had failed to furnish an account of his earnings & expenditure, the ct. would consider whether there was under 1890 Act, s. 8, "no reasonable probability" of bkpt. being able to comply with the terms of the conditional order of discharge, the conditions imposed in that order being intended for the benefit of the creditors, & on the evidence it was for their benefit that the offer should be accepted, & the application granted.—*Re* ROBERTS (JOHN) & CO., *Ex p.* BONZOLINE MANUFACTURING CO., [1904] 2 K. B. 299; 73 L. J. K. B. 724; 91 L. T. 222; 20 T. L. R. 474; 11 Mans. 134, C. A.

5282. —— Under Bankruptcy (Discharge & Closure) Act, 1887 (c. 66).]—On an appeal against an order for conditional discharge, under the above Act, objection was taken that there was no right of appeal. The objection being withdrawn, the Div. Ct. in Bkpcy. heard the appeal.—*Re* WILLIAMS, *Ex p.* WILLIAMS (1888), 5 Morr. 162, D. C.

5283. —— Security for costs—Extension of time for entering appeal.]—Notice of appeal against a conditional order of discharge made by the registrar had been served by bkpt. on the trustee, but the appeal was not entered within twenty-one days of the signing of the order. An application by bkpt. that the usual deposit for security for costs of the appeal might be dispensed with, & that in case of necessity the time for entering the appeal might be extended, was refused with costs, the ct. remarking that merely serving notice of appeal was not bringing an appeal, but in the circumstances, it was ordered that the deposit might be made & the appeal entered within three days, the time for those matters being extended meanwhile.—*Re* DALLMEYER (1906), [1909] 1 K. B. 105, n., C. A.

Annotation:—**Folld.** *Re* Taylor, *Ex p.* Bolton, [1909] 1 K. B. 103.

5284. —— Form of order—Repetition of original order.]—Where under 1890 Act, s. 8 (2) the ct. grants an order of discharge, conditionally upon bkpt. consenting to judgment being entered against him by the official receiver for a part of the unsatisfied balance of the debts provable in the bkpcy., & bkpt. refuses to consent, & the official receiver applies under 1886 to 1890 Rules, r. 240 (3), to have the order revoked, it is not competent for the ct., by repeating its former order, to suspend the discharge until bkpt. consents, but when the order is revoked, the ct. is not bound as the only alternative to make an order suspending the discharge of bkpt. for two years, but may make such order as it thinks fit.—*Re* GASKELL, [1904] 2 K. B. 478; 73 L. J. K. B. 656; 91 L. T. 221; 20 T. L. R. 469; 48 Sol. Jo. 475; 11 Mans. 125, C. A.

5285. —— Costs of creditors served with notice of appeal—Official receiver or trustee appearing.]—Creditors served with notice of an appeal by bkpt. from an order granting him a conditional discharge, will not be allowed their costs of appearing on the hearing of the appeal, when the official receiver or trustee appears.—*Re* SALAMAN, *Ex p.* SALAMAN (1885), 14 Q. B. D. 936; 52 L. T. 378; 2 Morr. 61, C. A.

Annotation:—**Mentd.** *Re* Keays, *Ex p.* Keays (1891), 9 Morr. 18, C. A.

Interference with discretion by appellate court generally.]—*See* Nos. 5029-5034, *ante.*

SUB-SECT. 4.—ABSOLUTE REFUSAL OF DISCHARGE.

5286. Power of court to refuse—Even where no opposition.]—The ct. will not grant bkpt. his certificate, although neither the assignees nor creditors oppose it, if, upon inspection of the proceedings, there is good ground for withholding it.—*Re* WESTROPP & COXEDGE, *Ex p.* WESTROPP (1845), 6 L. T. O. S. 42.

Discretion of court generally.]—*See* Sect. 3, *ante.*

5287. Grounds for refusal—Must be exceptional.]—Bkpt.'s application for discharge will only be unconditionally refused in very exceptional circumstances.—*Re* PEARSE, *Ex p.* BANKRUPT (1912), 107 L. T. 859, D. C.

5288. —— Bankrupt unfit to trade—Omission to keep proper books.]—Where, on application by

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n. —— *Payment of costs & fees.*]—The judge in bkpcy., in granting a certificate of discharge, made it conditional on the payment of certain costs & fees:—*Held:* under 1898 Act, s. 39, he had no power to make such order.—*Ex p.* POWELL (1901), 1 S. R. N. S. W. 150.—**AUS.**

o. *Power to modify or dispense with conditions—Failure to pay seven shillings in pound—What must be proved.*]—The power of the Ct. of Insolvency to dispense with or modify the condition of 1890 Act, s. 139, as to the payment of a dividend of 7*s.* in the pound can, notwithstanding 1897 Act, s. 92, only be exercised if insolvent shall have proved to the satisfaction of the ct. that the failure to pay 7*s.* in the pound has arisen from circumstances for which insolvent cannot, on the opinion of the judge, be justly held responsible.—*Re* CAULFIELD (1901), 27 V. L. R. 588.—**AUS.**

Sect. 5.—The order: Sub-sects. 4, 5 *&* 6.]

bkpt. for his discharge, the ct. is satisfied that bkpt. has shown an incapacity to carry on his business in an ordinary & proper manner, as by not keeping proper books or not making out a balance sheet & so informing himself of his position, or that he has been guilty of similar offences which go to show that he is not a fit person in his present state of knowledge to be allowed to trade, a proper order for the ct. to make, instead of a simple suspension, is to refuse the discharge, with liberty to bkpt. to apply again at some future time, in order that on such second application he may have the opportunity of satisfying the ct. that he has acquired that knowledge of which he was before deficient.—*Re* FREEMAN, *Ex p.* FREEMAN (1890), 62 L. T. 367; 7 Morr. 38, D. C.

5289. —— Previous compositions—No satisfactory explanation.]—Bkpt. had paid 3*s.* 6*d.* in the pound under a former bkpcy., & had also compounded on two occasions with his creditors before his second bkpcy. He gave no satisfactory explanation of these circumstances:—*Held:* of themselves they rendered it improper to grant him a certificate which would do more than protect his person from arrest.—*Re* HOLLINGWORTH, *Ex p.* HOLLINGWORTH (1851), 4 De G. & Sm. 44; 20 L. J. Bcy. 13; 17 L. T. O. S. 303; 15 Jur. 914; 64 E. R. 727.

5290. —— —— Falsification of books—Misconduct.]—Bkpt., who had twice before compounded with his creditors, made false & fraudulent entries in his books, consisting of fictitious accounts in particular names. He stopped payment, being at the time able to pay 12*s.* in the pound, & soon after offered 11*s.* in the pound. The ct. refused him his certificate & all protection, his conduct being unfair, untradesmanlike, & disreputable.—*Re* CURTIES, *Ex p.* CURTIES (1852), 2 De G. M. & G. 255; 21 L. J. Bcy. 53; 20 L. T. O. S. 121; 42 E. R. 870, L. JJ.

5291. —— —— Caused by misfortune.]—A trader, who was not engaged in any business, except as the owner of two small sailing vessels, kept no regular accounts. He contracted with a shipbuilder for the repair of one of the vessels, & the amount claimed for the repair was far beyond the contract price, by reason of some alterations alleged to be beyond the contract. Cross actions were brought, & settled by arbn. The trader left England in a feeling of irritation at the result of the proceedings, & was declared bkpt. on the petition of the shipbuilder. He had on a former occasion compounded with his creditors, paying them less than 15*s.* in the pound, but had been forced into that proceeding by misfortune:—*Held:* (1) bkpt.'s conduct in quitting England was highly censurable, but would be sufficiently punished by suspending his certificate for twelve months; (2) under 1849 Act, the ct. would not universally refuse a certificate protecting a bkpt.'s property, merely because he had on a former occasion compounded with his creditors, & paid less than 15*s.* in the pound.—*Re* HODGSON, *Ex p.* HODGSON (1853), 3 De G. M. & G. 547; 43 E. R. 215, L. JJ.

5292. —— Wilful falsehood & dishonesty.]—Where bkpt. had been guilty of wilful falsehood & dishonesty, the ct. refused to allow the certificate.—*Re* STRONG, *Ex p.* DOBSON & CONLEY (1855), 6 De G. M. & G. 781; 25 L. J. Bcy. 17; 2 Jur. N. S. 56; 43 E. R. 1436, L. JJ.

Annotation:—**Mentd.** *Re* Lawrence, Mortimore & Schrader (1861), 4 L. T. 184.

See 1914 Act, s. 26.

5293. —— ——.]—Where bkpt. had been guilty of gross falsehood, & had brought himself within Debtors Act, 1869 (c. 62), the order of discharge was refused altogether.—*Re* PEARCE (1887), 3 T. L. R. 365.

5294. —— Gross misconduct within 1883 Act, s. 28 (2).]—Although facts may not be absolutely proved which would under the above sub-sect. compel the ct. to refuse any discharge, yet where gross misconduct within the sub-sect. is shown on the part of bkpt., the ct. is perfectly justified in declining to grant a discharge upon conditions, & in making an order absolutely refusing to such bkpt. any discharge at all.—*Re* BADCOCK, *Ex p.* BADCOCK (1886), 3 Morr. 138, D. C.

5295. —— Offences under 1883 Act, s. 28 (3)—& other misconduct.]—Bkpt. had committed certain offences under the above sub-sect. He had also vexatiously taken up a fictitious residence away from where he carried on business, & there filed his own petition at a time when he knew that a creditor's petition had been filed against him, & had traded with spurious bills, & had requested his brother to put in a false proof for £7,000. The county ct. having refused bkpt. his discharge absolutely:—*Held:* the decision was correct.—*Re* COOK, *Ex p.* COOK (1889), 61 L. T. 335; 6 Morr. 224, D. C

Annotation:—**Consd.** *Re* Bottomley, *Ex p.* Bottomley (1893), 10 Morr. 262.

5296. —— Felony "connected with bankruptcy."]—1890 Act. s. 8, was intended to extend the operation of 1883 Act, s. 28, to offences *ejusdem generis* with those defined in 1883 Act & Debtors Act, 1869 (c. 62).

An offence "connected with bkpcy.," within 1890 Act, s. 8, is one in which the conviction is based on facts which resulted in or brought about bkpcy., or in which the conviction is based on misconduct by debtor committed as a bkpt., or in view of impending bkpcy.

Where a person embezzles money of his employer & subsequently becomes bkpt., the mere fact that the employer proves in the bkpcy. for the amount so embezzled does not cause the offence to be a felony "connected with the bkpcy." within s. 8.—*Re* HEDLEY, *Ex p.* BOARD OF TRADE, [1895] 1 Q. B. 923; 64 L. J. Q. B. 460; 72 L. T. 470; 43 W. R. 464; 11 T. L. R. 365; 39 Sol. Jo. 428; 2 Mans. 186; 15 R. 366, D. C.

Annotation:—**Mentd.** *Re* Atherton (1912), 28 T. L. R. 339.

to keep proper books.]—*Held:* the omission to keep any books prevented the judge from granting a discharge, whether the intent was fraudulent or not.—*Re* HILL (1882), 7 A. R. 694.—**CAN.**

5288 ii. —— —— *Frivolous defences.*]—Where, in addition to not keeping reasonable accounts & entries of his receipts & payments, insolvent by frivolous & inequitable defences had put his creditors to vexatious & unjustifiable expense, & the Ct. of Insolvency refused him a certificate of discharge:—*Held:* the offence would not sufficiently be punished by suspension of the certificate for the utmost limit of suspension allowed, & decision affirmed.—*Re* MCNALLY (1886), 12 V. L. R. 254.—**AUS.**

5288 iii. —— —— *Fraudulent preference.*]—Where the transactions of bkpt. with a creditor amounted to a fraudulent preference, & he kept no account book of cash receipts & payments, or other books of account suitable for his trade, a discharge under 1864 Act was absolutely refused.—*Re* BEARE (1867), 3 C. L. J. N. S. 294.—**CAN.**

5288 iv. —— —— *Assignment not made to assignee.*]—Discharge refused, because the assignment was not made to the assignee, where insolvent carried on business, & was not in duplicate, & insolvent had kept no proper accounts.—*Re* SULLIVAN, 5 C. L. J. N. S. 71.—**CAN.**

p. —— *Fraudulent trading.*]—Certificate refused, where insolvent had been guilty of fraudulent practices in trade.—*Re* JANSSEN *v.* REUSS (1864), Cor. 13.—**IND.**

5297. Liberty to apply again—When granted.]—*Re* FREEMAN, *Ex p.* FREEMAN, No. 5288, *ante*.

5298. Review & appeals—Jurisdiction of court.]—The ct. of bkpcy. has power to review an order refusing the discharge of bkpt.—*Re* ATHERTON, *Ex p.* ATHERTON (1868), 3 Ch. App. 142; 37 L. J. Bcy. 6; 17 L. T. 485; 16 W. R. 294, L. J.

5299. —— ——.]—The ct. has jurisdiction under 1883 Act, s. 104, to reconsider an absolute refusal of an order of discharge &, if so minded, to discharge bkpt.—*Re* TOBIAS & Co., *Ex p.* TOBIAS, [1891] 1 Q. B. 463; 60 L. J. Q. B. 244; 64 L. T. 115; 39 W. R. 399; 7 T. L. R. 296; 8 Morr. 30, D. C.

Annotation:—**Mentd.** *Re* Shields, *Ex p.* Bankrupt (1912), 106 L. T. 345, D. C.

5300. —— Time for entering—Tender to officer after office closed.]—Where an appeal by bkpt. against the comr.'s refusal of his certificate was, through accident, not presented at the proper office until after the office was closed on the last day allowed for appeal, but was in the evening of the same day tendered to the officer at his private residence, the ct. permitted the petition of appeal to be entered as of that day.—*Re* HULL BANK (1858), 27 L. J. Bcy. 16; 6 W. R. 385, L. C. & L. JJ.

5301. —— Ex parte application—Primâ facie grounds.]—An application made to the ct. by bkpt. for a review of an order refusing him his discharge ought not to be an *ex p.* application, & it ought to be made & decided upon by the ct. before the facts of the case are gone into.

On such application it is necessary that bkpt. should make out a *primâ facie* case, which the other side are not required to answer until the ct. has determined whether or not it will grant an order for review.

When the ct. comes to the conclusion that there are *primâ facie* grounds, which lead it to think that the former order ought to be reviewed, if the other side are dissatisfied, their proper course is to appeal at once from the determination to review the order, & not to wait until the order has been brought up for review before appealing.—*Re* LLOYD, *Ex p.* LLOYD (1889), 62 L. T. 366; 6 Morr. 297, D. C.

Annotation:—**Consd.** *Re* Tobias, *Ex p.* Tobias, [1891] 1 Q. B. 463, D. C.

5302. —— On what evidence.]—An application to review need not necessarily be founded on evidence which might have been before the ct. on the first application for a discharge.—*Re* TOBIAS & Co., *Ex p.* TOBIAS, [1891] 1 Q. B. 463; 60 L. J. Q. B. 244; 64 L. T. 115; 39 W. R. 399; 7 T. L. R. 296; 8 Morr. 30, D. C.

Annotation:—**Mentd.** *Re* Shields, *Ex p.* Bankrupt (1912), 106 L. T. 345, D. C.

5303. —— Who may be heard—In support of refusal—Creditor not heard to oppose certificate.]—A creditor, who has not been permitted to oppose the certificate before the comr., on the ground of his having omitted to give the requisite notice of his intention to oppose, cannot be heard in support of the comr.'s decision, refusing the certificate & protection, on an appeal from that decision.—*Re* HOLTHOUSE, *Ex p.* HOLTHOUSE (1851), 1 De G. M. & G. 237; 21 L. J. Bcy. 3; 18 L. T. O. S. 84; 42 E. R. 543, L. JJ.

Annotations:—**Mentd.** *Re* Rufford, *Ex p.* Rufford (1852), 2 De G. M. & G. 234, L. JJ.; *Re* Manico, *Ex p.* Manico (1853), 22 L. J. Bcy. 41, L. JJ.

5304. —— Order varied—How dated.]—If an order made on an application for discharge is varied on appeal, the order so varied shall be dated on the day on which the application was made, & shall take effect from the day on which such order was drawn up.—*Re* PEARSE, *Ex p.* BANKRUPT (1912), 107 L. T. 859, D. C.

5305. —— Costs.]—Bkpt. successfully appealing against an absolute refusal of his discharge may be allowed his costs out of his estate, notwithstanding 1886 Rules, r. 239.—*Re* NICHOLAS, *Ex p.* NICHOLAS (1890), 7 Morr. 54, D. C.

Interference with discretion by appellate court generally.]—*See* Nos. 5029-5034, *ante*.

SUB-SECT. 5.—RELEASE OF DEBTS.

See, now, 1914 Act, s. 28 (1) (*c*).

5306. Damages in divorce suit.]—The ct., while suspending bkpt.'s discharge for two years, refused to make an order under 1890 Act, s. 10, releasing bkpt. from liability under a judgment against him as co-resp. in a matrimonial cause.—*Re* PALMER (1905), 21 T. L. R. 344.

Annotation:—**Consd.** *Re* Schumacher (1907), 23 T. L. R. 336.

5307. —— Onus of proof.]—The *onus* lies upon bkpt., who is applying for his discharge, to show some special reason why the ct. should make an order under the above sect., releasing him from liability for the debts specified in that sect., including liability under a judgment against him as co-resp. in a matrimonial suit.—*Re* SCHUMACHER (1907), 23 T. L. R. 336.

See 1914 Act, s. 28.

See, further, Sect. 7, *post*.

SUB-SECT. 6.—FORM OF ORDER.

5308. What order must contain—Grounds of court's decision—1890 Act, s. 8 (2).]—In order to bring into operation 1890 Act, s. 8 (2) (i), (ii), (iii) & (iv), it is necessary that the ct., in which the bkpcy. proceedings are pending, should find that the facts upon which the discharge is to be refused or suspended or a condition imposed, in

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5298 i. *Review & appeals—Jurisdiction of court.*]—The ct. has power under 1874 Act, s. 14, to review a refusal of a certificate of discharge, & has a discretion under s. 168 to grant a certificate already refused under that sect., & in exercising that discretion regard should be had to all the circumstances of the case, including the period during which insolvent has been under disability.—*Re* RANSOME (1894), 5 Q. L. J. 124.—**AUS.**

5298 ii. —— ——.]—An appeal will lie to the full ct. from an order of a Ct. of Insolvency refusing to dispense with payment of a dividend of 7*s.* in the pound.—*Re* MCINTYRE (1885), 11 V. L. R. 312.—**AUS.**

q. —— *On what grounds.*]—A judgment refusing a discharge to insolvent under a deed of composition on preliminary or technical objections under 1869 Act, without any examination of insolvent or enquiry into the validity of the deed, may be set aside.—*Re* TUCKER (1871), 8 N. S. R. 300.—**CAN.**

5305 i. —— *Costs.*]—Where the discharge was refused on appeal, costs were ordered to be paid out of the estate.—*Re* HUTCHINSON (1877), 3 R. & C. 40.—**CAN.**

5305 ii. —— ——.]—When insolvent appealed from an order of the judge of the Insolvency Ct. refusing him his certificate & refusing to dispense with payment of 7*s.* in the pound & the opposing creditors appeared to support the decision, the ct. allowed the appeal, but without costs, as opposing creditors should not be discouraged from supporting the decision of the ct. below.—*Re* MCINTYRE (1885), 11 V. L. R. 312.—**AUS.**

PART XVIII. SECT. 5, SUB-SECT. 6.

r. *How entitled.*]—*Held:* 1869 Act regulated the procedure, after its passage, in insolvency proceedings begun under 1864 Act, & the discharge of insolvent, who had made an assignment under the earlier Act, intituled "Insolvent Act, 1869," was valid.—CARNEGIE *v.* TUER (1874), 6 P. R. 165.—**CAN.**

5308 i. *What order must contain—Operative words.*]—An order recited the petition, & that debtor was entitled to protection, & then certified that "this final order" was granted under 19 & 20 Vict. c. 93, the operative words of the order being omitted:—*Held:* the order was insufficient.—COMMERCIAL BANK *v.* CUVILLIER (1859), 18 U. C. R. 378.—**CAN.**

5308 ii. —— *Conditions precedent to jurisdiction.*]—The preliminary circum-

Sect. 5.—*The order: Sub-sect.* 6. *Sects.* 6 & 7: *Sub-sect.* 1.]

fact existed.—*Re* OSWELL, *Ex p.* BOARD OF TRADE (1892), 9 Morr. 202, D. C.

5309. —— —— —— Misdemeanour under Debtors Act, 1869 (c. 62).]—In cases coming within the words in 1890 Act, s. 8 (2), "Provided the ct. shall refuse the discharge in all cases where bkpt. has committed any misdemeanour under Debtors Act, 1869, unless for special reasons the ct. otherwise determines," if any order is made other than an order absolutely refusing the discharge, sufficient special reasons for the determination of the ct. must exist, & should be stated in the order.—*Re* STEVENS, *Ex p.* BOARD OF TRADE, [1898] 2 Q. B. 495; 67 L. J. Q. B. 932; 79 L. T. 80; 47 W. R. 61; 14 T. L. R. 556; 42 Sol. Jo. 703, D. C.

Annotation:—**Refd.** *Re* Solomons, [1904] 1 K. B. 106, C. A.

5310. —— —— Effect of omission by county court judge—1886 Rules.]—On application by bkpt. for his discharge the county ct. judge refused the discharge absolutely, but omitted to fill up the form provided by 1886 Rules, showing his reasons for the refusal:—*Held:* the county ct. judge having neglected to comply with the requirements of the Act, the ct. must form its own judgment on the facts before it, & the charge against bkpt. of having brought on his bkpcy. by rash & hazardous speculations not having been sufficiently proved, in the circumstances the offence of having continued to trade after knowledge of insolvency would be met by a suspension of the order of discharge for a period of two years.—*Re* NICHOLAS, *Ex p.* NICHOLAS (1890), 7 Morr. 54, D. C.

5311. What order may contain—Liberty to apply—Second application as of right.]—Although, where upon the hearing of an application for discharge the ct. is of opinion that applct. is not entitled to an absolute discharge, but is unable to fix a period of suspension, it may in refusing to grant a discharge reserve liberty to bkpt. to apply again, in which case bkpt. may make a second application in pursuance of the leave reserved as a matter of right; yet having regard to the power of rehearing conferred by 1883 Act, s. 104, the more convenient course for the ct. to take in such a case is to refuse the discharge absolutely.—*Re* TOBIAS & CO., *Ex p.* TOBIAS, [1891] 1 Q. B. 463; 60 L. J. Q. B. 244; 64 L. T. 115; 39 W. R. 399; 7 T. L. R. 296; 8 Morr. 30, D. C.

Annotation:—**Refd.** *Re* Shields, *Ex p.* Bankrupt (1912), 106 L. T. 345, D. C.

5312. Joint certificate—Death of one bankrupt—Allowance of separate certificate of survivor.]—Where two bkpts. under a joint fiat obtain a joint certificate from their creditors, & one of bkpts. dies before the certificate is allowed, the ct. will on motion, allow it as the separate certificate of the survivor.—*Re* CARTER, *Ex p.* CARTER (1834), 3 Deac. & Ch. 549.

See 1914 Act, s. 26 (1).

SECT. 6.—RESCISSION OF ORDER.

5313. Jurisdiction of court—Discharge subject to judgment—Conditions not fulfilled.]—When the ct. grants bkpt. a conditional discharge under 1890 Act, s. 8 (2) (iv), in the terms of 1886–1890 Rules, App. Form 63A, the condition of the discharge is not merely his consenting to judgment being entered against him for the required amount but his due performance of the judgment by payment of the instalments directed, & if bkpt. gives the usual consent to judgment, but fails without sufficient cause to pay the instalments, the ct. has jurisdiction under 1883 Act, s 104, to revoke the order of discharge.—*Re* SUMMERS, *Ex p.* OFFICIAL RECEIVER, [1907] 2 K. B. 166; 76 L. J. K. B. 707; 96 L. T. 791; 23 T. L. R. 465; 51 Sol. Jo. 430; 14 Mans. 101.

5314. Grounds for rescission under former Acts—Fraud of debtor—Fabrication of debts—Fictitious creditors.]—Two years after bkpt. had obtained his certificate, it was discovered that the commission had been issued fraudulently by bkpt., that with his connivance debts had been fabricated & proved under the commission, & that by the preponderance of

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stances necessary to justify a comr. in making order for discharge must be set out. A general statement that debtor "had in all respects conformed himself to the provisions of the chapter" is insufficient.—CONNELL *v.* YERXA (1880), 19 N. B. R. 537.—**CAN.**

5308 iii. —— *Debtor's signature to truth of disclosure & answers.*]—An order under C. S., c. 38, s. 7, discharging debtor, should show on its face that debtor signed to the truth of his disclosure & answers.—*Ex p.* MARQUIS (1893), 32 N. B. R. 252—**CAN.**

5308 iv. —— *Distribution of effects of bankrupt—Protection of person & goods.*]—The final order under 8 Vict. c. 48, must be as well for the distribution of the effects of bkpt., as for protecting his person & goods from process.—FERRIE *v.* LOCKHART (1847), 4 U. C. R. 477.—**CAN.**

5308 v. —— *Not that insolvent acted fairly towards creditors.*]—Debtor was discharged in 1833, under India Insolvent Act, 1828 (c. 73), from liability to arrest, & afterwards applied to the ct. in India, under 4 & 5 Will. 4, c. 79, for a complete discharge:—*Held:* it was not necessary for the order to recite in the words of the latter Act that insolvent appeared to the ct. to have acted fairly & honestly towards his creditors.—*Re* GORDON (1860), 1 De G. F. & J. 381; 45 E. R. 407.—**IND.**

s. *Under* 19 *&* 20 *Vict. c.* 93*—Constriction.*]—SMITH *v.* DEMPSEY (1860), 10 C. P. 515.—**CAN.**

PART XVIII. SECT. 6.

5313 i. *Jurisdiction of court—Questions affecting validity of order.*]—A judge in chambers will not in general entertain or enter into a question as to the validity of an order or discharge for insolvency in the nature of bkpt.'s certificate, under 19 & 20 Vict. c. 93, but will rather let the point be determined by way of *audita querela.*—SCHOFIELD *v.* BULL, 3 C. L. J. O. S. 204.—**CAN.**

t. *Who may apply for rescission—Not individual creditor—On grounds which might have been raised before.*]—BUCHANAN *v.* DUNLOP (1829), 26 Fac. Coll. 168.—**SCOT.**

u. *Who must be made parties.*]—Where a bill was filed by a creditor to vacate a deed of composition & discharge, where the discharge had been obtained by a fraudulent concealment of assets:—*Held:* the assignee in insolvency was not a necessary party.—MCGEE *v.* CAMPBELL (1882), 2 O. R. 130.—**CAN.**

w. *Grounds for rescission—Indian* 1847 *Act, s.* 56.]—An order under s. 47 of the above Act for the final discharge of insolvent once granted cannot be set aside, except upon the grounds specified in s. 56 of that Act.—*Re* DAYABHAI SARUPCHAND, *Ex p.* SORABJI BYRAMJI COLAH (1898), I. L. R. 23 Bom. 474.—**IND.**

x. —— *Fraud — On court.*]—*Semble:* fraud in the proceedings before the judge might vitiate the order.—COLLINS *v.* BOYLE (1860), 4 All. 582.—**CAN.**

y. —— —— ——.]—The certificate of bkpt. obtained by imposition practised upon the great seal, will be revoked, if it will not prejudice persons subsequently dealing on the faith of it with bkpt.—*Ex p.* TALLIS (1810), 1 Rose, 371; 1 Ball & B. 321.—**IR.**

z. —— *Fraudulent concealment of assets.*]—A final order of discharge obtained by insolvent upon a deed of composition & discharge duly confirmed, will be vacated, on bill filed by a creditor, party to the insolvency proceedings, where such discharge has been obtained by a fraudulent concealment of assets.—MCGEE *v.* CAMPBELL (1882), 2 O. R. 130.—**CAN.**

a. —— ——.]—Where insolvent before the meeting of his creditors concealed a portion of his stock:—*Held:* his discharge was thereby avoided, & it was not the less a fraud because he had valued his assets at a sum sufficient to cover the goods so concealed.—MCLEAN *v.* MCLELLAN (1870), 29 U. C. R. 548.—**CAN.**

b. —— —— *What assets.*]—It appeared that among insolvent's assets was a sum received by him, or to which he had a claim, from a certain railway co. as compensation for services rendered as temporary acting president:—*Held:* insolvent was bound to return as an asset the portion of the compensation payable for services rendered up to the date of the assignment in insolvency, but not the remainder.—MCGEE *v.* CAMPBELL (1882), 2 O. R. 130.—**CAN.**

such fictitious creditors his certificate had been obtained. The certificate was recalled as having been obtained by fraud.—*Re* GREATOREX, *Ex p.* CAWTHORPE (1814), 2 Rose, 186.

See 1914 Act, s. 108 (1).

5315. —— —— Votes obtained by malpractice.]—When a resolution to discharge a liquidating debtor has been passed by the statutory majority & registered, the registration will be vacated, if it is shown that any one of the votes of the majority was obtained by a malpractice on the part of debtor, such as bribing the creditor to give his vote, even though, if the vote thus procured were struck off, the statutory majority in favour of the discharge would remain.—*Re* BAUM, *Ex p.* BAUM (1878), 7 Ch. D. 719; 47 L. J. Bcy. 48; 38 L. T. 367; 26 W. R. 568, C. A.

5316. —— Mere suspicion.]—The ct. will not, upon the ground of mere suspicion alone, entertain an application to rescind an order of discharge or annul the final examination, but, on the application of the assignee, it retained the petition of appeal for six weeks, to afford an opportunity for obtaining further evidence in support of it.—*Re* ANGERSTEIN, *Ex p.* BAILEY (1863), 8 L. T. 223; 9 Jur. N. S. 763, L. C.

5317. —— —— Fraud not established.]—On a petition to recall bkpt.'s certificate, upon the ground that bkpt., in order to induce the creditors to sign his certificate, had wilfully & fraudulently represented his estate to be of much greater value than it actually was, it appeared from the accounts that bkpt. had represented his estate to be of much greater value than it actually proved to be:—*Held:* although there were circumstances of suspicion, wilful misrepresentation had not been established, &, as in order to induce the ct. to recall a certificate, a clear case must be made out against bkpt., the petition would be dismissed.—*Re* FOULERTON, *Ex p.* HOOD (1822), 1 Gl. & J. 219.

5318. —— —— ——.]—All the creditors of H. except one, agreed to accept a composition, &, having the necessary majority, gave debtor his discharge. The dissentient creditor applied to the county ct. to have the order of discharge rescinded, on the grounds that it had been granted without proper care & from motives of benevolence. From the evidence it appeared that the creditors did not wish to see debtor ruined, but also that the main part of debtor's property consisted of an equity of redemption, which might have taken time to realise. The county ct. judge refused the application:—*Held:* no case of fraud had been proved, & applt. was not entitled to the order asked for.—*Re* HARPER, *Ex p.* LINSLEY (1874), 9 Ch. App. 290; 43 L. J. Bcy. 84; 29 L. T. 857, L. C. & L. JJ.

Annotation:—**Mentd.** *Re* Page, *Ex p.* Page (1876), 24 W. R. 502, C. A.

5319. Ground for refusing—Bankrupt in long possession.]—Where bkpt. has been long in possession of his certificate, the ct. will not recall it.—*Re* SOWERBY, *Ex p.* REED (1819), Buck, 430.

SECT. 7.—EFFECT OF ORDER.

SUB-SECT. 1.—IN GENERAL.

5320. From what date effectual.]—The discharge granted to bkpt. under 1861 Act, takes effect from the date of the order made by the comr., & not from the date of the certificate given to bkpt.—*Re* LAFOREST (1863), 2 New Rep. 251; 32 L. J. Bcy. 50; 8 L. T. 481; 9 Jur. N. S. 856; 11 W. R. 738, L. C.

Annotations:—**Apprvd.** Jones *v.* Hill (1870), L. R. 5 Q. B. 230; **Refd.** *Re* Gaskell, *Ex p.* Gaskell (1864), 11 L. T. 685; *Re* Tubb, *Ex p.* Tubb (1864), 11 L. T. 222.

5321. Under 1849 Act, s. 221—Whether conclusive.]—*Held:* a certificate under the above sect. was not conclusive, & it was competent to a creditor to show that the arrangement had not been duly carried out and the creditors satisfied.—NAYLOR *v.* MORTIMORE (1864), 17 C. B. N. S. 207; 5 New Rep. 186; 33 L. J. C. P. 273; 10 L. T. 903; 10 Jur. N. S. 1001; 13 W. R. 47; 144 E. R. 83.

See, now, 1914 Act, s. 28 (3).

5322. Under 1869 Act.]—*Held:* an order of discharge under the above Act, had the same effect as one granted under former bkpcy. acts.—*Re* HAMMOND & NEVARD, *Ex p.* HAMMOND (1873), L. R. 16 Eq. 614; 42 L. J. Bcy. 97; 29 L. T. 72; 21 W. R. 865.

Annotation:—**Distd.** Meggy *v.* Imperial Discount Co. (1878), 3 Q. B. D. 711, C. A.

See, now, 1914 Act, s. 28 (3).

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c. —— —— *By one member of firm—Rescission as to that member only.*]—A final order of discharge obtained by an insolvent firm, one of the members of which, C., had fraudulently concealed some of his private property, not the property of the partnership, was vacated as to the private estate of C. only.—MCGEE *v.* CAMPBELL (1882), 2 O. R. 130.—**CAN.**

d. —— *Want of assets.*]—In 1866 judgment was recovered against deft. in an action for breach of promise of marriage, & in another for seduction. Deft. then made an assignment under Insolvent Act, 1864, having no assets, & his only creditors being pltfs. in the two actions. No creditors appeared, & after twelve months he petitioned for his discharge. The application was duly advertised, & no opposition being made, was granted. He subsequently acquired some property, & execution was then issued in the breach of promise action:—*Held:* the want of assets at the time of making the assignment could not be set up on the application as a ground for avoiding the discharge, but as a matter for the consideration of the insolvent ct. upon the application therefor, & unless attacked for fraud it was a complete answer to pltf.'s claim.—FORRESTER *v.* THRASHER (1882), 9 P. R. 383; 2 O. R. 38.—**CAN.**

f. —— *Omission to inform trustee of bequest.*]—A wife bequeathed to her husband an annuity of £100 *per annum,* on the conditions that (1) he should survive her mother, who liferented her estate, (2) he should not become a bkpt., or assign charge, or encumber the annuity, or attempt to do so; (3) her trustees were to have the power to refuse or discontinue payment of the annuity at their discretion, & without assigning any reason. The husband became bkpt. during his wife's lifetime, & at the date of her death was still undischarged, but he obtained his discharge shortly after, without informing his trustee of the bequest of the annuity, which was still under the liferent:—*Held:* the omission of bkpt. to inform his trustee of the bequest did not, in consequence of the terms of the will, affect his discharge but such an omission in ordinary circumstances would have the effect of annulling a discharge.—TRAPPES *v.* GRAHAM (1871), 44 Sc. Jur. 25.—**SCOT.**

g. —— *Surprise—Discharge obtained ex parte.*]—Where an opposing creditor, being, without any default on his part, misled as to the time when insolvent's petition was to come on for hearing, failed to appear when the petition was called on, & insolvent obtained his discharge *ex p.,* the appellate ct., on the ground that the opposing creditor had been taken by surprise, set aside the order of discharge & restored the case to the board. *Semble:* in the circumstances the comr. sitting in insolvency had no jurisdiction to set aside the order of discharge.—DVARKADAS LALUBHAI *v.* BLACKWELL (1872), 9 Bom. 319.—**IND.**

5319 i. *Grounds for refusing—Application made after certificate made & omission from schedule amended.*]—*Re* GRAY (1860), 12 Ir. Jur. 267.—**IR.**

k. *What evidence admissible—Not evidence to prove fraud & collusion.*]—Evidence that the bkpcy. was fraudulent & collusive is inadmissible on a trial at *Nisi Prius* to impeach bkpt.'s certificate duly obtained from the comr. & certified by the Ct. of Ch. under 5 Vict. c. 43 & 6 Vict. c. 4.—MORRISON *v.* ALBEE (1851), 2 All. 145.—**CAN.**

PART XVIII. SECT. 7, SUB-SECT. 1.

l. *Under* 19 *&* 20 *Vict. c.* 93.]—The effect of an order under the above Act is not confined to debts specified in the schedule.—COMMERCIAL BANK *v.* CUVILLIER (1859), 18 U. C. R. 378.—**CAN.**

Sect. 7.—Effect of order: Sub-sects. 1 & 2, A. & B.]

5323. As evidence—Of validity of proceedings.]—The certificate of discharge given by the registrar to debtor, whose affairs are liquidated by arrangement, is conclusive evidence of the validity of the liquidation proceedings.—LEWIS *v.* LEONARD (1880), 5 Ex. D. 165; 49 L. J. Q. B. 308; 42 L. T. 351; 28 W. R. 719, C. A.

5324. Application to tax solicitor's bill of costs paid by trustee.]—Where a solr.'s bill of costs has been paid by a trustee, bkpt., when discharged, even though all the creditors have been paid in full & there is a surplus, is not "a party interested" within Solicitors Act, 1843 (c. 78), ss. 39, 40, at the time when the bill of costs was paid, so as to be entitled to an order for taxation, or to a copy of the bill of costs.—*Re* LEADBITTER (1878), 10 Ch. D. 388; 48 L. J. Ch. 242; 39 L. T. 286; 27 W. R. 267, C. A.

Annotations:—**Consd.** Bird *v.* Pilpott, [1900] 1 Ch. 822. **Refd.** *Re* Jones & Everett, [1904] 8 Ch. 363.

See, further, Part XVI., Sect. 5, sub-sect. 2, *ante*.

Release of debts under 1890 Act, s. 10.]—*See* Sect. 5, sub-sect. 5, *ante*.

Release from custody under the Debtors Acts, *see* Part XXII., *post*.

SUB-SECT. 2.—WHAT DEBTS ARE DISCHARGED.

See 1914 Act, s. 28.

A. Provable Debts.

See 1914 Act, s. 30 (3).

What debts are provable.]—*See* Part VIII., *ante*.

5325. Bond forfeited before bankruptcy—Payment of interest after discharge.]—If a bond for the payment of money has been forfeited before a bkpcy. payment of interest by bkpt. after the certificate may perhaps render him liable to be sued upon it.—ALSOP *v.* BROWN (1779), 1 Doug. K. B. 192; 99 E. R. 126.

5326. Covenant to charge particular debt on specific fund.]—A claim founded on a covenant to charge a particular debt upon a specific fund, in which the covenanter has no present interest, but merely an expectancy, is not barred by the bkpcy. & certificate of the covenanter, before he acquires an actual interest in the fund.

A. granted an annuity to B., & covenanted to charge it upon all such property as, in the event of C. dying before him, he might become possessed of at C.'s death, either by will or otherwise. A. became bkpt. & obtained his certificate, & afterwards C. died, having bequeathed an annuity in trust for A.:—*Held:* B. was entitled to a decree specifically charging his annuity upon the annuity bequeathed in trust for A.—LYDE *v.* MYNN (1833), 1 My. & K. 683; Coop. *temp.* Brough. 123; 39 E. R. 839, L. C.

Annotations:—**Consd.** Cole *v.* Kernot, Thompson *v.* Cohen (1872), 41 L. J. Q. B. 221; **Distd.** Thompson *v.* Cohen (1872), L. R. 7 Q. B. 527. **Consd.** Collyer *v.* Isaacs (1881), 19 Ch. D. 342, C. A. **Refd.** *Re* North, *Ex p.* McTurk (1836), 2 Deac. 58; Robinson *v.* Ommanney (1882), 21 Ch. D. 780; Montagu *v.* Sandwich (1886), 32 Ch. D. 525, C. A. **Mentd.** Parker *v.* Downing (1833), Coop. *temp.* Brough. 148; Wellesley *v.* Wellesley (1839), 4 My. & Cr.

m. *Under 20 & 21 Vict. c. 60.*]—20 & 21 Vict., c. 60, ss. 347 & 352, must be construed together, & the certificate given by the latter is valid only against such persons as, being creditors at the date of the petition, received the proper notices.—COGAN *v.* GARVEY (1869), 3 I. L. T. Jo. 329.—**IR.**

5323 i. *As evidence—Of validity of proceedings.*]—A judgment confirming the discharge of insolvent is *chose jugée* & the validity of his assignment cannot be questioned afterwards in an ordinary action against him for calls.—ROSS *v.* ANGUS (1883), 6 L. N. 292.—**CAN.**

5323 ii. —— ——.]—Circumstances in which:—*Held:* a final order was conclusive, & not to be questioned in an action brought for a debt barred by it.—STEPHENSON *v.* GREEN (1854), 12 U. C. R. 290.—**CAN.**

5323 iii. —— ——.]—In an action to recover a debt, deft. produced a certificate of his discharge as a bkpt.:—*Held:* it was not competent for pltf. to show irregularity in the proceedings in the Insolvent Ct., or to attack the discharge on the ground that deft. was not a trader, & not a legitimate subject of the jurisdiction exercised.—BEULAIR *v.* GILLIATT (1875), 9 N. S. R. 525; *dbtd.* BROWN *v.* PEARMAN, R. E. D. 491.—**CAN.**

5323 iv. —— —— *Under 7 Vict., c. 10, s. 64.*]—*Held:* the certificate obtained by bkpt. under the ordinance of Lower Canada, 2 Vict. (3) c. 36, prior to 7 Vict. c. 10, might be given in evidence under the general form of plea allowed by s. 64.—PHILLIPS *v.* MASSON (1852), 9 U. C. R. 20.—**CAN.**

5323 v. —— —— *Order alleged to be obtained by fraud.*]—Where pltf. to a plea of discharge, under Insolvent Act, 1869, replied that the discharge had been obtained by fraud:—*Held:* the replication was good, & the trial judge had misdirected the jury in instructing them that the question of fraud was only for the ct. that confirmed the discharge, & could not be brought up except by appeal.—GODKIN *v.* BEECH (1876), 1 R. & C. 261.—**CAN.**

5323 vi. —— —— ——.]—In an action on a promissory note, with a plea of discharge under Insolvency Act, & replication that the discharge was obtained by fraud, inasmuch as deft. had concealed from the assignee certain promissory notes, it appeared from his own evidence that deft., several months before his assignment, which was voluntary, desiring to raise money on his farm, one-fifth of which belonged to his wife, the value of her interest not being stated, gave his wife at least $300 of notes of a third person, she otherwise refusing to consent to a mtge. of the farm. It further appeared that deft. had attempted to collect the notes, as he alleged, for his wife, & that the mtge. had been nearly paid off, but by what means was not shown:—*Held:* pltf. was entitled to recover.—GOLLOGHY *v.* GRAHAM (1872), 22 C. P. 226.—**CAN.**

5323 vii. —— —— ——.]—*Held:* fraud by bkpt. in obtaining his certificate might be given in evidence under the general form of plea allowed by 7 Vict. c. 10, s. 64.—PHILLIPS *v.* MASSON (1852), 9 U. C. R. 20.—**CAN.**

5323 viii. —— —— ——.]—Deft. pleaded in *assumpsit*, that he was discharged from the debt by the order of a judge under Insolvent Debtors Act, 21 Vict. c. 17. Replications that the order was obtained by fraud & concealment, & by giving undue preference to certain creditors:—*Held:* pltf. should have opposed deft.'s discharge before the judge under s. 14, & the replication was bad.—COLLINS *v.* BOYLE (1850), 4 All. 582.—**CAN.**

5323 ix. —— —— ——.]—To a plea of discharge, confirmed by the judge, pltf. replied a corrupt agreement between insolvent & D. & Co., parties to the deed of composition & discharge, that in consideration of executing it D. & Co. should receive an additional sum above the composition, for which insolvent gave them his note, & that pltf. & other creditors had no knowledge of such agreement until after the confirmation:—*Held:* a good answer, the confirmation not being made conclusive by the Act in such circumstances.—THOMPSON *v.* RUTHERFORD (1868), 27 U. C. R. 205.—**CAN.**

n. *As discharge from actions—Whether confirmation required.*]—The judge's order under the insolvent law need not be confirmed by the Ct. of Review to operate as a discharge from actions.—FERRIE *v.* LOCKHART (1848), 4 U. C. R. 477.—**CAN.**

o. —— —— *Interlocutory judgment obtained before confirmation set aside.*]—Though a certificate of bkpcy. be no discharge till confirmed, an interlocutory judgment entered before confirmation will be set aside to allow bkpt., to plead his certificate, or the ct. will relieve him by staying the execution of the *fi. fa.*, on a proper application after judgment & execution issued.—COMMERCIAL BANK *v.* CULROSS (1847), 3 U. C. R. 176.—**CAN.**

p. *Discharge under voluntary assignment—Assignee refusing to act or accept.*]—*Held:* a voluntary assignment to an official assignee under 1864 Act, s. 2, was not valid when the assignee had refused to accept or act under it, & a discharge obtained by insolvent had no effect.—BECHER *v.* BLACKBURN (1873), 23 C. P. 207.—**CAN.**

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q. *Whether specified in schedule or not.*]—The order of discharge of an insolvent trader, under Insolvent Debtors Act, s. 60, operates to discharge such trader from all debts that could be proved in the matter of his insolvency, whether they are specified in his schedule or not.—DADARHAI NASARVANJI *v.* MANIKJI SHAPURJI KAKA (1870), 7 Bom. O. C. 22.—**IND.**

5325 i. *Bond forfeited before bankruptcy—Debt accruing due before bankruptcy of surety.*]—A bond, made by deft. as surety, was forfeited before, & deft.'s liability under the bond accrued due after, deft. became bkpt.:—*Held:* as pltf. might have proved, deft. was discharged, & was not liable in an action on the bond.—PERRIN *v.* HAMILTON (1854), 5 C. P. 57.—**CAN.**

561; Mornington *v.* Keane (1858), 2 De G. & J. 292; *Re* Lind, Industrials Finance Syndicate *v.* Lind, [1915] 2 Ch. 345, C. A.

5327. Debt specifically charged on after-acquired property.]—Declaration for entering pltf.'s premises & seizing goods of pltf. Plea, that by indenture pltf. assigned all his household goods, etc., on certain premises to deft., to secure the repayment of £52 lent by deft. to pltf., & it was agreed that, if the £52 were not repaid on the day named, & so long as any money should be secured or recoverable by virtue of the deed, deft. was to be at liberty to enter & take, & on default to sell the goods, & it was further agreed that, if, during the continuance of the security, pltf. should become possessed of any goods other than those already assigned, the same should in all respects be subject to the deed, & be seized & sold in the same manner as if they were, at the date of the deed, possessed by pltf. & duly assigned to deft. The plea then alleged that deft. seized the goods in the declaration mentioned by virtue of the above deed. Replication, that after the bill of sale, & before the seizing of the goods, pltf. filed a petition for liquidation of his affairs, which was duly carried out under 1869 Act, & that the goods were goods acquired by pltf. after the liquidation, & pltf. then held them freed & discharged from the bill of sale:—*Held:* the debt being released by virtue of the liquidation, the power in the deed to seize after-acquired property so long as the debt remained secured by the deed must fall with it.—THOMPSON *v.* COHEN (1872), L. R. 7 Q. B. 527; 41 L. J. B. Q. 221; 26 L. T. 693; 36 J. P. 822.

Annotations:—**Consd.** Collyer *v.* Isaacs (1881), 19 Ch. D. 342, C. A.; *Re* Lind, Industrials Finance Syndicate *v.* Lind, [1915] 2 Ch. 345, C. A. **Refd.** *Re* Lind, Industrials Finance Syndicate *v.* Lind, [1915] 1 Ch. 744.

5328. —— Expectancy as next of kin.]—An assignment of mere expectancy as next of kin upon the death of a living person where the subject-matter of the assignment is definite, notwithstanding that the assignment is by way of mtge. to secure a debt, creates, not merely a personal liability on the mtgor. to transfer the property when the time comes, but an actual interest in the mtgee. as if he had been possessed of the property at the date of the assignment, & this interest is not affected by the subsequent bkpcy. & discharge of the mtgor.; & the mtgee. takes the property assigned, upon its becoming realised, in priority to a purchaser & assignee of the expectancy from the mtgor. under an assignment made before its realisation, but after the bkpcy. & discharge of the mtgor.—*Re* LIND, INDUSTRIALS FINANCE SYNDICATE, LTD. *v.* LIND, [1915] 2 Ch. 345; 84 L. J. Ch. 884; 113 L. T. 956; 59 Sol. Jo. 651; [1915] H. B. R. 204, C. A.

See, generally, Part XX., Sect. 7, sub-sect. 2, *post.*

B. Debts incurred by Fraud and Breach of Trust.

See 1914 Act, s. 28 (1) (*b*).

5329. General rule—Right of creditor to sue—Notwithstanding proof in liquidation—Extent of debtor's liability.]—After a liquidating debtor has obtained his discharge, a creditor, whose debt has been incurred by means of fraud, is entitled to sue debtor at law for the amount of the debt, notwithstanding that the liquidation is not closed, & that he has proved the debt in the liquidation; the Ct. of Bkpcy. will not, in such a case, restrain the action. If the creditor has received any dividends in the liquidation, debtor will only remain liable for the unpaid balance of the debt.—*Re* CHATTERTON, *Ex p.* HEMMING (1879), 13 Ch. D. 163; 49 L. J. Bcy. 17; 41 L. T. 513; 44 J. P. 153; 28 W. R. 218, C. A.

Annotation:—**Consd.** Ross *v.* Gutteridge (1882), 52 L. J. Ch. 280.

5330. —— —— Judgment given pending liquidation—Enforceable after discharge only.]—A liquidating debtor was sued, while the liquidation was still pending, on a debt incurred by him by fraud prior to the commencement of the liquidation proceedings:—*Held:* the ct. had jurisdiction to give judgment against him before his discharge, but the judgment should be ordered not to be enforced against him until after discharge obtained, or until further order, liberty being given to pltf. to apply in case of debtor unduly delaying to apply for his discharge.—ROSS *v.* GUTTERIDGE (1882), 52 L. J. Ch. 280; 48 L. T. 117.

5331. Solicitor receiving money for client—Receipt in proper character of solicitor.]—The ct. will not compel an attorney to pay a sum of money he has received in his character of attorney, he having after the receipt of the money become bkpt., & obtained his certificate.—*Ex p.* CULLIFORD *v.* WARREN (1828), 8 B. & C. 220; 6 L. J. O. S. K. B. 329; 108 E. R. 1026.

Annotation:—**Consd.** *Re* —, an Attorney (1855), 25 L. T. O. S. 98.

5332. —— —— Fraud must be clear & notified.]—Where an attorney has received money to the use of his client, & not accounted for it, & has afterwards become bkpt. & obtained his certificate, the ct. will not, on motion, order him to repay the money so received, the amount being a debt barred by the certificate; but if the attorney committed fraud in the receiving & not accounting, the ct., in the exercise of its general jurisdiction over its officer, will enforce such payment, as a modification of the punishment which it might otherwise inflict for his misconduct. The case of fraud, however, ought to be clear, & the attorney should have notice by the form of the rule, that the application is of a penal nature. It is not enough to call upon him to show cause why he should not pay over the money.—*Re* BONNER (1833), 4 B. & Ad. 811; 1 Nev.& M. K. B. 555; 110 E. R. 661.

Annotations:—**Apld.** *Re* ——, an Attorney (1855), 25 L. T. O. S. 98. **Mentd.** *Re* Newbery (1835), 4 Ad. & El. 100.

5333. —— Failure to reinvest stock.]—Money was invested in stock, pursuant to a will, for the benefit of a legatee. An attorney obtained the legatee's authority, & a power from her trustee, to sell out the stock, representing that it might

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. *Judgment debt—Judgment entered before discharge.*]—Where deft. had obtained his certificate of discharge in bkpcy. after entry of judgment & before execution issued, the execution & all subsequent proceedings were set aside with costs.—HARRIS *v.* BUNNELL (1856), 2 P. R. 103.—**CAN.**

s. *Arrest for provable debt—Right to release.*]—Where deft. showed that the debt for which he was arrested in Nova Scotia was a debt "provable under his bkpcy.":—*Held:* he was entitled to be discharged from arrest.—MILLS *v.* SMITH (1866), 2 Old. 328.—**CAN.**

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t. *Misrepresentation — Concealment of true position.*]—An allegation that defts., having funds in their hands belonging to S. for goods sold on his account, had accepted a bill of exchange drawn by S. for the amount in favour of pltfs. at sight, that when pltfs. presented the bill to defts. on Sept. 9, they falsely pretended, in order to obtain a further term of credit for payment of the bill, that the goods, against proceeds of which the bill had been drawn, had not yet been sold, & that pltfs. on the strength of such representation extended the payment till Oct. 1, that defts. at that time knew they were unable to meet their engagements, but concealed from pltfs. their inability to do so with intent to defraud pltfs.:—*Held:* not to show a fraud within 1869 Act, s. 92, & a plea of discharge of defts. under the Act was an answer to an action brought on the bill.—JONES *v.* HANFORD (1875), 2 Pug. 467.—**CAN.**

u. *Purchasing goods on credit—With knowledge of insolvency.*]—To a plea of a discharge pltf. replied that deft. purchased the goods sued for on credit at a time when he knew himself

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be better invested in a mtge., & that he would find a proper security. The stock was sold out, & the proceeds received & held by the attorney, he paying interest on the amount to the legatee, who did not know that the money had not been reinvested. Inquiries being afterwards made, he admitted that he had not reinvested the sum, but promised that he would do so, & proposed a mtge., which was thought sufficient, on property of his own. No further satisfaction being offered, the legatee moved the ct. against him, & a rule was made, by consent, ordering that he should reinvest the money in stock, on or before June 24 then next, & pay costs, &, on default, that an attachment should issue against him. The money was not reinvested, nor costs paid, & on June 25 a fiat in bkpcy. issued against the attorney, who, in Oct., obtained his certificate. The rule & *allocatur* were served, & the costs demanded, in Aug. On motion made afterwards for an attachment pursuant to the above rule:—*Held:* in the circumstances, the certificate was no answer to the application, & the attachment might issue.—*Re* NEWBERY (1835), 4 Ad. & El. 100; 1 Har. & W. 575; 5 Nev. & M. K. B. 419; 5 L. J. K. B. 4; 111 E. R. 725.

Annotation:—**Consd.** *Re* ——, an Attorney (1855), 25 L. T. O. S. 98.

5334. Solicitor bringing action without authority—Liability to pay costs.]—An attorney, having brought an action without any authority to do so from pltf., was ordered to pay deft.'s costs of the action:—*Held:* his liability to pay such costs was a liability incurred by means of a fraud within 1869 Act, s. 49, & an order of discharge in bkpcy. did not discharge from such a liability.—JENKINS *v.* FEREDAY (1872), L. R. 7 C. P. 358; 41 L. J. C. P. 152; 27 L. T. 37; 20 W. R. 781.

See, generally, SOLICITORS.

5335. Breach of trust—Fraud of company promoter.]—Under a secret agreement between the vendors of a mine & G., a financial agent who was promoting & afterwards formed a co. for its purchase, G. received from the vendors part of the purchase-money without the knowledge of the co. In an action by the co. to make G. liable for the amount of the secret profit he had so made, a specific sum was found due from him to the co. upon that footing. G. then presented a petition for liquidation, & his creditors passed a resolution for liquidation of his affairs by arrangement; a trustee was appointed of his estate, & he obtained his certificate of discharge:—*Held:* the debt due from G. was incurred by "fraud" & also "breach of trust" within 1869 Act, s. 49, & G. was not released from such debt by his discharge, but must personally pay the debt to the co., or so much thereof as should not be received by the co. under the liquidation.—EMMA SILVER MINING CO. *v.* GRANT (1880), 17 Ch. D. 122; 50 L. J. Ch. 449; 29 W. R. 481.

Annotations:—**Consd.** Hale *v.* Boustead (1881), 8 Q. B. D. 453. **Refd.** Ross *v.* Gutteridge (1882), 52 L. J. Ch. 280. **Mentd.** *Re* Parker & Parker, *Ex p.* Sheppard (1887), 4 Morr. 135; Capel *v.* Sim's Ships Compositions Co. (1888), 57 L. J. Ch. 713; *Re* British Gold Fields of West Africa, [1899] 2 Ch. 7, C. A.; *Re* Macfadyen, *Ex p.* Vizianagaram Mining Co., [1908] 2 K. B. 817, C. A.

5336. —— Misfeasance by company director.]—A co. had, by action brought in 1880, made R., one of its directors, personally liable for certain loans of the co.'s money, which were improper loans, & had been lost to the co. R. sued his co-directors for contribution in respect of the sums he had been compelled to pay in the action. E., a director, who was managing director & present at both of the meetings sanctioning the loans in question, went into liquidation in 1879, & received his discharge:—*Held:* there was a liability "incurred by means of a breach of trust" within 1869 Act, s. 49, & E. was not discharged from his liability to contribute in respect of the loans.—RAMSKILL *v.* EDWARDS (1885), 31 Ch. D. 100; 55 L. J. Ch. 81; 53 L. T. 949; 34 W. R. 96; 2 T. L. R. 37.

5337. Misappropriation by copartners—Bankrupt innocent.]—Where a debt has been incurred by one of several partners for which the partnership is liable, & the partnership goes into liquidation under 1869 Act, a partner who has received his order of discharge is not thereby released from such debt if it was incurred by fraud, though he himself was innocent of such fraud.—COOPER *v.* PRICHARD (1883), 11 Q. B. D. 351; 52 L. J. Q. B. 526; 48 L. T. 848; 31 W. R. 834, C. A.

See, now, 1914 Act, s. 28 (1) (*b*).

5338. Costs incurred in action relating to fraudulent breach of trust.]—Costs incurred in an action relating to a fraudulent breach of trust, & ordered to be paid by the trustee, are not "a debt or liability incurred by means of any fraudulent breach of trust" within 1883 Act, s. 30 (1), & will be released by the trustee's discharge in bkpcy., or by any composition equivalent thereto.—*Re* GREER, NAPPER *v.* FANSHAWE, [1895] 2 Ch. 217; 64 L. J. Ch. 620; 72 L. T. 865; 59 J. P. 441; 43 W. R. 547; 39 Sol. Jo. 503; 2 Mans. 350; 13 R. 598.

Annotations:—**Mentd.** *Re* Turnbull, Turnbull *v.* Nicholas, [1900] 1 Ch. 180; White & Pill *v.* Stennings, [1911] 2 K. B. 418, C. A.

C. Debts entered in Schedule or Statement.

See 1914 Act, ss. 28 (2), 30 (3).

5339. To what extent.]—Under Insolvent Debtors Acts insolvent is discharged with respect to debts due from him only to the extent of the sums stated by him in his schedule.—BARTON *v.* TATTERSALL (1831), 2 Russ. & M. 541; 9 L. J. O. S. Ch. 199; 39 E. R. 500.

5340. Sufficiency of entry—Entry of drawer of bill instead of indorsee—Ignorance of indorsement.]—Deft. being indebted to A. for goods sold, accepted a bill drawn by A. for the amount, which became due in Oct., 1823. Before that time deft. became insolvent, & presented his petition to be discharged, & in his schedule delivered into the Insolvent Debtors Ct., he stated that he was

to be unable to meet his engagements, which fact he concealed from pltfs. with intent to defraud pltfs. of the goods:—*Held:* the replication must fail, as deft. had not been found guilty of fraud at the trial.—ROONEY *v.* LYONS (1877), 2 A. R. 53.—**CAN.**

w. *Debt for which imprisonment permitted—Debt proved in ordinary way.*]—Pltf. sued insolvent, who had obtained his discharge under a deed of composition & discharge, for a debt alleged to have been contracted in such circumstances, that the imprisonment of debtor for enforcing payment would have been permitted by 1875 Act, s. 136:—*Held:* pltfs. had not precluded themselves from enforcing the claim by having proved it in the ordinary way, & not as a debt contracted by fraud.—MCMASTER *v.* KING (1878), 3 A. R. 106.—**CAN.**

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x. *Sufficiency of entry—Question for jury.*]—When, to an action brought, a discharge under Insolvent Act is pleaded, & a misdescription in the schedule of insolvent is clear, the ct. will decide upon it, but if it be doubtful whether the description given may not be a sufficient one, the question of sufficiency must be left to the jury.—MURPHY *v.* AGAR (1854), 4 I. C. L. R. 495; 7 Ir. Jur. 370.—**IR.**

y. —— *Misdescription of creditor.*]—If the description of the creditor be *bonâ fide,* & not calculated to deceive, it is sufficient in the absence of fraud.—USSHER *v.* BRADLEY (1830), 3 Ir. L. Rec. 1st ser. 344.—**IR.**

indebted to A. for goods, & that A. held his acceptance for the amount which became due in Oct., 1823. A. had indorsed the bill to B., but the insolvent was ignorant of that fact. B. having brought an action against the insolvent upon the bill, the latter pleaded his discharge under Insolvent Debtors Act, 1820 (c. 119):—*Held:* the schedule contained a true description of the person to whom the insolvent was indebted within s. 6.—REEVES *v.* LAMBERT (1825), 4 B. & C. 214; 107 E. R. 1039.

Annotations:—**Apld.** Boydell *v.* Champneys (1837), 2 M. & W. 433. **Folld.** Booth *v.* Coldman (1859), 1 E. & E. 414. **Mentd.** Levy *v.* Horne (1850), 5 Exch. 257; Lambert *v.* Smith (1851), 11 C. B. 358; Symons *v.* May (1851), 6 Exch. 707.

5341. —— —— ——.]—A bill, at the time of the petition, had been indorsed over by the drawer, but the insolvent, the acceptor, did not know of such indorsement:—*Held:* he sufficiently described the bill by naming the drawer, without adding that he did not know whether it had been indorsed over or not, & he was discharged from liability on the bill.—BOOTH *v.* COLDMAN (1859), 1 E. & E. 414; 28 L. J. Q. B. 137; 32 L. T. O. S. 254; 5 Jur. N. S. 844; 7 W. R. 188; 120 E. R. 964.

Annotations:—**Mentd.** Franklin *v.* Beesley (1859), 1 E. & E. 425; Romellio *v.* Halaghan (1861), 1 B. & S. 279.

5342. —— —— ——.]—*Assumpsit* on a bill of exchange for £30, drawn by A. upon C. on Feb. 16, 1849, payable to E. or order, thirty-five days after date. Plea, a discharge of the acceptor under Insolvent Debtors Act. In support of the plea, deft. put in his sched., which contained the following description of the original debt:—"A. Debt £30; £20 money lent, £10 clothes. I gave my acceptance to a bill drawn by him, Feb. 16, 1849, at thirty-five days." No mention was made of pltfs. as holders of the bill, nor was there any allegation that the holders were unknown:—*Held:* the adjudication under the Act was no discharge as to the claim of E. upon the bill, under Judgments Act, 1838 (c. 110), s. 75. *Semble:* the description of the debt was not a full & true description under s. 69.—LAMBERT *v.* SMITH (1851), 11 C. B. 358; 2 L. M. & P. 446; 20 L. J. C. P. 195; 17 L. T. O. S. 167; 138 E. R. 511.

Annotation:—**Consd.** Romellio *v.* Halaghan (1861), 1 B. & S. 279.

5343. —— **Misdescription of holder of bill—Questions for jury.**]—In an action against the acceptor of a bill of exchange, who pleaded his discharge under Insolvent Debtors Act, 1826 (c. 57), deft. having misdescribed the holder in his schedule, & there being some evidence tending to show that he knew the holder at the time:—*Held:* the true question for the jury was whether he did so know the holder.—LEVY *v.* DOLBELL (1828), Mood. & M. 202.

5344. —— **Misdescription of drawer & acceptor of bill—Wrong date.**]—A bill of exchange for £45, dated Oct. 30, 1858, had been drawn by insolvent upon, & accepted by, A., but in his schedule insolvent described the bill as drawn by A. & accepted by himself. & dated about Nov., 1858. Insolvent being afterwards sued on the

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5343 i. —— *Misdescription of holder of bill.*]—*Semble:* it is not sufficient for insolvent to insert in his schedule merely the description of a creditor, without also adding his name, although in the case of negotiable instruments some allowance will be made in cases where it is impracticable for insolvent to ascertain the name of the present holder, provided the name of the holder, last known to insolvent as such, be correctly given.—DINNEN *v.* JAMES (1863), 7 Ir. Jur. 28.—**IR.**

5343 ii. —— ——.]—Deft., residing in India, drew bills of exchange on R., which were purchased in that country for & on account of pltf., M. S., residing in England, & the bills were indorsed by deft., & transmitted to pltf. Deft. afterwards becoming insolvent, petitioned the Insolvent Ct. in India, & described the debt on the bills of exchange in his schedule as follows:—"Creditor, A. M. S., for the following bills of exchange (describing them), drawn by us upon R. in favour of M. S." A person of the name of A. M. S. resided at Calcutta, but it was not shown that he was in any way connected with the bills. In an action by M. S. upon the bills:—*Held:* deft.'s description of pltf.'s debt in his schedule was insufficient within Indian 1847 Act, & deft. was liable on the bills.—SYMONS *v.* MAY (1851), 6 Exch. 707; 155 E. R. 729.—**IND.**

a. —— *Misdescription of payee of note.*]—Defts. were sued on a promissory note made to the solrs. of pltf. & by them indorsed to pltf. They pleaded a discharge under 1869 Act. Two defts. produced a supplementary list of creditors alleged to have been filed a few days before the date of the discharge, which list did not give the residence of the parties scheduled or state the nature of the debt, or whether direct or indirect, but was simply a bald statement of names & amounts, & it was not shown that any schedule to which it professed to be supplementary had ever been filed in the manner required by the Act. Third deft. produced no schedule, but stated that he had sent it to his solr. to be filed. There was no proof that the solr. had received it or that it had been filed; & it was shown that the debt had been scheduled as due to the solrs. instead of being scheduled as due to pltf.:—*Held:* the discharge in insolvency did not release the claim.—KNAUT *v.* SPONAGLE (1883), 4 R. & G. 193.—**CAN.**

b. —— *Insufficient description of note—How correctly described.*]—Pltf. sued on a note made by deft. to John T. Fraser for $70.86 & indorsed to him. Deft. pleaded a discharge in insolvency. The schedule contained the following:—"John T. Fraser's note $72.60.":—*Held:* the schedule did not sufficiently describe the note, which being negotiable should have been scheduled as "negotiable paper, the holder of which is unknown."—HUTT *v.* SUTHERLAND (1881), 2 R. & G. 191; 1 C. L. T. 664.—**CAN.**

d. —— *Misdescription of executor.*]—Deft., to an action brought by the exor. & extrix. of J., upon a bill of exchange made by deft. to deceased, pleaded a discharge under Insolvent Act. In his schedule the following item in reference to the debt in question appeared: "No. 19, J., solr., Belfast, exor. of J., late of Belfast, cattle dealer, deceased." That person was not the exor., but the judge admitted evidence to show that deft. had used the best means in his power to ascertain who the personal representatives of J., deceased, were, & it appeared that he had only received hearsay evidence that J., son of deceased, was his exor., & that although he had employed an attorney to prepare his schedule, & was aware that wills were proved in the Prerogative Ct., he had not directed his attorney, or any other person, to search there for the purpose of ascertaining who was the personal representative of deceased:—*Held:* the description in the schedule was insufficient.—DINNEN *v.* JAMES (1863), 7 Ir. Jur. 28.—**IR.**

f. —— *Omission to enter amount of debt.*]—Where deft. pleaded a discharge in insolvency, & the note sued on, of which pltf. was indorsee, had been included in the amount scheduled as the claim of the original payee, but no particulars of it were given as provided by 1875 Act, s. 61, pltf.'s name appearing in the schedule but no amount being set opposite, judgment for pltf. was sustained.—DE WOLF *v.* NEILLY (1879), 1 R. & G. 243.—**CAN.**

g. —— —— *Claim for balance of costs.*]—To an action for attorney's costs deft. pleaded his discharge under 1864 Act, alleging that pltf.'s name & residence, with a statement of deft.'s indebtedness to him being for a balance of costs in two suits specified, were stated in his schedule filed, & that he was not aware before obtaining his discharge of the exact amount of such indebtedness. Pltf. replied that his name was not mentioned in the schedule for any sum or amount whatever:—*Held:* the debt due to pltf. was, in the circumstances, sufficiently stated in the schedule.

The Act is substantially complied with if the debt is set out in such a manner as cannot mislead, & leaves no doubt as to the debt referred to, & the amount is capable of being ascertained by the creditor.—CAMERON *v.* HOLLAND (1870), 29 U. C. R. 506.—**CAN.**

k. —— *Approximate amount of debt entered.*]—To an action on a promissory note, deft. pleaded a discharge under 1875 Act. In the schedule of liabilities a debt due pltfs. was set out "N. about $750":—*Held:* a sufficient compliance with the Act.—NAUFFTS *v.* MASKELL (1887), 19 N. S. R. 547.—**CAN.**

l. —— *Entry of part of debt—Omission to enter note given for same.*]—Pltf. took deft.'s note for advances made, for £366, on Mar. 10 at three months. On the 19th deft. obtained his final order for discharge under 8 Vict. c. 48, pltf. being mentioned in his schedule as a creditor for £150:—*Held:* the order was not a bar to the note, even as to the £150, if included in it.—GREENWOOD *v.* FARRELL (1859), 17 U. C. R. 498.—**CAN.**

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bill, pleaded his discharge, & the jury found that the misdescription was by mistake:—*Held:* deft. was entitled to the verdict.—ROMELLIO *v.* HALAGHAN (1861), 1 B. & S. 279; 4 L. T. 402; 121 E. R. 718; *sub nom.* ROMILLIO *v.* HALAHAN, 30 L. J. Q. B. 231; 8 Jur. N. S. 11; 9 W. R. 737.

5345. —— —— Misdescription unintentional & not likely to deceive.]—In an action against an acceptor of a bill of exchange, who pleaded his discharge under Insolvent Debtors Act:—*Held:* the description in the sched. of a bill, as drawn by deft. & accepted by A., who was in fact the drawer of the bill sued on, & held by C., an indorser on the bill, for the precise sum & of nearly the same date as the bill sued on, was a sufficient description for the discharge of deft., the misdescription of the bill not being intended, nor likely to deceive the holder.—NIAS *v.* NICHOLSON (1825), 2 C. & P. 120; Ry. & M. 322.

Annotation: **Consd.** Romellio *v.* Halaghan (1861), 1 B. & S. 279.

5346. —— —— Wrong amount.]—W. drew & deft. accepted a bill of exchange for £26 7*s.* 6*d.* as a renewal of a bill accepted by deft.'s partner. Deft. afterwards petitioned the Insolvent Ct., under Execution Act, 1844 (c. 96), & named in his sched. as creditors, the representatives of W., who was dead, with the following description:—"Amount of debt, £30.—These creditors hold a bill of exchange drawn by self & partner, & afterwards renewed by self." Deft. obtained a final order for protection, & the indorsees of the bill afterwards sued him for the amount:—*Held:* the bill was not set forth in the sched., as required by s. 22, & deft. was not discharged from the debt.—KEMP *v.* HURRY (1855), 11 Exch. 47; 24 L. J. Ex. 220; 25 L. T. O. S. 130; 3 W. R. 420; 3 C. L. R. 1042; 156 E. R. 739.

Annotation: **Distd.** Romellio *v.* Halaghan (1861), 1 B. & S. 279.

5347. —— Omission to enter arrears of annuity.]—A party, taking advantage of Insolvent Debtors Act, 1826, inserted in his schedule of indebtedness the purchase price of an annuity & the annual amount of the latter, but he omitted to enter arrears of the annuity:—*Held:* there being no intention to mislead by such omission, the insolvent could claim to be discharged in respect of such arrears.—JERVIS *v.* JONES (1836), 4 Dowl. 610; 1 Har. & W. 654.

Annotation:—**Mentd.** Fletcher *v.* Turk (1843), 13 L. J. Q. B. 43.

5348. —— Entry of debt but not note given for same.]—A. being indebted to B. & C. in two sums amounting to £80, gave them a promissory note for £80. Shortly afterwards he took the benefit of Judgments Act, 1838 (c. 110), but his schedule did not set forth the note so given, though the original debt to B. & C. was inserted:—*Held:* A. was not discharged from the note, as it was not specified in the schedule.—CARR *v.* KIRKWRIGHT (1852), 19 L. T. O. S. 209.

5349. Effect of inserting name of holder of bill.]—An insolvent debtor, who inserts in his schedule the name of the holder of a bill of exchange on which he is liable, or gives such other description of it as satisfies Insolvent Debtors Act, 1826 (c. 57), is discharged as to all the parties to the bill, although they are not named in the schedule, & also as to the original debt for which it was a security.—BOYDELL *v.* CHAMPNEYS (1837), 2 M. & W. 433; Murp. & H. 84; 6 L. J. Ex. 122; 1 Jur. 384; 150 E. R. 827.

Annotations:—**Mentd.** Booth *v.* Coldman (1859), 7 W. R. 188; Litten *v.* Dalton (1864), 17 C. B. N. S. 178.

m. —— *Omission to enter debt as disputed.*]—Previous to the application for his discharge, A. had filed his schedule in the Insolvent Ct., & had returned therein the amount for which he had been taken in execution as a debt from him to B., without stating that he disputed same:—*Held:* A. had not thereby waived the benefit of 9 Will. 3, c. 10, s. 8.—MONTGOMERY *v.* BYRNE (1851), 4 Ir. Jur. 46.—**IR.**

n. —— *Entry of amount paid upon calls—Liability for unpaid calls—Change of plaintiffs' name.*]—Pltfs. sued deft., as a shareholder in their bank for calls, & deft. pleaded his discharge under 1869 & 1875 Acts, the assignment having been made under the former, & the deed of composition & discharge filed under the latter, Act. The only mention of pltfs.' claim in deft.'s statement of affairs & schedule was this entry in the statement of assets, "25 shares St. Lawrence Bank stock; amount paid up $500" (the pltfs.' name having been changed from St. Lawrence Bank):—*Held:* pltfs.' claim was discharged.—STANDARD BANK OF CANADA *v.* JOHNSON (1877), 42 U. C. R. 16.—**CAN.**

o. *Effect of omitting to enter debt.*]—Plea to a promissory note, an absolute discharge duly obtained under 1864 Act. Replication, that pltf.'s name, as a creditor, & the note & cause of action, were not mentioned in deft.'s schedule annexed to his assignment, nor in any supplementary schedule, as required by law, & the debt was never proved against the estate:—*Held:* (1) the replication was good; (2) the effect of the discharge obtained under the Act by insolvent, was limited to the debts & causes of action set forth in his schedule, either originally or by supplement.—KING *v.* SMITH (1869), 19 C. P. 319.—**CAN.**

p. ——.]—To an action on a guarantee, deft. pleaded his insolvency & discharge. Replication, that deft., did not schedule pltf.'s claim, nor did he by a supplementary or any list of creditors, set forth pltf.'s claim, which was not, in fact, ever furnished to the assignee or proved against deft.'s estate:—*Held:* replication good.—PALMER *v.* BAKER (1871), 22 C. P. 59.—**CAN.**

q. ——.]—A creditor whose debt has not been included in the scheduled debts, is entitled to proceed with the execution of his decree against insolvent's property, notwithstanding his discharge.—ASHRAFUDDIN AHMED *v.* BEPIN BEHARI MULLIK (1902), I. L. R. 30 Calc. 407.—**IND.**

r. —— *Debt due on I. O. U.*]—Civil bill in *assumpsit* on an I. O. U., signed by deft., who was subsequently discharged as an insolvent debtor. Deft. had returned in his schedule other debts due by him to pltf., but had not returned the amount due by him on foot of the I. O. U His discharge had been opposed by pltf. upon grounds connected with the debts specified in the schedule, but no opposition was made by pltf. in relation to the debt due on foot of the I. O. U., nor did he make any objection as to its not having been inserted in the schedule:—*Held:* the discharge of deft. operated as a discharge, as well from the debts specified in the schedule, as from the debt due on foot of the I. O. U.—TRACY *v.* MALCOLMSON (1841), 2 Craw. & D. 197.—**IR.**

s. —— *Debt due under chattel mortgage.*]—Pltf., the holder of a chattel mtge. with a covenant for payment, was not scheduled in proceedings in insolvency under 1875 Act, but he was aware of the proceedings, & insolvent obtained a final discharge:—*Held:* the debt under the chattel mtge. was not extinguished.—BEATY *v.* SAMUEL (1881), 29 Gr. 105.—**CAN.**

t. —— *Distinguished from "omission, mistake or misdescription"—Irish 1857 Act, s. 232.*]—An insolvent is only discharged under Irish Bkpcy. & Insolvency Act, 1857, c. 60, s. 212, from the debts returned on his schedule. The "omission, mistake, or misdescription," in an insolvent's schedule, which is cured by s. 232, is an omission, mistake, or misdescription, of something in the description of a debt which is returned on an insolvent's schedule.

Where A., who became insolvent in 1861, at the time of his insolvency was indebted to B. in an ascertained sum, on a running account from 1856 to 1859, & returned such debt on his schedule, & was also indebted to B. in an unascertained sum, on a running account from 1859 to 1861, & did not return or refer to such debt on his schedule, & stated that he did not intend to return it:—*Held:* an omission of a debt from the schedule, & not such a "mistake, omission, or misdescription," as could be cured by the above sect., & A. was not released from the debt.—DARLEY *v.* M'DONNELL (1868), I. R. 3 C. L. 260.—**IR.**

u. —— *Trader's debt.*]—Deft., who had taken the benefit of Insolvent Act, was sued by pltf. for a debt contracted previously to his insolvency, the debt not having been entered in insolvent's sched. at the time of his final discharge:—*Held:* insolvent being a trader, under s. 60 of the Act, taken in connection with 5 & 6 Vict., c. 122, the discharge was good & valid.—BRETT *v.* SCHONERSTEDT (1864), 2 Hyde, 1.—**IND.**

5350. Effect of omitting creditor's name—Creditor without notice of liquidation.]—The certificate of discharge of a liquidating debtor is a good answer to a claim in respect of a debt due before the discharge, though the creditor's name was omitted from debtor's statement, & though he had no notice of the proceedings in liquidation.—HEATHER & SON *v.* WEBB (1876), 2 C. P. D. 1; 46 L. J. Q. B. 89; 25 W. R. 253.

Annotations :—**Distd.** Jakeman *v.* Cook (1878), 4 Ex. D. 26. **Consd.** *Re* Andrews, *Ex p.* Barrow (1881), 18 Ch. D. 464, C. A. **Folld.** *Re* Bonacina, Le Brasseur *v.* Bonacina, [1912] 2 Ch. 68. **Distd.** *Re* Bonacina, Le Brasseur *v.* Bonacina, [1912] 2 Ch. 394, C. A.

5351. —— ——.]—A debtor who has obtained his discharge in liquidation proceedings, under 1869 Act, s. 125, is not liable, in respect of a debt provable in the liquidation at the suit of a creditor who, without fraud, was omitted from debtor's statement of affairs, & had no notice of the liquidation.—ELMSLIE *v.* CORRIE (1878), 4 Q. B. D. 295; 48 L. J. Q. B. 462; 40 L. T. 150; 27 W. R. 279, C. A.

Annotation :—**Consd.** *Re* Nelson, *Ex p.* Dare & Dolphin, [1918] 1 K. B. 459, C. A. **Mentd.** Wadsworth *v.* Pickles (1880), 5 Q. B. D. 470.

5352. —— **Omission fraudulent.**]—The certificate of discharge obtained by a debtor, who has gone through liquidation by arrangement, under 1869 Act, s. 125, is a defence to an action for a debt provable in the liquidation proceedings, although the name of the creditor, to whom the debt is due, has been fraudulently omitted by debtor from the list of creditors delivered to the registrar.—WADSWORTH *v.* PICKLES (1880), 5 Q. B. D. 470; 49 L. J. Q. B. 454; 43 L. T. 410; 28 W. R. 628.

See, further, Part XXIII., *post*.

D. Other Cases.

See 1914 Act, ss. 28, 30 (3).

5353. Debt accruing before issue of commission—But after act of bankruptcy.]—A debt accrued subsequent to an act of bkpcy., & previous to the issuing of the commission, is not barred by the certificate.—BAMFORD *v.* BURRELL (1799), 2 Bos. & P. 1; 126 E. R. 1120.

5354. —— **Judgment obtained after discharge.**]—A certificate discharges bkpt. from a debt accruing before the commission, though judgment be not obtained till after the certificate allowed.—BOUTEFLOUR *v.* COATES (1774), 1 Cowp. 25; 98 E. R. 948.

Annotations :—**Consd.** *Ex p.* Hill (1804), 11 Ves. 646. **Apld.** Dinsdale *v.* Eames (1820), 2 Brod. & Bing. 8.

5355. Debt due from wife before marriage—Discharge of husband.]—Debts of the wife, *dum sola*, are discharged by the bkpcy. of the husband.—MILES *v.* WILLIAMS (1714), 1 P. Wms. 249; 10 Mod. Rep. 243; 24 E. R. 375; *sub nom.* MYLES *v.* WILLIAMS, Gilb. 318.

Annotations :—**Consd.** Gayner *v.* Wilkinson (1773), Dick. 491. **Distd.** Mitford *v.* Mitford (1803), 9 Ves. 87. **Apld.** Lockwood *v.* Salter (1833), 5 B. & Ad. 303; Yates *v.* Sherrington (1843), 11 M. & W. 42. **Distd.** Sherrington *v.* Yates (1844), 12 M. & W. 855, Ex. Ch. **Consd.** *Re* Butler (1863), 1 New Rep. 538; Chubb *v.* Stretch (1870), L. R. 9 Eq. 555. **Refd.** Bosvil *v.* Brander (1718), 1 P. Wms. 458; Ineson *v.* Moulston (1742), 9 Mod. Rep. 373; *Ex p.* Coysegame (1753), 1 Atk. 192; Sparkes *v.* Bell (1828), 2 Man. & Ry. K. B. 124; Michell *v.* Hughes (1830), 6 Bing. 689; Sheen *v.* Garrett (1830), 6 Bing. 686. **Mentd.** Stafford *v.* Buckley (1750), 2 Ves. Sen. 170; Smith *v.* Marsack (1848), 12 L. T. O. S. 217.

5356. —— ——.]—A debt due from a wife before marriage is entirely barred by the subsequent discharge of the husband under Insolvent Debtors Act, 1826 (c. 57).—LOCKWOOD *v.* SALTER (1833), 5 B. & Ad. 303; 2 Nev. & M. K. B. 255; 2 L. J. K. B. 198; 110 E. R. 803.

Annotations :—**Folld.** Carr *v.* Duncan (1858), 6 W. R. 466. **Consd.** *Re* Butler (1863), 1 New Rep. 538; Chubb *v.* Stretch (1870), L. R. 9 Eq. 555. **Mentd.** *Re* Butler (1864), 12 W. R. 352; *Re* Parkin, Hill *v.* Schwarz, [1892] 3 Ch. 510.

5357. Joint debts—Discharge under separate commission.]—If there be two partners, & one of them becomes bkpt., & on a separate commission being sued out against him, his certificate is allowed, this does not only discharge bkpt. of what he owed separately, but also of what he owed jointly, & on the partnership account, because bkpt., upon making a full discovery & obtaining his certificate, is to be discharged of all his debts.—*Ex p.* YALE (1721), 3 P. Wms. 24, n.; 24 E. R. 955, L. C.

5358. —— ——.]—Under 1869 Act, as under former Bkpcy. Acts, an order of discharge granted to debtor, who is one of a partnership firm, in his separate bkpcy or liquidation, releases him from his joint, as well as from his separate debts.—*Re* HAMMOND & NEVARD, *Ex p.* HAMMOND (1873), L. R. 16 Eq. 614; 42 L. J. Bcy. 97; 29 L. T. 72; 21 W. R. 865.

Annotation :—**Distd.** Meggy *v.* Imperial Discount Co. (1878), 3 Q. B. D. 711, C. A.

5359. —— ——.]—Money paid by one partner to another before the bkpcy. of the latter, for the purpose of being paid over as his liquidated share of a debt to their joint creditor, if it be not so applied is provable as a debt under the commission of the bkpt. partner; although the solvent partner was not called upon to repay the debt to the joint creditor till after the bkpcy. of the other. But the solvent partner may recover from bkpt. his share of such debt so paid after the bkpcy. to the joint creditor, notwithstanding bkpt. has obtained his certificate.—WRIGHT *v.* HUNTER (1800), 1 East, 20; 102 E. R. 8; *subsequent proceedings* (1801), 5 Ves. 792.

Annotations :—**Refd.** *Re* Badnall, *Ex p.* Ellis (1827), 2 Gl. & J. 312, L. C.; Alfalo *v.* Fourdrinier (1829), 6 Bing. 306. **Mentd.** Brodie *v.* Howard (1855), 25 L. J. C. P. 57.

5350 i. *Effect of omitting creditor's name—Claim entered under special name.*]—To an action of covenant in a mtge. to pay money, deft. pleaded that, becoming insolvent after execution of the mtge., he made an assignment; that pltf.'s claim was known as that of the "Wood Estate," & was so described in the schedule submitted to the assignee & creditors, that pltf. resided abroad, & was represented in Canada by M., who had notice of the appointment of the assignee, that on the expiry of a year deft. obtained his discharge absolutely, by which he was discharged from pltf.'s claim. Replication, that the order for discharge was made before Sept. 1, 1869, & that pltf.'s name was not mentioned as creditor in any schedule, & his claim was never proved against deft.'s estate. Rejoinder, that pltf.'s claim was known as that of the "Wood Estate" (pltf. representing & being entitled to such estate) & was so entered in the schedule filed by deft. with the assignee, & that pltf. was represented by M., who had notice, etc.:—*Held :* rejoinder good.—FARRELL *v.* O'NEILL (1871), 22 C. P. 31.—**CAN.**

w. *Effect of omitting to give creditor notice.*]—*Held :* the ct. would not, upon motion, discharge deft. from custody under a *ca. sa.*, after his discharge as an insolvent, under 1 & 2 Geo. 4, c. 59, the arrest being for a debt returned by him in his schedule, & pltf. swearing that he had no notice of the filing of the petition prior to the discharge of the insolvent. *Semble :* a discharge, under 1 & 2 Geo. 4, c. 59, was inoperative as against a creditor returned in the schedule, who had not received notice of the filing of the petition, though such notice had been transmitted to him by post.—M'DONALD *v.* MOORE (1834), Hayes & Jo. 698.—**IR.**

x. *Pleading entry.*] — Where an order of discharge is pleaded in bar of a debt, it must be averred that such debt was included in deft.'s schedule.—STEPHENSON *v.* GREEN (1854), 11 U. C. R. 452.—**CAN.**

y. *Proof of entry.*]—A party applying for protection from arrest should show clearly that the name of pltf. was in his schedule, & this is not sufficiently done by putting in a copy of the schedule, without swearing that pltf.'s name is there.—*Re* MACKAY *v.* GOODSON (1868), 27 U. C. R. 263.—**CAN.**

Sect. 7.—Effect of order: Sub-sect. 2, D.; sub-sect. 3.]

5360. Separate debts—Discharge under joint commission.]—Where a liquidating debtor has separate, as well as joint creditors & assets, an order of discharge by the joint creditors will not operate to discharge him from his separate debts.—MEGGY *v.* IMPERIAL DISCOUNT CO., LTD. (1878), 3 Q. B. D. 711; 48 L. J. Q. B. 54; 38 L. T. 309; 42 J. P. 740; 26 W. R. 342, C. A.

Annotations:—**Mentd.** Cohen *v.* Mitchell (1890), 25 Q. B. D. 262, C. A.; *Re* Clark, *Ex p.* Beardmore, [1894] 2 Q. B. 393, C. A.

5361. —— ——.]—A joint commission discharges each partner as to his separate debts.—WICKES *v.* STRAHAN (1741), 2 Stra. 1157; 93 E. R. 1098.

5362. Debts under previous insolvency.]—In 1836, C. petitioned & was discharged under Insolvent Debtors Act, 1826 (c. 57). In 1854 he was adjudicated bkpt. & obtained his certificate:—*Held:* the certificate in bkpcy. did not discharge & satisfy the debts owing under the insolvency.—*Re* CLAGETT (1855), 2 Bankr. & Ins. R. 101; 25 L. T. O. S. 120.

Annotations:—**Folld.** *Re* Pain (1867), 16 W. R. 308. **Distd.** *Re* Clagett's Estate, Fordham *v.* Clagett (1882), 20 Ch. D. 637, C. A.

5363. ——.]—Debtor obtained his discharge under Judgments Act, 1838 (c. 110), after giving the usual warrant of attorney to the provisional assignee. He afterwards became bkpt. & obtained his order of discharge under the bkpcy.:—*Held:* his after-acquired property remained liable to the claim of the official assignee for payment of his debts under the insolvency.—*Re* PAIN, *Ex p.* PAIN (1868), 3 Ch. App. 639; 37 L. J. Bcy. 21; 18 L. T. 753; 16 W. R. 833, L. JJ.

Annotations:—**Consd.** *Re* Clagett's Estate, Fordham *v.* Clagett (1882), 20 Ch. D. 637, C. A. **Mentd.** *Re* Wilson (1869), 20 L. T. 119; Collyer *v.* Isaacs (1881), 19 Ch. D. 342, C. A.

5364. Exchange of acceptances—Both parties bankrupt—Dividends paid in excess to cover unpaid acceptances.]—Bills to the amount of £3,000 were exchanged between P. & Co. & D. & Co., there being no other consideration than the exchange of acceptances. P. & Co. paid several bills drawn on them by D. & Co., & went bkpt. D. & Co. also failed, leaving all their acceptances unpaid. P. & Co.'s assignees paid a dividend, as drawers of the bills accepted by D. & Co., & also paid the rest of P. & Co.'s acceptances. D. & Co. & P. & Co. subsequently obtained their certificates, no final dividend having been declared under either commission. The excess of the dividends paid by P. & Co.'s assignees over their acceptances was £528. In an action by P. & Co.'s assignees to recover that sum:—*Held:* D. & Co.'s certificate was a bar to the action.—COWLEY *v.* DUNLOP (1798), 7 Term Rep. 565; 101 E. R. 1135.

Annotations:—**Consd.** Buckler *v.* Buttivant (1802), 3 East, 72. **Distd.** Pownall *v.* Ferrand (1827), 6 B. & C. 439. **Refd.** Starey *v.* Barns (1806), 7 East, 435; *Re* Dyer & Swayne, *Ex p.* Solarte (1834), 3 Deac. & Ch. 419. **Mentd.** Cardwell *v.* Martin (1808), 9 East, 190; Burdon *v.* Benton (1847), 9 Q. B. 843.

5365. Liability as contributory.]—Where a co. has come to an end before the bkpcy. of a shareholder, the certificate discharges him from all liability to contribute to debts, & also from all liability to contribute to the expenses of winding up, & he ought not to be put on the list of contributories.—*Re* WARWICK & WORCESTER RY. CO., PARBURY'S CASE (1861), 3 De G. F. & J. 80; 30 L. J. Ch. 513; 4 L. T. 62; 7 Jur. N. S. 503; 9 W. R. 470; 45 E. R. 808, L. C. & L. JJ.

Annotations:—**Consd.** *Re* Petition for Adjudication, *Ex p.* Professional Life Assce. (1864), 9 L. T. 811; Williams *v.* Harding (1866), L. R. 1 H. L. 9, H. L. **Mentd.** *Re* General Estates Co., Hastie's Case (1869), 4 Ch. App. 274, L. JJ.

PART XVIII. SECT. 7, SUB-SECT. 2.—D.

5360 i. *Separate debts—Release from sequestration of joint estate.*]—The release from sequestration of a joint estate, operates as a release of the separate estate of each partner.—HASLINGDEN *v.* BATE (1857), 1 N. S. W. S. C. R. 41.—**AUS.**

a. *Debts incurred before insolvency.*]—Rehabilitation is a complete discharge of all debts incurred before insolvency.—QUIN BROTHERS *v.* VAN DER MERWE (1892), 9 S. C. 217.—**S. AF.**

b. ——.]—The debts of insolvent incurred prior to his insolvency are not discharged until he has obtained his rehabilitation.—CAPE OF GOOD HOPE BANK *v.* MELLÉ (1893), 10 S. C. 280; 3 C. T. R. 399.—**S. AF.**

c. ——.]—To an action on a note deft. pleaded that after contracting the debt, & before the suit, a petition for protection from process was duly presented & filed in the Insolvent Ct., & that thereupon, before action, a final order for protection & distribution was made by, etc., & that the debt was contracted before the date of filing such petition. Pltf. replied that the promise was made, & the cause of action accrued, after the petition was presented, concluding to the country:—*Held:* replication bad, & plea good.—MARCH *v.* ALEXANDER (1852), 10 U. C. R. 435.—**CAN.**

d. *Debts incurred pending allocation under previous insolvency.*]—Insolvent will be discharged from debts contracted pending an allocation made under a previous insolvency, creditors being allowed to apply afterwards, if they pleased, for a second allocation.—ANON. (1868), 2 I. L. T. Jo. 385.—**IR.**

f. *Claim for wages.*]—To an action by a commercial traveller for wages, defts. pleaded a deed of composition & discharge in insolvency. Pltf. replied that the claim was privileged:—*Held:* privileged claims were not within the class of debts mentioned in 1875 Act, s. 63, to which a discharge did not apply without the consent of the creditor.—FRYER *v.* SHIELDS (1881), 6 A. R. 57.—**CAN.**

5365 i. *Liability as contributory.*]—M., registered holder of shares in A. Co., became bkpt., & obtained his certificate in July, 1868. In Nov., 1870, A. Co. was ordered to be wound up, M.'s name being still upon the register of shareholders:—*Held:* M. was, notwithstanding his bkpcy. still liable upon the shares which he held, & his name was rightly placed upon the list of contributories.—*Re* AMICABLE INSURANCE CO., *Ex p.* MALONE (1871), I. R. 6 Eq. 272—**IR.**

5365 ii. —— *Liability for calls.*]—A shareholder in a limited co., the shares of which were only partly paid up, was sequestrated, but in 1885 was discharged, on payment of a composition "of all debts & obligations contracted by him, or for which he was liable at the date of the sequestration," & reinvested in his estate. The co. did not claim in the sequestration. In 1887 the shareholder, for the first time, requested the co. to remove his name from their register, on the ground that his estate had been sequestrated, but the co. refused to do so, & subsequently made a call upon him in respect of his shares. In a petition at his instance, to have his name removed from the register, on the ground that the amount unpaid on his shares was a debt for which he was liable at the date of the sequestration, the ct. refused the prayer.—TAYLOR *v.* UNION HERITABLE SECURITIES CO. (1889), 16 R. (Ct. of Sess.) 711.—**SCOT.**

5365 iii. —— ——.]—Defender was a shareholder in a co., which went into liquidation in 1896, but, the liquidation being stayed, resumed business in Feb. 1901. Defender had been sequestrated in Dec., 1894, but was discharged in Dec. 1895 under a deed of arrangement made under Scottish 1856 Act, by which he provided a certain sum to be divided among his creditors & was in return discharged of all debts or obligations contracted by him, or for which he was liable at the date of the sequestration. The co. had in 1894 & 1895 made calls upon defender in respect of his shares & had ranked in his sequestration for those whichwere unpaid & obtained dividend. Subsequent to his discharge, further calls were made, & the co. sued to enforce their payment. The winding up under the deed of arrangement was still incomplete at the date of the action:—*Held:* the winding up under the deed of arrangement was for the present purpose just a continuance of the sequestration, & as the co.'s claim was such as could have ranked in the sequestration proper, or the winding up under the deed of arrangement, it was excluded by the discharge granted under the deed of arrangement.—CRESWELL RANCHE & CATTLE CO., LTD. *v.* BALFOUR MELVILLE (1901), 9 S. L. T. 356.—**SCOT.**

5365 iv. —— —— *Order for winding up made prior to discharge.*]—An insolvent trader, who has obtained his discharge under Act XXVIII of 1865, s. 24, is not liable for calls made, after he has obtained his discharge, in respect of shares held by him in a joint stock co., when the order for the winding up of such co. has been made prior to the time of the insolvent trader obtaining his discharge.—*Re* MERCANTILE CREDIT & FINANCIAL ASSOCN., PUNNETT *v.* VINAYAK PANDURANG (1872), 9 Bom. 27.—**IND.**

5366. —— Winding up after discharge—Shares not taken by trustee.]—Where the assignee of a bkpt. shareholder does not take or dispose of his shares, & the co. is wound up after the discharge of bkpt., bkpt. is properly placed on the list of contributories.—*Re* GENERAL ESTATES CO., HASTIE'S CASE (1869), 4 Ch. App. 274; 38 L. J. Ch. 233; 20 L. T. 93; 17 W. R. 302, L. JJ.

Annotations :—**Consd.** Financial Corpn. *v.* Lawrence (1869), L. R. 4 C. P. 731; *Re* Bank of Hindustan, China & Japan, Mitchell & Aspinall's Case (1870), 39 L. J. Ch. 530, L. J. **Follid.** City Discount Co. *v.* Lloyd (1871), 24 L. T. 512; *Re* Land Credit Co. of Ireland, McEwen's Case (1871), 24 L. T. 252. **Refd.** *Re* Wilson (1869), 20 L. T. 119. **Mentd.** Cary *v.* Dawson (1869), L. R. 4 Q. B. 568; *Re* Muggeridge, Muggeridge *v.* Sharp, *Ex p.* Bank of London & National Provincial Insce. Assocn. (1870), L. R. 10 Eq. 443; Morgan *v.* Hardy (1887), 18 Q. B. D. 646, C. A.

5367. —— Bankruptcy of joint stock company—Liabilities incurred before bankruptcy of member.]—A joint stock co., completely registered, became bkpt. One of the members of the co. had previously been declared bkpt., & obtained his certificate. The master placed bkpt.'s name on the list of contributories, & calls were made by the master on him for contributions to discharge the liabilities of the co. incurred before his bkpcy. :—*Held :* his certificate was a bar to the liabilities to satisfy which the calls were made, & his name ought to be removed from the list of contributories.—CHAPPLE'S CASE (1852), 5 De G. & Sm. 400; 64 E. R. 1171.

Annotations :—**Consd.** *Re* Warwick & Worcester Ry. Co., Parbury's Case (1861), 3 De G. F. & J. 80, L. C. & L. JJ. **Refd.** *Re* General Estates Co., Hastie's Case (1869), 4 Ch. App. 274, L. JJ.

See, generally, COMPANIES.

5368. Costs—Action against bankrupt commenced after commission.]—If an action be commenced against bkpt. after the commission, for work done before the bkpcy., & bkpt. afterwards obtain his certificate, deft. is discharged from the costs as well as the debt.—WILLETT *v.* PRINGLE (1806), 2 Bos. & P. N. R. 190; 127 E. R. 596.

Annotation :—**Mentd.** Simpson *v.* Mirabita (1869), 10 B. & S. 77.

5369. —— Of non prosequitur—Writ of error brought after discharge—Original action continued & judgment obtained after bankruptcy.]—Pltf. sued deft. for a debt before the bkpcy. of deft., & went on with the suit after his bkpcy., & had judgment. Deft. obtained his certificate & afterwards brought a writ of error, which was abandoned, & costs of *non prosequitur* in error were awarded against him :—*Held :* deft. was discharged by his certificate from those costs.—SCOTT *v.* AMBROSE (1814), 3 M. & S. 326; 105 E. R. 634.

Annotations :—**Follid.** Dinsdale *v.* Eames (1820), 2 Brod. & Bing. 8. **Mentd.** *Re* Mostyn, *Ex p.* Griffith (1853), 1 W. R. 236, L. JJ.; *Re* Lloyd, *Ex p.* Lloyd (1864), 11 L. T. 251; Simpson *v.* Mirabita (1869), 10 B. & S. 77.

5370. —— Of action where original debt barred by discharge—Release from imprisonment.]—The costs of proceedings in an action upon contract, which for want of a previous verdict are not provable under the bkpcy., & where the original debt is barred by the order of discharge, are also barred.

Where the original debt is provable under the bkpcy., & barred by the order of discharge, & bkpt. is in custody for the costs of an action brought after the bkpcy. in respect of the original debt, he is entitled to his release immediately upon obtaining his order of discharge under 1861 Act, s. 162, unless good reason be shown to the contrary. The circumstance that bkpt. has applied for his release to a judge at chambers, who declined to interfere, is not *per se* "a good reason" for withholding from him his statutory right to be released from custody under the sect.—*Re* LLOYD, *Ex p.* LLOYD (1864), 11 L. T. 251.

See 1914 Act, s. 9.

5371. —— Of action brought before bankruptcy—Verdict & judgment after bankruptcy—Release from imprisonment.]—Where, in an action on a contract brought before bkpcy., a verdict & judgment are obtained after bkpcy., & deft. is arrested for debt & costs, a certificate of conformity entitles him to be discharged in respect of both, though the costs are not provable under the bkpcy.—SIMPSON *v.* MIRABITA (1869), L. R. 4 Q. B. 257; 10 B. & S. 77; 38 L. J. Q. B. 76; 20 L. T. 275; 17 W. R. 589.

Annotation :—**Mentd.** *Re* Nelson, *Ex p.* Dare & Dolphin, [1918] 1 K. B. 459, C. A.

5372. Damages & costs incurred in action for libel—Married woman—Release from custody.]—A married woman, who has been arrested in respect of damages, & costs in an action for libel, is entitled, upon obtaining an order of discharge under 1861 Act, s. 159, to an order for her release from the custody of the sheriff.—*Re* ABBOTT, *Ex p.* ABBOTT (1868), 16 W. R. 651.

See 1914 Act, s. 9.

Damages—In action for seduction.]—*See* Nos. 2395, 2396, *ante.*

—— In divorce suit.]—*See* Nos. 2953, 2954, 5102, 5105, 5306, 5307, *ante.*

Payments—Under affiliation order.]—*See* Nos. 2817-2819, *ante.*

SUB-SECT. 3.—WHO IS RELEASED.

See, now, 1914 Act, s. 28 (4).

5373. Co-obligors.]—The bkpcy. & certificate of one of several joint grantors of an annuity, & covenantors for payments, discharges bkpt., but not his co-defts.—BAXTER *v.* NICHOLS (1811), 4 Taunt. 90; 128 E. R. 262.

Annotations :—**Distd.** Browne *v.* Lee (1827), 6 B. & C. 689; *Re* Wyatt, *Ex p.* Thompson (1833), Mont. & B. 219, Ct. of R. **Consd.** *Re* Colnaghi, *Ex p.* Marks (1838), 3 Deac. 133. **Refd.** Arnott *v.* Holden (1852), 18 Q. B. 593. **Mentd.** White *v.* Corbett (1859), 1 E. & E. 692, Ex. Ch.

5374. —— Discharge under Insolvent Act—By which future estate not discharged.]—On an annuity bond, forfeited, when the grantor was discharged under Insolvent Act, which provided that future estate should not be discharged, the penalty, being less than the subsequent arrears, was allowed as the debt, not only in favour of the purchaser of an annuity, but also of a co-obligor, as surety, who had compounded with the purchaser, & obtained possession of the securities, by repaying the money advanced with the arrears, then due, being at that time less than the penalty.—BUTCHER *v.* CHURCHILL (1808), 14 Ves. 567; 33 E. R. 638.

Annotations :—**Mentd.** Reed *v.* Norris (1837), 2 My. & Cr. 361, L. C.; Bower *v.* Marris (1841), Cr. & Ph. 351.

5371 i. *Costs—Of judgment signed after bankruptcy but before discharge.*]—The costs of a judgment signed after bkpcy. & before discharge follow the principal debt, & are discharged or not by the certificate of discharge, according as to whether the principal debt is discharged or not.—GILBERT *v.* RAYMOND (1879), 19 N. B. R. 315.—**CAN.**

g. —— *Decreed personally against bankrupt—Though omitted from schedule.*]—A party against whom there was a decree for £709, on foot of an annuity, & against whom the costs were decreed personally, was afterwards discharged as an insolvent, & in his schedule he stated pltf. to be a creditor to the amount of £923, being the amount of a bond, which was a collateral security for the annuity, & said nothing of the costs. Deft. was arrested under an attachment for the costs :—*Held :* his discharge as an insolvent removed deft.'s liability for the costs.—WATSON *v.* SADLER, 4 Ir. L. Rec. 1st ser. 24, 33.—**IR.**

PART XVIII. SECT. 7, SUB-SECT. 3.

k. *Bail.*]—An *interim* order of protection under Insolvent Debtors' Act, does not prevent bail from surrendering their principal, nor does the final certificate discharge them from liability if the bail be previously fixed.—ROSS *v.* BROOKES, 3 C. L. J. O. S. 110; 7 C. P. 366.—**CAN.**

Sect. 7.—Effect of order: Sub-sects. 3, 4 & 5. *Sect.* 8: *Sub-sect.* 1.]

5375. —— Only person in whose favour granted.]—1869 Act, ss. 49, 50, apply to discharges under proceedings in liquidations under ss. 125, 126, & the rules & forms relative to them, & an order of discharge on all such cases releases only debtor, in whose favour it is given, & not his solvent co-debtor.—MEGRATH *v.* GRAY, GRAY *v.* MEGRATH (1874), L. R. 9 C. P. 216; 43 L. J. C. P. 63; 30 L. T. 16; 22 W. R. 409.

Annotations:—**Consd.** Ellis *v.* Wilmot (1874), L. R. 10 Exch. 10. **Refd.** Simpson *v.* Henning (1875), L. R. 10 Q. B. 406, Ex. Ch.; Thornton *v.* Maynard (1875), L. R. 10 C. P. 695; Société Générale de Paris *v.* Geen (1883), 8 App. Cas. 606, H. L. **Mentd.** R. *v.* Creese (1874), 43 L. J. M. C. 51, C. C. R.; *Re* Jacobs, *Ex p.* Jacobs (1875), 10 Ch. App. 211, L. JJ.

5376. Surety for bankrupt—Bankrupt discharged by creditor.]—A creditor, pending an action on a guarantee against a surety who contested the question of his liability, proved the debt under a commission of bkpcy. against the principal debtor, &, by his signature, enabled bkpt. to obtain his certificate, though the surety had given him notice not to sign it:—*Held:* the surety was not thereby discharged from his liability on the guarantee.—BROWNE *v.* CARR (1827), 2 Russ. 600; 38 E. R. 461.

5377. —— —— No reservation of rights against surety.]—When a joint & several bond is executed by one of the obligors as surety for his co-obligor, who afterwards files a petition for liquidation under 1869 Act, & the creditors, without the assent of the surety, duly resolve under s. 125 that debtor's discharge be granted, the surety is not discharged from liability, although the obligee of the bond votes in favour of the resolution, & although there is no reservation of rights against sureties.—ELLIS *v.* WILMOT (1874), L. R. 10 Exch. 10; 44 L. J. Ex. 10; 31 L. T. 574; 23 W. R. 214.

Annotations:—**Consd.** Simpson *v.* Henning (1875), L. R. 10 Q. B. 406, Ex. Ch. **Refd.** Beckett *v.* Addyman (1882), 9 Q. B. D. 783, C. A.

See, further, GUARANTEE.

SUB-SECT. 4.—WHAT PROPERTY IS RELEASED—AFTER-ACQUIRED PROPERTY.

See Part XXIII., Sect. 7, sub-sect. 3, *post.*

SUB-SECT. 5.—OTHER CASES.

See 1914 Act, s. 28.

On pending suit.]—*See* Part XXI., *post.*

5378. On attachment against executor.]—A certificate discharges an attachment against an exor. for non-payment of a sum of money.—WALL *v.* ATKINSON (1815), Coop. G. 198; 2 Rose, 196; 35 E. R. 529.

Annotations:—**Refd.** *Re* Fenwick, *Ex p.* Brown (1849), 13 L. T. O. S. 468. **Mentd.** *Re* Helsby (1832), 1 L. J. Bcy. 5, Ct. of R.

5379. On creditors' right of action—Where either action of assumpsit or in tort maintainable.]—If pltf. in equity might proceed at law for that which he demands by his bill, either by an action of *assumpsit* or by an action for the tort, the bill may be demurred to if it be in the nature of an action for the tort; but if it be in the nature of an action of *assumpsit*, deft. may plead his bkpcy. & certificate.—DE TASTET *v.* WALKER (1818), Buck, 153.

5380. On distress by landlord—Goods of stranger.]—A landlord distrained the goods of A., on his tenant's premises, for rent in arrear. The tenant afterwards became bkpt. & obtained his certificate. A. having brought an action of replevin:—*Held:* bkpt.'s certificate did not extinguish the debt, & the landlord had a right to avow for a return of the distress.—NEWTON *v.* SCOTT (1842), 10 M. & W. 471; 12 L. J. Ex. 488; 152 E. R. 556, Ex. Ch.

Annotations:—**Refd.** Toppin *v.* Field (1843), 7 Jur. 257; Phillips *v.* Shervill (1845), 6 Q. B. 944.

See 1914 Act, s. 35.

5381. ——.]—It is no objection to a distress for rent that the tenant, after it became due, petitioned the Insolvent Debtors' Ct. under Judgments Act, 1838 (c. 110), inserted the rent in his schedule as a debt, was opposed in respect of it by the landlord, & obtained his discharge.—PHILLIPS *v.* SHERVILL (1845), 6 Q. B. 944; 14 L. J. Q. B. 144; 4 L. T. O. S. 412; 9 Jur. 179; 115 E. R. 356.

Annotation:—**Refd.** Watson *v.* Humphrey (1855), 10 Exch. 781.

See 1914 Act, s. 35.

5382. On power of county court to commit—Under County Courts Act, 1846 (c. 95), s. 99.]—The power of commitment by a county ct. judge under the above sect. is taken away by the discharge of deft. under the Insolvent Ct.

C. sued R. in the county ct., & judgment was obtained against R. Subsequently an order for his discharge was granted by the Insolvent Ct.:—*Held:* the judgment debt against R. being inserted in his schedule, the county ct. judge had no power to commit R.—COOKMAN *v.* ROSE (1857), Saund. & M. 199; 29 L. T. O. S. 123; 3 Jur. N. S. 866; 5 W. R. 576.

Annotation:—**Consd.** *Re* Wood (1859), 32 L. T. O. S. 262.

See 1914 Act, ss. 28, 30 (3).

PART XVIII. SECT. 7, SUB-SECT. 5.

l. *On right to defeat voluntary settlement.*]—A. having made a voluntary settlement of land under Transfer of Land Statute (No. 301) became insolvent, & after a composition with his creditors under Insolvency Statute, 1871, s. 129, his estate was revested in him under s. 131. Being indebted to pltf., & requiring from him a further sum, he executed a deed reciting the voluntary settlement, & falsely reciting an agreement with pltf. to sell to him the land for the amount of the debt & further advance, & executed also a transfer to him, which the Office of Titles refused to register. On bill filed by pltf.:—*Held:* (1) the effect of ss. 129 & 131, was to revest in A. the same right to defeat the settlement as he would have had if no insolvency had occurred; (2) notwithstanding the false recital, there being a clear debt due to pltf., the settlement should be defeated to the extent of a mtge. to him for that amount.—MOSS *v.* WILLIAMSON (1877), 3 V. L. R. 221.—**AUS.**

m. *On bail-bond—Debtor not making disclosure.*]—An order made for the discharge of a debtor, who had not made a disclosure of the actual state of his affairs under C. S. c. 38, s. 7, does not release the bail-bond, & an action may be brought thereon.—CLARKE *v.* DEACON (1887), 28 N. B. R. 263.—**CAN.**

n. *On judgment on bond—Executed prior to insolvency—Payable on contingency happening after discharge.*]—A judgment obtained against a person upon a bond executed previously to his insolvency, but payable upon a contingency which did not happen until after his discharge, under 53 Geo. 3, c. 138, set aside, & insolvent, having been arrested thereunder, was discharged.—TURNER *v.* MAFFETT, 1 Ir. L. Rec. N. S. 112.—**IR.**

o. *On judgment obtained on plea of confession.*]—A judgment obtained on a plea of confession given by bkpt. after commission, & before certificate for a debt incurred before the act of bkpcy. committed:—*Held:* discharged by the certificate.—CROSTHWAITE *v.* KERRIGAN (1827), 1 Hud. & B. 120.—**IR.**

p. *On warrant of attorney to confess judgment.*]—*Held:* a discharge under 1 & 2 Geo. 4, c. 59, operated as a revocation of a warrant of attorney to confess judgment.—MITCHELL *v.* READE, 3 Ir. L. Rec. N. S. 289.—**IR.**

q. *On proceedings by outlawry—Judgment entered before insolvency.*]—The ct. will not set aside, as being irregular, proceedings by outlawry & *custodiam* against a discharged insolvent, on a judgment entered before the insolvency.—TRESDEN *v.* O'NEIL, 3 Ir. L. Rec. N. S. 123.—**IR.**

5380 i. *On distress for municipal rates.*—The ct. will not enjoin a distress for municipal rates where the distress is made after the certificate, & there is no other available remedy.—*Re* FRY (1893), 27 I. L. T. Jo. 658.—**IR.**

5382 i. *On power to commit—Division Courts Acts.*]—A discharge under Insolvent Act does not prevent a party from being committed upon a judgment summons under Division Cts. Acts.—*Re* MACKAY *v.* GOODSON (1868), 27 U. C. R. 263.—**CAN.**

5383. On action on judgment—Original debt barred.]—On Mar. 7 creditors commenced actions on three bills. On the 8th bkpt. obtained his certificate. On Mar. 25 & Apr. 4 the creditors obtained judgments in the actions, & on Apr. 25 brought an action on the judgments:—*Held:* the certificate being a bar to the original debts, was equally a bar to the action on the judgments.—NAYLOR *v.* MORTIMORE (1864), 17 C. B. N. S. 207; 5 New Rep. 186; 33 L. J. C. P. 273; 10 L. T. 903; 10 Jur. N. S. 1001; 13 W. R. 47; 144 E. R. 83.

On executions.]—*See* Part XX., Sect. 10, *post.*

5384. On sequestration of profits of benefice.]—The fact that bkpt., a beneficed clergyman, has obtained an order of discharge does not prevent the trustee in the bkpcy. from issuing a sequestration of the profits of the benefice which bkpt. held at the time of the bkpcy.—*Re* MEREDITH, *Ex p.* CHICK (1879), 11 Ch. D. 731; 41 L. T. 246, C. A.

Annotation:—**Consd.** Lawrence *v.* Adams (1896), 75 L. T. 410.

See 1914 Act, s. 50.

5385. ——.]—The incumbent of a benefice having been adjudged bkpt., a sequestration of the profits of the benefice was granted by the bishop of the diocese, who appointed a sequestrator of the benefice. Subsequently an order was made in the bkpcy. discharging bkpt., & he applied by petition to the Consist. Ct. of the diocese praying the ct. to relax the sequestration, & to direct the discharge of the sequestrator. The trustee in the bkpcy. opposed the application, & objected that the debts provable in the bkpcy. still remained in part unsatisfied:—*Held:* the relaxation of the sequestration & the discharge of the sequestrator must be refused, as the Ecclesiastical Ct. had no jurisdiction to determine the question whether the discharge of bkpt. acted as a satisfaction of the sequestration.—*Re* LAWRENCE, [1896] P. 244.

5386. ——.]—On the application of the trustee in bkpcy. of a beneficed clergyman of the Church of England the bishop of the diocese issued a sequestration of the income of the living, by virtue of which a portion was paid to debtor while performing the duties of the benefice under order of the bishop, & the residue, after paying thereout the costs & expenses of the sequestration, was handed over to his trustee in bkpcy. Subsequently debtor obtained an order of discharge, the whole of his property available for dividend, other than the money obtained by means of sequestration, having been realised & distributed, but the sequestration was not relaxed by the bishop, the trustee in bkpcy. having refused to take any steps to obtain the relaxation, on the ground that the bkpcy. had not been closed, that a dividend of only 8*s.* 9*d.* in the pound had been paid, & that the sequestration ought not to be relaxed until the whole of the debts were satisfied. In an action by debtor against the trustee in bkpcy. for an injunction to restrain him from receiving the residue of the income of the benefice, a declaration that debtor was entitled after his discharge to receive the income, & an order on the trustee in bkpcy. to take steps to obtain the relaxation of the sequestration:—*Held:* the order of discharge did not entitled debtor to the income of his benefice, & the action must be dismissed.—LAWRENCE *v.* ADAMS (1896), 75 L. T. 410.

See 1914 Act, s. 50.

5387. On wife's right to maintenance under separation deed—Right of wife to take proceedings for restitution.]—The annual sum payable to a wife under a separation deed being provable in the husband's bkpcy., but no action being maintainable against the husband, after he has obtained his discharge, under his covenant to pay the allowance specified in the deed, the deed is no bar to proceedings for restitution of conjugal rights subsequently instituted by the wife.

The very foundation of the deed is the obligation to maintain the wife & child, & the essence of the agreement is that the contributions shall be kept up (EVANS, P.).—MCQUIBAN *v.* MCQUIBAN, [1913] P. 208; 83 L. J. P. 19; 109 L. T. 412; 29 T. L. R. 766.

SECT. 8.—PROMISES FOR PAYMENT OF DEBTS BARRED BY CERTIFICATE.

SUB-SECT. 1.—SINCE BANKRUPTCY LAW CONSOLIDATION ACT, 1849 (c. 106).

5388. What amounts to.]—W., a bkpt., proposed to set aside £200 a year for the payment of his debts, & upon condition of his so doing his order of discharge was granted. On his again becoming bkpt.:—*Held:* the condition annexed to the order of discharge was not a contract or promise to pay provable debts under 1861 Act, s. 154, & was not affected by the subsequent order of discharge.—*Re* WILSON (1869), 20 L. T. 119; 17 W. R. 493.

5389. Will not support action—Nudum pactum.]—A promise to pay a debt barred by bkpcy. is a mere *nudum pactum*, notwithstanding 1869 Act.—JONES *v.* PHELPS (1871), 20 W. R. 92.

Annotations:—**Follid.** *Re* Russell, *Ex p.* Russell (1875), 32 L. T. 4, L. JJ.; Heather *v.* Webb (1876), 2 C. P. D. 1. **Consd.** *Re* Andrews, *Ex p.* Barrow (1881), 18 Ch. D. 464, C. A. **Follid.** *Re* Bonacina, Le Brasseur *v.* Bonacina, [1912] 2 Ch. 68. **Mentd.** Jakeman *v.* Cook (1878), 4 Ex. D. 26.

5390. —— ——.]—A promise by debtor to pay a debt barred by a discharge under 1869 Act is a *nudum pactum*, & its breach does not afford a cause of action.—HEATHER & SON *v.* WEBB (1876), 2 C. P. D. 1; 46 L. J. Q. B. 89; 25 W. R. 253.

Annotations:—**Distd.** Jakeman *v.* Cook (1878), 4 Ex. D. 26. **Consd.** *Re* Andrews, *Ex p.* Barrow (1881), 18 Ch. D. 464, C. A. **Follid.** *Re* Bonacina, Le Brasseur *v.* Bonacina, [1912] 2 Ch. 68. **Distd.** *Re* Bonacina, Le Brasseur *v.* Bonacina, [1912] 2 Ch. 394, C. A.

5391. —— **On note given to creditor.**]—Debtor & his creditors entered into a deed of composition while 1861 Act was in operation. The deed was

r. *On right to impugn bankruptcy proceedings.*]—The obtaining of his discharge by bkpt. will not place him in a worse position, should he desire to impugn the allowance of proofs, or any other proceedings under the order of adjudication.—*Re* ELL (1893), 11 N. Z. L. R. 789.—**N.Z.**

s. *On rights of bank in liquidation—Consent of liquidators to discharge.*]—Where a bank in liquidation is creditor upon an insolvent estate, the liquidators may consent to the rehabilitation of insolvent without thereby prejudicing the bank's rights.—*Ex p.* PILGRAM (1892), 9 S. C. 441.—**S. AF.**

t. *On land conveyed to third party by insolvent.*]—Land was granted to R. on Dec. 31, 1861. On Oct. 1, 1863, a certificate of conformity was granted to him, on Jan. 29, 1875, R. executed a deed purporting to convey the land by lease & release to A. in fee. On Aug. 31, 1877, R.'s estate was relieved from sequestration:—*Held:* the conveyance did not pass the estate which became subsequently revested in R. to A.—JOHNSTON *v.* RILEY (1878), 2 N. S. W. S. C. R. N. S. 1.—**AUS.**

w. —— *Covenant by insolvent to obtain revesting order—Notice to insolvent of application for order.*]—All the creditors of insolvent having been paid 20*s.* in the pound, N. applied for an order revesting insolvent's estate in N. N. had purchased such estate, subject to the payment of the scheduled debts, & the deed of assignment contained a covenant by insolvent to procure a revesting order:—*Held:* an order revesting insolvent's estate in his assignee under a deed would not be made without notice to insolvent, although he covenanted in that deed to procure such revesting order.—*Re* SLEATOR (1869), 3 I. R. Eq. 240, 663.—**IR.**

Sect. 8.—Promises for payment of debts barred by certificate: Sub-sects. 1 & 2, A. & B.]

to have the effect on his debts as if debtor had been discharged in bkpcy. After the repeal of the Act by Bkpcy. Repeal Act, 1869 (c. 83), s. 20, debtor gave a bill of exchange to one of his creditors, who was barred by the composition deed, for his old debt:—*Held:* the operation of 1861 Act, s. 164, upon the transaction was preserved by the saving clause in s. 20, & the bill was void.—RIMINI *v.* VAN PRAAGH (1872), L. R. 8 Q. B. 1; 42 L. J. Q. B. 1; 27 L. T. 540; 21 W. R. 107.

5392. Will not revive old debt.]—In 1859 W. became insolvent & obtained his discharge. Deft. was at the time a scheduled creditor for £200. In 1865 W. gave to deft. a bill of sale on his furniture & effects to cover the prior debt of £200 & further advances with interest at 5 per cent. Sundry payments were made by W., who was charged 15 per cent. interest, & the amount due, apart from the £200, was reduced to £38. In Feb., 1867, W. gave deft. a note of hand for £100. Deft. then seized under the bill of sale & sold the furniture & effects for £121, paying thereout £40 due to the landlord. W. became bkpt. in Oct., 1867, & pltf. was the creditors' assignee:—*Held:* the £200, due prior to the insolvency could not be revived, & the £121 realised by the sale must be refunded.—PEAKMAN *v.* HARRISON (1872), L. R. 14 Eq. 484.

5393. Invalid—Though made under seal—Or by bond.]—1849 Act, s. 204, applies, not only to a contract, promise or agreement requiring a consideration to support the promise, but to contracts under seal, & extends to bonds.—KIDSON *v.* TURNER (1858), 3 H. & N. 581; 27 L. J. Ex. 492; 31 L. T. O. S. 204; 6 W. R. 678; 157 E. R. 600.

Annotation:—**Distd.** *Re* Bonacina, Le Brasseur *v.* Bonacina, [1912] 2 Ch. 394, C. A.

5394. —— Except where new consideration.]—Deft. being indebted to pltf. for goods supplied, filed a petition for the liquidation of his affairs by arrangement. Pltf. proved against his estate as one of his creditors, but received no dividend, & deft. subsequently got his discharge in the liquidation proceedings. Deft. afterwards promised pltf. to pay him the old debt, if he would continue to supply him with goods on credit, & pltf. supplied the goods:—*Held:* such a promise was binding, & pltf. could successfully maintain an action to recover the amount of the old debt, notwithstanding the discharge in the liquidation proceedings.—JAKEMAN *v.* COOK (1878), 4 Ex. D. 26; 48 L. J. Q. B. 165; 43 J. P. 255; 27 W. R. 171, D. C.

Annotations:—**Distd.** *Re* Andrews, *Ex p.* Barrow (1881), 18 Ch. D. 464, C. A.; *Re* Bonacina, Le Brasseur *v.* Bonacina, [1912] 2 Ch. 68. **Folld.** *Re* Bonacina, Le Brasseur *v.* Bonacina, [1912] 2 Ch. 394, C. A.; Wild *v.* Tucker, [1914] 3 K. B. 36.

5395. —— ——.]—A contract by an undischarged bkpt., in consideration of a small loan, to pay in full a debt of a large amount due from him at the commencement of & provable in his bkpcy., is not void as being contrary to public policy or the policy of Bkpcy. Acts, but is a valid & enforceable contract.—WILD *v.* TUCKER, [1914] 3 K. B. 36; 83 L. J. K. B. 1410; 111 L. T. 250; 30 T. L. R. 507; 21 Mans. 181.

5396. —— Except where no new consideration necessary under foreign law.]—An Italian subject trading in England became bkpt. in 1897, & obtained his discharge in 1901. At the date of his bkpcy. he was indebted to a creditor, also an Italian subject, but that debt was not disclosed in the bkpcy. proceedings, of which the creditor was unaware. In 1906 debtor signed a document (*privata scrittura*) in Italian form, whereby he acknowledged to the creditor the amount of the debt and undertook to pay it off within five years with interest. In Mar., 1908, debtor died, & in an action to administer his estate in England the creditor claimed to prove for the amount of the debt. According to Italian law no consideration was necessary to support a promise to pay the old debt, there being a moral obliation to pay which, by the execution of the *privata scrittura*, was converted into a valid legal obligation:—*Held:* the *privata scrittura* constituted a new & enforceable contract entered into after the discharge, & the claim was not barred by 1883 Act, s. 30 (3).—*Re* BONACINA, LE BRASSEUR *v.* BONACINA, [1912] 2 Ch. 394; 81 L. J. Ch. 674; 107 L. T. 498; 28 T. L. R. 508; 56 Sol. Jo. 667; 19 Mans. 224, C. A.

5397. Time at which made—Discharge suspended as to particular debt—Warrant of attorney given to obtain release from custody.]—Insolvent, who was adjudged to be discharged forthwith as to all his debts except his debt to A., & as to that debt, after he should have remained in custody twenty months, in order to obtain A.'s consent to his release from custody during the period gave A. a warrant of attorney to secure to A. the payment of his debt by instalments:—*Held:* the warrant of attorney although given before the time that insolvent was entitled to his discharge, was invalid & might be set aside before the twenty months had expired as Judgments Act, 1838 (c. 110), s. 91, avoided any new security, given after adjudication, to secure to a creditor payment of his original debt.—HUMPHRIES *v.* SMITH (1853), 22 L. J. Q. B. 121.

5398. —— Before composition completed.]—It is only after a composition has been fully worked out & paid, that debtor is in the position of a discharged bkpt., so as to enable him for a new consideration to enter into a binding contract to pay in full the debt of one of the creditors bound by the resolutions to accept a composition. Such an agreement entered into before completion of the composition is in contravention of good faith & the spirit of the bkpcy. laws, & void.—*Re* ANDREWS, *Ex p.* BARROW (1881), 18 Ch. D. 464; 50 L. J. Ch. 821; 45 L. T. 197, C. A.

Annotations:—**Consd.** Wild *v.* Tucker, [1914] 3 K. B. 36. **Mentd.** *Re* Bonacina, Le Brasseur *v.* Bonacina, [1912] 2 Ch. 394, C. A.

See, further, Part XXIII., *post.*

PART XVIII. SECT. 8, SUB-SECT. 1.

5394 i. *Invalid—Except where new consideration.*]—In 1869 deft. effected a policy of insurance on his life, as a security for a debt of £700 due to pltf. In 1870 deft. was adjudged a bkpt. in England, a composition on his debts, including the £700, being accepted & approved by the ct. In 1872 deft. agreed to effect a new policy of insurance with another co. as a security to pltf. for the £700 & £70 paid by pltf. to keep the former policy alive, & undertook & guaranteed to pay pltf. the amount of any premiums to be paid by him on the new policy, with interest. The new policy was effected, & pltf. paid certain premiums thereon to keep same alive. In an action to recover the amount thereon as money paid at deft.'s request, deft. pleaded his bkpcy., & that there was no consideration for the undertaking & guarantee of 1872:—*Held:* pltf. was entitled to recover, there having been a wholly new contract entered into subsequent to the bkpcy., for which reason English 1869 Act, s. 49, did not apply.—JOHNSTONE *v.* O'DONOGHUE (1881), 15 I. L. T. 52.—IR.

SUB-SECT. 2.—BEFORE BANKRUPTCY LAW CONSOLIDATION ACT, 1849 (c. 106).

A. Effect of Promise.

5399. Binding—Enforceable by action.]—Bkpt. after a commission of bkpcy. sued out, may in consideration of a debt due before the bkpcy., for which the creditor agrees to accept no dividend or benefit under the commission, make such a creditor a satisfaction in part or for the whole of his debt, by a new undertaking or agreement, & *assumpsit* will lie upon such new promise or undertaking.—TRUEMAN *v.* FENTON (1777), 2 Cowp. 544 ; 98 E. R. 1232.

Annotations :—**Distd.** Cockshott *v.* Bennett (1788), 2 Term Rep. 763. **Refd.** Rose *v.* Main (1834), 1 Bing. N. C. 357. **Mentd.** Burke *v.* Jones (1813), 2 Ves. & B. 275 ; Scales *v.* Jacob (1826), 11 Moore, C. P. 553 ; Jones *v.* Scott (1830), 1 Russ. & M. 255 ; Williams *v.* Moor (1843), 12 L. J. Ex. 253 ; *Re* Lyon, *Ex p.* Robinson (1844), 2 L. T. O. S. 440 ; *Re* Emmings (1849), 14 L. T. O. S. 208.

5400. Creates new debt—Recoverable in action.]—Bkpt. may bind himself by a new promise to pay a debt, which would otherwise be barred by a certificate under a former commission, & by the new promise it becomes a new debt, & it can be recovered in an action.—ROBERTS *v.* MORGAN (1799), 2 Esp. 736.

Annotations :—**Refd.** Rose *v.* Main (1834), 1 Scott, 127 ; Earle *v.* Oliver (1848), 2 Exch. 71.

5401. Revives creditor's right to sue—Bankrupt liable to arrest.]—Bkpt., who has obtained his certificate, if he afterwards promises to pay a creditor a debt due from him before his bkpcy., revives the creditor's right to sue him, & he may be arrested on such promise.—DREW *v.* JEFFERIES (1786), 8 Price, 531 ; 146 E. R. 1286.

Annotation :—**Refd.** Blackbourn *v.* Ogle (1820), 8 Price, 526.

5402. —— Bankrupt liable to be held to bail.]—If debtor, who has become bkpt. & obtained his certificate, makes a promise afterwards to a creditor to pay him at a future day the debt which was due to him before the bkpcy., he not only revives the debt, & thereby renders himself liable to be sued for its recovery, but he may be held to bail in an action against him, founded on the demand so revived by the subsequent promise, because as it becomes a good debt, recoverable at law, it must have all the incidents of a legal debt, & all the ordinary modes of proceeding to recover it are open to the creditor.—BLACKBOURN *v.* OGLE (1820), 8 Price, 526 ; 146 E. R. 1284.

Annotation :—**Refd.** Walker *v.* Rushbury (1821), 9 Price 16.

5403. Notes indorsed for purpose—Liability of bankrupt thereon.]—Bkpt. having promised, after his bkpcy., & before certificate, to pay a debt due before the bkpcy., indorsed to pltf. two promissory notes for that purpose :—*Held :* his certificate was no bar to an action on the notes.—BRIX *v.* BRAHAM (1823), 1 Bing. 281 ; 8 Moore, C. P. 261 ; 1 L. J. O. S. C. P. 103 ; 130 E. R. 114.

Annotation :—**Distd.** Rose *v.* Main (1834), 1 Bing. N. C. 357.

5404. Agreement to deliver goods in satisfaction—Whether debt revived.]—A promise by bkpt. to deliver goods in satisfaction of a debt due by him before his bkpcy. is not such a promise to pay the debt, as will revive it after certificate.—TATTLE *v.* GRIMWOOD (1826), 3 Bing. 493 ; 11 Moore, C. P. 432 ; 4 L. J. O. S. C. P. 174 ; 130 E. R. 603.

Annotation :—**Mentd.** Mount *v.* Taylor (1868), L. R. 3 C. P. 645.

5405. Agreement to pay personally—Whether certificate bar to action.]—Bkpt., three days before his certificate was granted, personally promised to pay a debt due before his bkpcy. by instalments at later dates :—*Held :* the certificate was no bar to an action against him for such debt.—KIRKPATRICK *v.* TATTERSALL (1845), 13 M. & W. 766 ; 14 L. J. Ex. 209 ; 4 L. T. O. S. 398 ; 9 Jur. 214 ; 153 E. R. 321.

Annotations :—**Consd.** Earle *v.* Oliver (1848), 2 Exch. 71. **Mentd.** Aris *v.* Orchard (1860), 30 L. J. Ex. 21.

See, further, cases in Part XXIII., *post.*

B. Sufficiency of Promise.

5406. Must be in precise & positive terms.]—To bind bkpt. by a new promise to pay, subsequent to his bkpcy., it must be a precise & positive promise to pltf., & not given in general terms that he would pay everybody 20*s.* in the pound.—LYNBUY *v.* WEIGHTMAN (1805), 5 Esp. 198, N. P.

Annotation :—**Refd.** Kirkpatrick *v.* Tattersall (1845), 14 L. J. Ex. 209.

5407. ——.]—Bkpt. having obtained his certificate is not liable upon a promise to pay a former debt, unless it be express, distinct & unequivocal.—FLEMING *v.* HAYNE (1816), 1 Stark. 370, N. P.

Annotation :—**Refd.** Kirkpatrick *v.* Tattersall (1845), 14 L. J. Ex. 209.

5408. *S. P.* HAWES *v.* MARSH, No. 5411, *post.*

5409. ——.]—A subsequent promise to pay a debt, from which the party has been discharged by operation of the bkpt. & insolvent laws, must be explicit & distinct, or it will not be sufficient to support an action of *assumpsit* against a debtor so discharged by act of law. A verdict for pltf., obtained upon a constructive promise, or a promise by implication, was set aside & entered for deft., although the judge, who tried the cause, had left the question of fact of promise or no promise to pay to the jury.—BROOK *v.* WOOD (1824), 13 Price, 667 ; 147 E. R. 1117.

5410. Sufficiency of evidence—Letters from bankrupt.]—A., having become bkpt. in Aug., 1819, wrote, in Nov., 1826, a letter to B., in which he spoke of a debt of £98 15*s.* due from him to B., & wrote : " By the end of next month I shall have my banker's account here, & I shall remit the sum due to you in a draft on them." In *indebitatus assumpsit* by B. against A. for the sums mentioned :—*Held :* the letter contained a sufficient promise to answer a plea of bkpcy., & to render the plea of bkpcy. applicable to the case, it must be shown that the debt existed prior to the bkpcy.—LANG *v.* MACKENZIE (1830), 4 C. & P. 463, N. P.

5411. —— ——.]—In an action for not replacing stock :—*Held :* a letter written by bkpt., in which he said, " you may rely on the dividends being paid regularly until liquidated," was not sufficient evidence of a promise to replace the stock, &, as a lease had been deposited with pltf., fully adequate to pay the amount of the dividends, it was not even a sufficiently clear promise to pay the dividends, so as to make bkpt. liable to an action.—HAWES *v.* MARSH (1831), 1 L. J. K. B. 41.

5412. —— ——.]—On a plea of no consideration to an action by the drawer against the acceptor of a bill of exchange, the bill bearing date immediately after deft.'s bkpcy. & certificate, pltf. produced a letter from deft. to himself, expressing deft.'s gratitude to pltf., who was an attorney, for procuring deft.'s certificate & helping him through

PART XVIII. SECT. 8, SUB-SECT. 2. —A.

a. *What amounts to new obligation.*]—A., having passed his bond & warrant to confess, etc. to trustees, & having been discharged as an insolvent under 3 Geo. 4, c. 126, returned them in his schedule for the amount. Judgment was afterwards entered on the warrant by them, & assigned to new trustees on the old trusts, by a deed to which A. was a party :—*Held :* this was in the nature of a new obligation, & the judgment was an available security.—BALL *v.* BALL & CURTIS (1847), 11 I. Eq. R. 370.—IR.

Sect. 8.—*Promises for payment of debts barred by certificate: Sub-sects.* 2, *B. & C. &* 3. *Sects.* 9 *&* 10.]

his bkpcy.:—*Semble:* it was sufficient evidence of a consideration to raise a new promise for payment of debts due previous to the bkpcy.—YOUNGE *v.* FISHER (1843), 7 Jur. 69.

5413. —— ——.]—On an issue whether deft., a certificated bkpt., had given a written promise signed by him after his bkpcy., so as, under 6 Geo. 4, c. 16, s. 131, to revive a claim barred by the certificate, the following letter was produced, written by him:—"Mr. S. begs to inform" pltfs. "that he will take an early opportunity of settling their account, but Mr. S. objects to give his bill. Mr. S. regrets that he has been prevented from answering" pltfs.' "letter before." Evidence of the amount due was given:—*Held:* the letter was a sufficient promise, notice having been given to deft. to produce the letter of pltfs. referred to, which had not been done, though two other letters, written by deft. about the same time, were produced by pltfs., in one of which deft., promised to discharge pltfs.' account as soon as he could, & in the other said he would give a promissory note, & it did not appear in what order of time the three were written.—LOBB & KNIGHT *v.* STANLEY (1844), 5 Q. B. 574; 1 Dav. & Mer. 635; 13 L. J. Q. B. 117; 2 L. T. O. S. 366; 8 Jur. 462; 114 E. R. 1366.

Annotations:—**Consd.** Holmes *v.* Mackrell (1858), 3 C. B. N. S. 789. **Mentd.** Bennett *v.* Brumfitt (1867), L. R. 3 C. P. 28; Caton *v.* Caton (1867), L. R. 2 H. L. 127, H. L.

5414. Time at which made—Immaterial whether before or after certificate.]—There is no difference between a promise to pay a debt due before bkpcy. by instalments at later dates made before & after the certificate; provided it appear that bkpt. promised to pay personally & not out of his estate, & to pay notwithstanding the certificate.—KIRKPATRICK *v.* TATTERSALL (1845), 13 M. & W. 766; 14 L. J. Ex. 209; 4 L. T. O. S. 398; 9 Jur. 214; 153 E. R. 321.

Annotations:—**Consd.** Earle *v.* Oliver (1848), 2 Exch. 71. **Mentd.** Aris *v.* Orchard (1860) 30 L. J. Ex. 21.

5415. —— Before certificate.]—Bkpt. promised to repay pltf. a debt, which he had contracted with a banking co. as surety for bkpt. before the bkpcy.:—*Held:* it was no objection to the promise that it was made before the certificate.—EARLE *v.* OLIVER (1848), 2 Exch. 71; 10 L. T. O. S. 463; 154 E. R. 410.

Annotation:—**Mentd.** Flight *v.* Reed (1863), 1 H. & C. 703.

5416. Sufficiency of consideration.]—A declaration *in assumpsit* set forth a guarantee, whereby, in consideration that a banking co-partnership would make advances to deft., pltf. undertook to guarantee the copartnership the due payment of the sums advanced not exceeding £250. Averment, that the copartnership made advances to deft., who afterwards became bkpt., & that, at the time of his bkpcy., there was due to the co., for such advances a sum exceeding £250, that, after the issuing of the fiat, deft., in consideration of the premises, promised pltf. that if, by virtue of the guarantee, pltf. should be called upon to pay the copartnership the sum of £250, deft. would repay same to pltf. when it should be in his power, notwithstanding he should previously obtain his certificate, & also interest on the sum, & that pltf. being called upon under the guarantee, paid to the copartnership £250, of which deft. had notice. Breach, non-payment:—*Held:* the mere liability to repay pltf. was an equally good consideration to support the promise as an existing debt, & the promise to pay interest was supported by the same consideration as the original promise.—EARLE *v.* OLIVER (1848), 2 Exch. 71; 10 L. T. O. S. 463; 154 E. R. 410.

Annotation:—**Consd.** Flight *v.* Reed (1863), 1 H. & C. 703.

5417. Conditional promise—What must be proved.]—If bkpt., after obtaining his certificate, promise to pay a prior debt, when he is able, in a general *indebitatus assumpsit* brought on that promise, pltf. must prove the ability of deft. to pay.—BESFORD *v.* SAUNDERS (1792), 2 Hy. Bl. 116; 126 E. R. 460.

Annotations:—**Refd.** Scales *v.* Jacob (1826), 3 Bing. 638; Hawes *v.* Marsh (1831), 1 L. J. K. B. 41.

5418. —— ——.]—If bkpt. only promises conditionally, pltf. must prove that the condition was performed.—PENN *v.* BENNET (1815), 4 Camp. 205, N. P.

5419. —— Validity of.]—A conditional promise to pay when bkpt. was able:—*Held:* good.—EARLE *v.* OLIVER (1848), 2 Exch. 71; 10 L. T. O. S. 463; 154 E. R. 410.

Annotation:—**Mentd.** Flight *v.* Reed (1863), 1 H. & C. 703.

5420. Effect of 1849 Act—On new note for balance of note given before Act.]—Before 1849 Act came into operation, a certificated bkpt. gave to a creditor a promissory note for the amount of a debt incurred before the bkpcy. After the passing of the Act, bkpt., having paid off part of the money due on the promissory note gave a fresh promissory note for the balance, in substitution for the original note:—*Held:* the validity of the new note was not affected by the Act, the note in substitution for which it was given having been given at a time when it was lawful for bkpt. to renew a debt contracted prior to his bkpcy.—*Re* PRYTERCH, *Ex p.* EDWARDS (1865), 35 L. J. Bcy. 11; 13 L. T. 338; 11 Jur. N. S. 896; 14 W. R. 67, L. C.

C. Other Cases.

5421. Waiver of promise—Creditor opposing certificate.]—In an action against bkpt. on a new promise, proof that pltf. petitioned against the allowance of deft.'s certificate:—*Held:* a waiver of the agreement by bkpt. to pay & answer to the action.—COLLS *v.* LOVELL (1795), 1 Esp. 282, N. P.

5422. Pleading—Need not be special.]—To an action of *assumpsit* for goods sold & delivered, defts. pleaded their discharge, under a commission of bkpcy. Defts. had promised to pay the debt, after they were discharged by their certificate. Defts. objected that such promise could not be given in evidence under the count for goods sold & delivered, & that, to avail himself of the promise, pltf. should have declared specially:—*Held:* the declaration was sufficient as it stood.—WILLIAMS *v.* DYDE (1791), Peake, 68, N. P.

Annotation:—**Refd.** Brix *v.* Braham (1823), 8 Moore, C. P. 261.

5423. —— —— Unless promise conditional.]—If bkpt. promises absolutely to pay a debt barred by his certificate, *indebitatus assumpsit* lies against him on the original consideration, but if he only promises conditionally pltf. must declare specially.—PENN *v.* BENNET (1815), 4 Camp. 205, N. P.

5424. Right to be discharged on common bail.]—A certificated bkpt., who had subsequently promised to a creditor who had not proved to pay when able, was discharged on common bail.—BAILEY *v.* DILLON (1759), 2 Burr. 736; 97 E. R. 540.

Annotations:—**Refd.** Trueman *v.* Fenton (1777), 2 Cowp. 544; Blackbourn *v.* Ogle (1820), 8 Price, 526. **Mentd.** Wilson *v.* Kemp (1815), 3 M. & S. 595.

SUB-SECT. 3.—UNDER COLONIAL STATUTES.

See cases, *infra.*

SECT. 9.—PLEADING DISCHARGE.

See Nos. 5422–5423, *ante.*

SECT. 10.—ENGLISH, COLONIAL, AND FOREIGN ORDERS OF DISCHARGE.

5425. General rule.]—The legislature of a country cannot discharge persons except from debts contracted within the limits of their authority (BAYLEY, J.).—SHALLCROSS *v.* DYSART (1826), 2 Gl. & J. 87.

5426. Discharge under act applying to England & Scotland—Binding in England & Scotland.]—A discharge of a debt under an Act of Parliament of the United Kingdom, which is competent to legislate for every part of the kingdom, & to bind the rights of all persons, whether residing in England or Scotland, & which purports to bind the rights of subjects both in England & Scotland, operates as a discharge in both countries (BAYLEY, J.).—PHILLIPS *v.* ALLAN (1828), 8 B. & C. 477; 2 Man. & Ry. K. B. 576; 7 L. J. O. S. K. B. 2; 108 E. R. 1120.

Annotations:—**Folld.** Bartley *v.* Hodges (1861), 1 B. & S. 375. **Apld.** Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228. **Consd.** Seligman *v.* Huth (1875), Bitt. Prac. Cas. 64. **Folld.** Tharsis Sulphur & Copper Co. *v.* Société des Métaux (1889), 58 L. J. Q. B. 435. **Apld.** *Re* Nelson, *Ex p.* Dare & Dolphin, [1918] 1 K. B. 459, C. A. **Mentd.** Gibbs *v.* Société Industrielle & Commerciale des Métaux (1890), 25 Q. B. D. 399, C. A.

5427. Discharge in England—Binding in all English courts—Against any one.]—An English certificate is a discharge as against all the world in the English cts. (POLLOCK, C. B.).—ARMANI *v.* CASTRIQUE (1844), 13 M. & W. 443; 2 Dow. & L. 432; 14 L. J. Ex. 36; 153 E. R. 185.

Annotations:—**Apld.** Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228. **Distd.** *Re* Nelson, *Ex p.* Dare & Dolphin, [1918] 1 K. B. 459, C. A. **Mentd.** MacGregor *v.* Rhodes (1856), 6 E. & B. 266.

PART XVIII. SECT. 8, SUB-SECT. 3.

b. *Whether enforceable by action—New consideration necessary.*]—To an action for work & labour deft. pleaded that after the cause of action arose his estate was sequestrated, & that before the commencement of the action he obtained a certificate of discharge. Replication, that after he obtained the certificate & before action deft. promised pltfs. to pay them the sum sued for:—*Held:* the replication was bad, & the promise therein alleged was made without consideration.—WATSON *v.* MCFADDEN (1892), 13 N. S. W. L. R. 128.—**AUS.**

c. —— ——.]—A promise by insolvent after insolvency to pay a debt which fell due before insolvency cannot, in the absence of consideration for the promise, be sued upon.—GERBER *v.* WHITAKER, LTD. (1916), C. P. D. 661.—**S. AF.**

d. —— *Consideration sufficient.*]—*Held:* a promise to pay a debt from which a discharge under 1869 Act had been obtained, was founded on a good consideration, & might be enforced.—ADAMS *v.* WOODLAND (1878), 3 A. R. 213.—**CAN.**

f. —— ——.]—An antecedent debt, in respect of which insolvent has duly received his discharge under 1864 and 1869 Acts, is a continuing debt in conscience, & a sufficient consideration for a new promise to pay it.—AUSTIN *v.* GORDON (1872), 32 U. C. R. 621.—**CAN.**

g. —— —— *Advance by creditor.*]—An advance of money by a creditor to debtor, whose debt has been released by a composition agreement, is sufficient consideration for notes given by that debtor & his partner to the creditor for part of the released debt. A consideration is necessary to support a subsequent promise to pay a debt or the balance of a debt, which has been released by the creditor or discharged by a deed of composition or discharge.—SAMUEL *v.* FAIRGRIEVE (1894), 21 A. R. 418; on appeal *sub nom.* CRAIG *v.* SAMUEL (1895), 24 S. C. R. 278.—**CAN.**

h. —— *New debt created.*]—If insolvent after discharge undertakes to pay his old debts, such new contract must be sued on, & not the original liability.—QUIN BROTHERS *v.* VAN DER MERWE (1892), 9 S. C. 217; 2 C. T. R. 169.—**S. AF.**

k. —— ——.]—A promise by an uncertificated insolvent to pay a debt provable against his estate creates a new debt, & an action will lie for such new debt before certificate obtained.—MILLER *v.* KEOGH (1866), 5 N. S. W. S. C. R. 210.—**AUS.**

l. —— *Nudum pactum.*]—M., rendered an account to B. for medical attendance. Thereafter B.'s estate was sequestrated. B.'s wife, married out of community, having promised to pay the debt, M. did not prove on the estate. B.'s wife did not pay, & B., before any release from insolvency, promised to pay in full. M. thereafter sued B. on this promise:—*Held:* M.'s remedy had been barred by B.'s insolvency as against B., & the promise by B. to pay the debt was *nudum pactum.*—BAILIE *v.* MUIR (1907), 24 S. C. 109; 17 C. T. R. 42.—**S. AF.**

m. *Will not revive old debt—Barred by statute.*]—*Held:* all debts contracted by debtor before his bkpcy., save those excepted by 1883 Act, s. 161, were, under that Act, provable under the bkpcy., & were released by the order of discharge, & no promise to pay or payment on account could afterwards revive a debt barred by stat.—COX *v.* DUNCAN (1888), 6 N. Z. L. R. 562.—**N.Z.**

n. *Must be in precise & positive terms.*]—The mere fact that insolvent, after having obtained his final order for discharge, makes a voluntary payment on a claim existing against him before his insolvency & which is extinguished by such discharge, is not sufficient to revive the debt; for that purpose an express undertaking to pay the amount must be proved.—MCDONALD *v.* NOTMAN (1878), 25 Gr. 608.—**CAN.**

o. ——.]—In an action to recover a debt, from which deft. had been discharged by Bkpt. Act, pltf. relied upon the following promise to a creditor of deft. since his bkpcy.: "I acknowledge that I owe B. (pltf.) & you; as soon as I am able I will pay you":—*Held:* not such a distinct & unequivocal promise to pay pltf. as was necessary to entitle him to recover.—BLAIR *v.* ALBEE (1854), 3 All. 9.—**CAN.**

p. *Bill of exchange given for purpose—Liability of bankrupt thereon.*]—Deft., after his discharge as insolvent, gave a bill of exchange to secure an old debt. Pltf. having sued on the bill:—*Held:* the action was maintainable.—REA *v.* M'CABE (1832), Hayes, 484.—**IR.**

q. —— ——.]—A charge against the acceptor of a bill of exchange was sought to be suspended, on the ground that the acceptance was granted, without value, for the drawer's accommodation. On a reference to oath, the charger deponed that the acceptor was bkpt. discharged on composition, who at the date of his sequestration had been his debtor in a sum corresponding to the amount in the bill, that the acceptance was granted freely after his discharge, & was understood by both parties to be a revival of the old debt, but that no other consideration passed between the parties:—*Held:* the moral obligation incumbent on discharged bkpt. to pay his debts in full was sufficient consideration to preserve a deed granted in implement of that obligation from challenge at his instance as gratuitous.—CLARK *v.* CLARK (1869), 41 Sc. Jur. 198.—**SCOT.**

r. *Renewal note given for purpose—Liability of bankrupt thereon—Original debt discharged in foreign bankruptcy.*]—Where a promissory note made, & payable, in Canada while the maker was domiciled there is a renewal of a note, from which the maker had been discharged by the cts. of a foreign state wherein the original note was made, the maker may be sued in Canada upon the renewal note, if it be the law of such foreign state that the moral obligation to pay the original note constitutes a good consideration for a new promise to pay.—INTERNATIONAL HARVESTER CO. OF CANADA, LTD. *v.* ZARBOK, [1918] 3 W. W. R. 38; 11 Sask. L. R. 354.—**CAN.**

s. *Securities passed by principal or co-surety—For debt on which principal discharged—Void.*]—KENNEDY *v.* ——, 3 Ir. L. Rec. 1st ser. 370.—**IR.**

t. *Bond passed for debts due by discharged insolvent—Set aside.*]—GORMAN *v.* STUBBS, 4 Ir. L. Rec. 1st ser. 154.—**IR.**

w. *Pleading—Need not be special—Unless promise conditional.*]—In an action to recover a debt from which deft. had been discharged by Bkpt. Act, pltf. relied upon the following promise to a creditor of deft. since his bkpcy.: "I acknowledge that I owe B. (pltf.) & you; as soon as I am able I will pay you":—*Held:* pltf. should have declared specially on the conditional promise & proved deft.'s ability to pay.—BLAIR *v.* ALBEE (1854), 3 All. 9.—**CAN.**

PART XVIII. SECT. 10.

5425 i. *General rule.*]—A discharge under the insolvency laws of another country is not necessarily a bar to an action against insolvent.—BRAND *v.* GREEN (1898), 12 Man. L. R. 337.—**CAN.**

5425 ii. ——.]—A debt discharged by the law of the country where it was made payable cannot be sued for in any other country, provided the discharge amounts to an extinguishment of the debt.—CAPE OF GOOD HOPE BANK *v.* MELLÉ (1893), 10 S. C. 280; 3 C. T. R. 399.—**S. AF.**

a. 1875 *Act, s.* 115—*Not retrospective.*]—GILBERT *v.* RAYMOND (1879), 19 N. B. R. 315.—**CAN.**

Sect. 10.—*English, colonial, and foreign orders of discharge.*]

5428. —— Effect on—Provable debts of Scottish creditors.]—A certificate obtained under an English commission, operates as a discharge of the debts of Scottish creditors provable under the commission.—ROYAL BANK OF SCOTLAND *v.* CUTHBERT (1813), 1 Rose, 462.

Annotations :—**Consd.** *Re* Cridland, *Ex p.* Cridland (1814), 2 Rose 164, L. C.; Selkrig *v.* Davis (1814), 2 Rose, 291, H. L.; Carron Iron Co. *v.* Maclaren (1855), 5 H. L. Cas. 416, H. L. **Folld.** Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228. **Consd.** *Re* Artola Hermanos, *Ex p.* André Châle (1890), 24 Q. B. D. 640, C. A. **Mentd.** Bartley *v.* Hodges (1861), 1 B. & S. 375; Gill *v.* Barron (1868), 5 Moo. P. C. C. N. S. 213, P. C.; Lyall *v.* Jardine (1870), 18 W. R. 1050, P. C.

5429. —— —— Action on contract in Demarara.]—To a suit instituted in the Dutch Colonial ct. at Demarara for the recovery of the balance of an account for sugar consigned to & received by deft. & his partner in London, deft. pleaded his bkpcy. in England, of which pltfs. had notice but they had not proved their debt under it, & certificate. The colonial ct. admitted the certificate as a discharge :—*Held :* the colonial ct. was right.—ODWIN *v.* FORBES (1817), Buck, 57, P. C.

Annotations :—**Consd.** Sidaway *v.* Hay (1824), 4 Dow. & Ry. K. B. 658. **Apld.** Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228. **Mentd.** Fergusson *v.* Spencer (1840), 2 Scott, N. R. 229; Bartley *v.* Hodges (1861), 1 B. & S. 375.

5430. —— —— Action in India for debt contracted in India.]—A certificate of conformity obtained under a commission of bkpcy. in England is a bar to an action in India for a debt contracted by bkpt. at Calcutta previously to his bkpcy., although the creditor had no notice of the commission, & was resident at Calcutta.—EDWARDS *v.* RONALD (1830), 1 Knapp, 259; 12 E. R. 317, P. C.

Annotations :—**Distd.** Bartley *v.* Hodges (1861), 1 B. & S. 375. **Folld.** Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228. **Distd.** Gibbs *v.* Société Industrielle & Commerciale des Métaux (1890), 25 Q. B. D. 399, C. A. **Consd.** *Re* Debtor (No. 333 of 1917), *Ex p.* Debtor (1918), 34 T. L. R. 277, C. A. **Mentd.** Fergusson *v.* Spencer (1840), 2 Scott, N. R. 229.

5431. —— —— Action in England on contract in Canada—Action on Canadian judgment on such contract.]—Where a debt arises in a country, over which the Legislature of another country has paramount jurisdiction, a discharge by the law of the latter may be effectual in both countries.

A debt arose in Canada under a contract to be performed there. Debtor having obtained a discharge in England under 1861 Act :—*Held :* such discharge was an answer to an English action on the contract, for it was a discharge of the original debt, binding in Canada as well as in England.

An action in England was brought on a judgment obtained on such contract in Canada :—*Held :* a similar discharge obtained in England after breach, but before judgment in Canada, was no answer to the action, for the Canadian judgment was final between the parties, & deft. was estopped from saying that the discharge might have been pleaded there.—ELLIS *v.* M'HENRY (1871), L. R. 6 C. P. 228; 40 L. J. C. P. 109; 23 L. T. 861; 19 W. R. 503.

Annotations :—**Distd.** New Zealand Loan & Mercantile Agency Co. *v.* Morrison, [1898] A. C. 349, P. C. **Consd.** *Re* Nelson, *Ex p.* Dare & Dolphin, [1918] 1 K. B. 459, C. A.

5432. —— —— Jurisdiction of colonial court in regard to offences against insolvent law of colony.]—Applt., a trader in Barbadoes, having quitted the colony in debt & been adjudicated bkpt. in his absence, came to England & contracted debts in England, & was adjudicated bkpt. under the bkpcy. laws of England, & obtained his discharge. Applt. having returned to Barbadoes, proceedings were instituted by his creditors under the former bkpcy. in the colony, & applt. was sentenced to a term of imprisonment :—*Held :* although an adjudication & discharge in bkpcy. in England under the Imperial stat. had the effect of barring any debt which bkpt. might have contracted in any part of the world, yet the discharge under the Imperial stat. would not deprive the ct. of the colony of its jurisdiction to inquire

b. *Discharge in Lower Canada—Effect—Debts in Upper Canada.*]—Under 7 Vict. c. 10, s. 74, a certificate of discharge under the ordinance passed in Lower Canada, is a discharge from debts in Upper Canada which were provable under the Lower Canada commission.—MCDONALD *v.* DICKENSON (1843), 1 U. C. R. 15.—**CAN.**

5428 i. *Discharge in England—Effect on—Arrest in Nova Scotia.*]—An English certificated bkpt. is privileged from arrest in Nova Scotia for any debt provable under his bkpcy. in England.—MILLS *v.* SMITH (1866), 2 Old. 328.—**CAN.**

5428 ii. —— —— *Arrest for debt contracted on P. E. Island—Effect of interim protection.*]—Deft. was arrested in P. E. Island for a debt contracted there. He applied to be discharged on the ground that he had been duly declared a bkpt. in England, & had been granted to Aug. 20 next to finish his examination, & was not liable to arrest until that time had expired :—*Held :* though an English certificate of bkpcy. would be a bar to an action in the P. E. Island ct., yet the *interim* protection afforded by English 1842 Act, s. 23, did not extend to the colonies.——— *v.* IRVING (1851), 1 P. E. I. 38.—**CAN.**

5428 iii. —— —— *Debts contracted in New Brunswick.*]—A certificate granted in England under 1849 Act discharges bkpt. from his debts contracted in New Brunswick, except where special provisions are otherwise made by Dominion Insolvent Act.—GILBERT *v.* RAYMOND (1879), 19 N. B. R. 315.—**CAN.**

5428 iv. —— —— ——

into offences committed against the insolvent law of the colony, the insolvent being again within its jurisdiction, & such ct. having once acquired jurisdiction in the matter.—GILL *v.* BARRON (1868), L. R. 2 P. C. 157; 5 Moo. P. C. C. N. S. 213; 37 L. J. P. C. 33; 16 E. R. 496, P. C.

Annotation :—**Consd.** Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228.

5433. Discharge in Scotland—Under sequestration—Effect on—Action in England for debt contracted in England.]—Discharge under a Scottish sequestration is an effectual bar to an action in England for a debt contracted in England by a Scottish trader before the sequestration.—SIDAWAY *v.* HAY (1824), 3 B. & C. 12; 4 Dow. & Ry. K. B. 658; 2 L. J. O. S. K. B. 215; 107 E. R. 639.

Annotations :—**Consd.** Shallcross *v.* Dysart (1826), 2 Gl. & J. 87. **Distd.** Phillips *v.* Allan (1828), 8 B. & C. 477. **Apld.** Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228. **Consd.** *Re* Nelson, *Ex p.* Dare & Dolphin, [1918] 1 K. B. 459, C. A. **Mentd.** Vertue *v.* East Anglian Rails Co. (1850), 5 Exch. 280; Bartley *v.* Hodges (1861), 1 B. & S. 375.

5434. —— Upon cessio bonorum—Effect on—Action in England for debt contracted in England.]—A discharge of an insolvent debtor upon a *cessio bonorum* by the Ct. of Session in Scotland is no answer to an action brought by an English subject in a ct. in England to recover a debt contracted in England, although it appeared that pltf. opposed the discharge of deft. in the Scottish Ct. :—*Semble :* it would have been an answer to the action, if pltf. had claimed to have the benefit of the Scots law, & to take a distributive share of the property of the insolvent.—PHILLIPS *v.* ALLAN (1828), 8 B. & C. 477; 2 Man. & Ry. K. B. 576; 7 L. J. O. S. K. B. 2; 108 E. R. 1120.

Annotations :—**Folld.** Bartley *v.* Hodges (1861), 1 B. & S. 375. **Apld.** Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228. **Folld.** Seligman *v.* Huth (1875), Bitt. Prac. Cas. 64; Tharsis Sulphur & Copper Co. *v.* Société des Métaux (1889), 58 L. J. Q. B. 435. **Apld.** *Re* Nelson, *Ex p.* Dare & Dolphin, [1918] 1 K. B. 459, C. A. **Mentd.** Gibbs *v.* Société Industrielle & Commerciale des Métaux (1890), 25 Q. B. D. 399, C. A.

5435. Discharge in Ireland—Effect on—Action in England for debt contracted in Ireland.]—If a trader in Ireland becomes bkpt., & obtains his certificate, it will operate as a discharge in an action brought in England upon a debt arising in Ireland.—BALLANTINE *v.* GOLDING (1784), 1 Cooke's Bankrupt Laws, 8th ed. p. 487.

Annotations :—**Distd.** Pedder *v.* MacMaster (1800), 8 Term Rep. 609; Smith *v.* Buchanan (1800), 1 East, 6. **Folld.** Potter *v.* Brown (1804), 5 East, 124. **Consd.** Odwin *v.* Forbes (1817), Buck, 57, P. C. **Folld.** Gardiner *v.* Houghton (1862), 2 B. & S. 743. **Consd.** Phillips *v.* Eyre (1870), L. R. 6 Q. B. 1. **Apld.** Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228.

5436. —— —— —— Inquiry into original debt.]—The ct. will not order an *exoneretur* to be entered on the bail-piece, on the ground of deft.'s having obtained his certificate in Ireland, but will direct an issue, in order to ascertain the circumstances in which the original debt was contracted.—BAMFIELD *v.* ANDERSON (1821), 5 Moore, C. P. 331.

5437. —— —— Action in England for debt contracted in England.]—A bill of exchange drawn by deft. in Ireland, & accepted & paid by pltfs. in England, is a debt contracted in England, & cannot be discharged by a certificate under an Irish commission of bkpcy.—LEWIS *v.* OWEN (1821), 4 B. & Ald. 654; 106 E. R. 1076.

Annotations :—**Apld.** Phillips *v.* Allan (1828), 8 B. & C. 477. **Distd.** Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228. **Consd.** *Re* Nelson, *Ex p.* Dare & Dolphin, [1918] 1 K. B. 459, C. A. **Mentd.** Bartley *v.* Hodges (1861), 30 L. J. Q. B. 352.

5438. —— —— ——.]—A certificate obtained under Irish Bkpcy. Act, 1771, is not pleadable to an action for a debt contracted in England before the commission issued.—SHALLCROSS *v.* DYSART (1826), 2 Gl. & J. 87.

5439. —— —— ——.]—An Irish certificate since 6 & 7 Will. 4, c. 24, is a bar to an action against bkpt. for a debt contracted in England.—FERGUSON *v.* SPENCER (1840), 1 Man. & G. 987; 2 Scott, N. R. 229; 10 L. J. C. P. 20; 133 E. R. 632.

Annotations :—**Apld.** Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228. **Consd.** *Re* Nelson, *Ex p.* Dare & Dolphin, [1918] 1 K. B. 459, C. A. **Mentd.** Bartley *v.* Hodges (1861), 1 B. & S. 375.

5440. —— —— Action in England for debts contracted in Ireland or England.]—*Held :* a discharge under Irish Insolvent Debtors Act, 1840 (c. 107), operated as a bar to debts due from insolvent both in Ireland & in England.—SHEPHERD *v.* BERESFORD (1851), 17 L. T. O. S. 295.

Annotation :—**Folld.** Longbottom *v.* Stokes (1851), 18 L. T. O. S. 66.

5441. —— —— ——.]—A discharge under Irish Insolvent Debtors Act, 1840 (c. 107), operates as a bar to debts due from insolvent in Ireland, & also in England.—LONGBOTTOM *v.* STOKES (1851), 18 L. T. O. S. 66.

5442. —— —— Arrest for judgment & costs in respect of debt contracted in England before bankruptcy.]—On Nov. 20 deft. was adjudicated bkpt. on the petition of a creditor, in Dublin. On Jan. 12 he obtained a first class certificate, & also an order for protection from arrest. The certificate was retained in the ct., to allow of any creditors within a month appealing against its being granted. Pltf. had on Oct. 2, commenced an action in England against deft. upon a promissory note given in respect of a debt owing from deft., & which deft. had entered in his schedule. Deft. pleaded to the action, but did not appear at the trial, on Dec. 10, when a verdict passed for pltf. The costs were taxed on Jan. 8 & deft. was arrested on the 13th when he produced his order of protection :—*Held :* having obtained his certificate, deft. was privileged from arrest in respect of the costs as well as of the debt, & the arrest was unlawful.—SIMPSON *v.* MIRABITA (1869), L. R.

Scotia of bkpcy. in England,—MILLS *v.* SMITH (1866), 2 Old. 328.—**CAN.**

d. —— *Pleading.*]—Where deft. relies upon a discharge, granted in England under 1849 Act, a general plea of bkpcy. & discharge is not sufficient. The trading, the bkpcy., the fiat, & all other proceedings, should be set out in the plea.—GILBERT *v.* RAYMOND (1879), 19 N. B. R. 315.—**CAN.**

f. —— ——.] — *Semble :* an English certificate cannot be pleaded generally, but the proceedings on which it is founded must be set out.—JOUETT *v.* LOCKWOOD (1845), 2 Kerr, 674.—**CAN.**

5433 i. *Discharge in Scotland—Effect on—Action in Canada.*]—*Held :* a sequestration & warrant of protection under 1856 (Scotland) Act formed no bar to an action on notes against the makers, members of a firm carrying on business in Canada & in Glasgow.—ROBINSON *v.* MCKEAND (1864), 23 U. C. R. 359.—**CAN.**

5433 ii. —— —— *Debt contracted before bankruptcy.*]—Where deft. was arrested for a debt due on a bond, & after the debt was contracted he had become a bkpt., & received his discharge under Scottish 1856 Act, the ct. ordered his discharge on his entering a common appearance.—GILBERT *v.* MCLEAN (1870), 2 Han. 213.—**CAN.**

5433 iii. —— —— *Execution on judgment obtained in Canada.*]—In an action commenced on Dec. 23, 1896, judgment was given on Oct. 13, 1897, declaring the liability of deft.; & on Apr. 6, 1898, the ct. made a final decree for payment. On Sept. 20, 1897, a deliverance was granted by a Ct. of Bkpcy. in Scotland to deft. Upon an application by deft. to restrain pltf. from proceeding to execution upon the judgment, on the ground that the deliverance was a bar to the issue of the execution :—*Held :* the application must be dismissed.—TASKER *v.* GRIEVE (1903), 9 Nfld. L. R. 130, App. xiii.—**NFLD.**

Sect. 10.—*English, colonial, and foreign orders of discharge.*]

4 Q. B. 257; 10 B. & S. 77; 38 L. J. Q. B. 76; 20 L. T. 275; 17 W. R. 589.

Annotation :—**Mentd.** *Re* Nelson, *Ex p.* Dare & Dolphin, [1918] 1 K. B. 459, C. A.

5443. —— —— Arrest in England for debt contracted in Ireland.]—On a motion to discharge deft. out of custody, on an affidavit that the cause of action for which he was arrested, arose in Ireland, that he had since been found a bkpt. in Ireland, & obtained his certificate there :—*Held :* the ct. could not give any force to the Irish certificate, until its effect in Ireland had been shown. —— *v.* —— (1794), 1 Anst. 80; 145 E. R. 806.

5444. —— —— Arrest for debt contracted in England.]—The ct. will not discharge deft., who is holden to bail for a debt contracted in England, out of custody, on a common appearance, on an affidavit of his having become a bkpt. in Ireland, & there obtained his certificate, but will put him to plead.—QUIN *v.* KEEFE (1795), 2 Hy. Bl. 553; 126 E. R. 698.

Annotation :—**Mentd.** Sidaway *v.* Hay (1824), 3 B. & C. 12.

5445. Certificate under Irish 1872 Act—Effect on—Action in England for debt contracted in England.]—A certificate in the form of Sched. C. to the above Act, given to an arranging debtor in accordance with s. 64 of that Act, does not afford any defence to proceedings brought in England by an English creditor for a debt incurred & payable in England.—*Re* NELSON, *Ex p.* DARE & DOLPHIN, [1918] 1 K. B. 459; 87 L. J. K. B. 628; 118 L. T. 549; [1918–19] B. & C. R. 1; *sub nom. Re* A DEBTOR (No. 333 OF 1917), *Ex p.* THE DEBTOR, 34 T. L. R. 277; 62 Sol. Jo. 348, C. A.

5446. Discharge in India—Effect of omission in schedule.]—An order was made in 1849 for winding up an abortive assocn. for obtaining a railway Act. One of the shareholders, who had not been put upon the list of contributories, obtained in India, in 1853, a discharge under Indian Insolvent Act, 1847 (c. 21). In his schedule, filed in pursuance of that Act, he did not refer to his liability under the winding-up order, nor in any way refer to the railway scheme. In 1858, having returned to England, he was put on the list of contributories :—*Held :* the omission in the schedule did not prevent the discharge from having the same effect as a bkpcy. certificate in England.—*Re* WARWICK & WORCESTER RY. CO., PARBURY'S CASE (1861), 3 De G. F. & J. 80; 30 L. J. Ch. 513; 4 L. T. 62; 7 Jur. N. S. 503; 9 W. R. 470; 45 E. R. 808, C. A.

Annotations :—**Mentd.** *Re* Petition for Adjudication, *Ex p.* Professional Life Assce. (1864), 9 L. T. 811; Williams *v.* Harding (1866), L. R. 1 H. L. 9, H. L.; *Re* General Estates Co., Hastie's Case (1869), 4 Ch. App. 274, L. JJ.

5447. Discharge in Victoria—Effect on—Action in England for debts contracted in England—No allegation as to domicile of creditor or bankrupt.]—In an action on a bill of exchange drawn & accepted in England, & also for money lent, interest, & on accounts stated in England, deft. pleaded a discharge under the insolvent law of the colony of Victoria, not alleging that either pltf. or deft. was domiciled in that colony :—*Held :* no answer to the action.—BARTLEY *v.* HODGES (1861), 1 B. & S. 375; 30 L. J. Q. B. 352; 4 L. T. 445; 9 W. R. 693; 121 E. R. 754.

Annotations :—**Apld.** Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228. **Consd.** Faure Electric Accumulator Co. *v.* Phillipart (1888), 58 L. T. 525; Gibbs *v.* Société Industrielle & Commerciale des Métaux (1890), 25 Q. B. D. 399, C. A. **Mentd.** Gardiner *v.* Houghton (1862), 2 B. & S. 743.

5448. —— —— Action in England for debt contracted in Victoria—Pleading.]—Declaration for money received, money lent, money paid, interest, & on accounts stated. Plea, that deft. was resident in the colony of Victoria, & that the debts were contracted within the colony of Victoria, & subject to the laws thereof, & that deft. was discharged from the debts by the insolvent law of the colony. Replication, that when the debts were contracted, pltf. was resident at L. in England, & that at the time of the commencement of the suit deft. was resident in England, that under & by virtue of the contracts by which the debts became payable, they ought to have been paid to pltf. in England :—*Held :* the replications showed no answer, because the first part admitted that the debts sued on were contracte d within the colony of Victoria, & the second part did not show that they were payable in England, & not elsewhere.—GARDINER *v.* HOUGHTON (1862), 2 B. & S. 743; 121 E. R. 1247.

Annotation :—**Apld.** Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228.

5449. Discharge in Newfoundland—Effect on—Action in England for debt contracted in England.]—*Held :* insolvent's certificate, obtained in Newfoundland, under 49 Geo. 3, c. 27, s. 8, might be pleaded in bar to an action in England, for a debt contracted in England before the insolvency.

5446 i. *Discharge in India—Effect—Action on judgment obtained in England—Liability as contributory.*]—Pltfs., an English joint stock co. registered under English Cos. Act, 1862 (c. 89), sued deft., as a past member of the bank, upon a balance order of the High Ct. of Justice in England, dated Feb. 24, 1881. The bank was in liquidation under a winding-up order made on July 20, 1866. Deft. pleaded discharge by insolvency, & he had filed his schedule on Jan. 15, 1873, & had obtained his discharge under Indian Insolvency Act, s. 60, on July 15, 1874 :—*Held :* judgment must go against deft.—LONDON, BOMBAY, & MEDITERRANEAN BANK *v.* DADABHOY CURSETJI MAJU (1886), I. L. R. 10 Bom. 582.—**IND.**

5446 ii. —— —— *Premiums on policy of insurance—Liability under English* 1861 *Act, s.* 154.]—Insolvent obtained his final discharge in Apr., 1863 :—*Held :* he was not still liable, under the above sect., for the ascertained value of certain premiums on a policy of insurance.—GRAY *v.* CHICK (1864), Cor. 136.—**IND.**

g. *Discharge in New South Wales—Effect on—Action on judgment obtained in Victoria.*]—In an action on a judgment obtained in the Supreme Ct. of Victoria, deft. pleaded that he being domiciled in New South Wales, pltf. registered there his judgment obtained in Victoria, petitioned for & obtained the sequestration of deft.'s estate under the insolvent laws there in force, valued a mtge. security held by him, proved on the estate for the surplus of the debt, retained his security & received a dividend on his proof, & that deft. obtained his certificate of discharge under the insolvent laws in force in New South Wales :—*Held :* (1) it could not be presumed in support of the plea that the contract was made in New South Wales; (2) pltf. having been petitioning creditor, proved his debt, received dividends & retained his securities, had so assented to the sequestration as to be bound by it.—GLASS *v.* KEOGH (1867), 4 W. W. & A'B. 189.—**AUS.**

k. *Discharge in Cape Colony—Effect—Action in Transvaal for balance of debt.*]—The estate of a partnership, having been sequestrated in the Cape Colony, was rehabilitated there, such rehabilitation, according to the Cape law, acting as a discharge of all the partnership debts proved in the insolvency. Thereafter a creditor sued one of the partners in the Transvaal in his private capacity for the unpaid balance of a debt proved against the firm in the insolvency :—*Held :* the debt having been discharged by the rehabilitation, such creditor had no cause of action.—DYER *v.* CARLIS (1897), 4 O. R. 67.—**S. AF.**

l. *Discharge in Natal—Effect—Proof in Transvaal for balance of debt.*]—A. was a creditor of a certain firm in Natal & proved in the insolvency of that firm in Natal. After such firm had been rehabilitated, A. claimed to prove for the balance of his debt against the insolvent estate of one of the members of the firm in the Transvaal :—*Held :* as rehabilitation in Natal extinguished the debt, he was not entitled so to prove.—*Re* HOPE (1885), 2 S. A. R. 25.—**S. AF.**

—PHILPOTTS *v.* REED (1819), 1 Brod. & Bing. 294 ; 3 Moore, C. P. 623 ; 129 E. R. 735.

Annotations :—**Apld.** Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228. **Consd.** *Re* Nelson, *Ex p.* Dare & Dolphin, [1918] 1 K. B. 459, C. A. **Mentd.** Shepherd *v.* Beresford (1851), 17 L. T. O. S. 295.

5450. Foreign discharge—Whether binding in England.]—A foreign certificate is no answer to a demand in the cts. (POLLOCK, C. B.).—ARMANI *v.* CASTRIQUE (1844), 13 M. & W. 443 ; 2 Dow. & L. 432 ; 14 L. J. Ex. 36 ; 153 E. R. 185.

Annotations :—**Apld.** Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228. **Distd.** *Re* Nelson, *Ex p.* Dare & Dolphin, [1918] 1 K. B. 459, C. A. **Mentd.** MacGregor *v.* Rhodes (1856), 6 E. & B. 266.

5451. —— When effective in England.]—Where the effect of a foreign bkpcy., using the word " foreign " in its restricted sense, is to divest debtor of the whole of his property, wherever situate, & to vest it in the assignee for distribution amongst all his creditors wherever resident, the cts. in England give the same effect to the order or instrument discharging debtor in the bkpcy. as is given to it in the country where the bkpcy. occurs (EVE, J.).—*Re* NELSON, *Ex p.* DARE & DOLPHIN, [1918] 1 K. B. 459 ; 87 L. J. K. B. 628 ; 118 L. T. 549 ; [1918–19] B. & C. R. 1 ; *sub nom. Re* DEBTOR (No. 333 OF 1917), *Ex p.* DEBTOR (1918), 34 T. L. R. 277 ; 62 Sol. Jo. 348, C. A.

5452. —— Effect on—Action in England on contract arising in America.]—*Assumpsit* against the drawer of a bill of exchange drawn in America, on a merchant in London, protested for non-acceptance ; plea of bkpcy., certificate, & discharge thereby in America :—*Held :* the parties being resident in America at the making of the bill, there was a good discharge in England, if there were a good discharge in America, as the contract declared upon arose solely in America, the engagement of the drawer being that he would pay in America, if the bill was not accepted in London. —POTTER *v.* BROWN (1804), 5 East, 124 ; 1 Smith, K. B. 351 ; 102 E. R. 1016.

Annotations :—**Consd.** Bamfield *v.* Anderson (1821), 5 Moore, C. P. 331. **Folld.** Gardiner *v.* Houghton (1862), 2 B. & S. 743. **Consd.** Phillips *v.* Eyre (1870), 10 B. & S. 1004. **Apld.** Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228. **Mentd.** Odwin *v.* Forbes (1817), Buck, 57, P. C. ; Sidaway *v.* Hay (1824), 3 B. & C. 12 ; Thurburn *v.* Steward (1871), 7 Moo. P. C. C. N. S. 333, P. C.

5453. —— —— Action in England on bill accepted abroad.]—A man cannot be sued in England on his acceptance of a bill of exchange abroad, after he has been discharged by the laws of that country. —BURROWS *v.* JEMINO (1726), 2 Stra. 733 ; Cas. *temp.* King, 69 ; Dick. 48 ; Mos. 1 ; 2 Eq. Cas. Abr. 524, pl. 7 ; 93 E. R. 815, L. C.

Annotations :—**Distd.** Pedder *v.* MacMaster (1800), 8 Term Rep. 609. **Refd.** Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228. **Mentd.** Dacosta *v.* Villa Real (1734), 2 Stra. 961 ; Boucher *v.* Lawson (1735), Cunn. 144 ; Stafford *v.* Clark (1824), 2 Bing. 377 ; Cammell *v.* Sewell (1860), 5 H. & N. 728, Ex. Ch.

5454. —— —— Action in England on debt contracted abroad.]—The ct. will not order an *exoneretur* to be entered on the bail-piece, on the ground that the debt was contracted while deft. was resident in a foreign country, & before he became a bkpt. by the laws of that country, though he may have obtained his certificate there.—PEDDER *v.* MACMASTER (1800), 8 Term Rep. 609 ; 101 E. R. 1573.

Annotation :—**Consd.** Sidaway *v.* Hay (1824), 3 B. & C. 12.

5455. —— —— Action in England by British subject for debt contracted in England.]—A discharge under a commission of bkpcy. in a foreign country is no bar to an action for a debt arising in England against bkpt. by a creditor, a British subject.—SMITH *v.* BUCHANAN (1800), 1 East, 6 ; 102 E. R. 3.

Annotations :—**Folld.** Shallcross *v.* Dysart (1826), 2 Gl. & J. 87 ; Phillips *v.* Allan (1828), 8 B. & C. 477 ; Bartley *v.* Hodges (1861), 1 B. & S. 375. **Apld.** Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228. **Consd.** Gibbs *v.* Société Industrielle & Commerciale des Métaux (1890), 25 Q. B. D. 399, C. A. **Mentd.** Sidaway *v.* Hay (1824), 3 B. & C. 12 ; Tharsis Sulphur & Copper Co. *v.* Société des Métaux (1889), 58 L. J. Q. B. 435.

5456. —— —— ——.]—A discharge in a foreign country will not of necessity preclude an English creditor from suing in an English ct. for the recovery of a debt contracted in England (BAYLEY, J.).—PHILLIPS *v.* ALLAN (1828), 8 B. & C. 477 ; 2 Man. & Ry. K. B. 576 ; 7 L. J. O. S. K. B. 2 ; 108 E. R. 1120.

Annotations :—**Folld.** Bartley *v.* Hodges (1861), 1 B. & S. 375. **Apld.** Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228. **Consd.** Seligman *v.* Huth (1875), Bitt. Prac. Cas. 64. **Folld.** Tharsis Sulphur & Copper Co. *v.* Société des Métaux (1889), 58 L. J. Q. B. 435. **Apld.** *Re* Nelson, *Ex p.* Dare & Dolphin, [1918] 1 K. B. 459, C. A. **Mentd.** Gibbs *v.*

5452 i. *Foreign discharge—Effect on—Action on foreign judgment.*]—Pltf. sued on a foreign judgment recovered against deft. During the progress of the suit deft. obtained a discharge in bkpcy. in the district ct. of the northern district of Ohio, & at the trial obtained leave to plead the discharge. Deft. proved that such a discharge would release deft. from all his debts provable against his estate in the United States, including the debt to pltf. Pltf.'s only evidence in reply was, that deft. resided in Canada for two years previous to the discharge, & that pltf. had no notice of deft.'s bkpcy. in the United States, & he contended that, as Bkpcy. Acts required bkpt. to reside or carry on business in the state where he filed his petition, & deft. resided in Canada, the ct. in Ohio had no jurisdiction to grant a discharge, & that the one produced was bad :—*Held :* the discharge was a bar to pltf.'s suit.—OHLEMACHER *v.* BROWN (1879), 44 U. C. R. 366.—**CAN.**

5452 ii. —— —— *Action on note payable in foreign State.*]—A discharge in bkpcy. by a ct. of a foreign state from liability on a promissory note made by bkpt. while domiciled in such foreign state & payable therein, is a good defence to an action in Saskatchewan upon the note.—INTERNATIONAL HARVESTER CO. OF CANADA, LTD. *v.* ZARBOK, [1918] 3 W. W. R. 38 ; 11 Sask. L. R. 354.—**CAN.**

5452 iii. —— —— —— *Omission from schedule.*]—To an action on a promissory note made in the United States, deft. pleaded his discharge under the bkpt. laws there, to which pltf. replied, that by such law the discharge was fraudulent & void, because deft., in the schedule attached to his petition, had fraudulently, & with intent to prevent pltf. from sharing in his estate or opposing his discharge, omitted any mention of pltf. or his claim. The omission was proved, & the law of the United States was stated to be that such omission, unless fraudulent & wilful, would not avoid the discharge, but it was not shown whether the assent of a certain number of creditors or the payment of a certain dividend was requisite, or whether there was any provision which would show a motive for the omission :—*Held :* leave having been reserved to move for a nonsuit upon the whole case, the rule should be absolute, for though upon pltf.'s evidence the mere omission, unexplained, might afford some evidence of fraudulent intent, yet that was repelled by the undisputed facts sworn to by deft.—FOSTER *v.* TAYLOR (1871), 31 U. C. R. 24.—**CAN.**

5452 iv. —— —— *Discharge from custody.*]—The ct. refused to discharge deft. upon filing common bail, on the ground of his person having been discharged from arrest by an insolvent law of New York.—DASCOMB *v.* HEACOCKS (1827), Tay. 438.—**CAN.**

5452 v. —— —— ——.]—A foreign law authorising the discharge of an insolvent debtor must be directly proved, & the ct. will not listen to an application for the discharge of such person after he has allowed judgment to go by default, & is in execution.—BROWN *v.* HUDSON (1826), Tay. 346.—**CAN.**

5452 vi. —— —— ——.]—Where the person of an insolvent debtor is discharged from arrest by a foreign authority, the ct. will not set aside an arrest made under the process of the ct. for the same cause of action, it not being bound to model or restrain its course of proceeding by that of other countries.—BROWN *v.* HUDSON (1826), Tay. 390.—**CAN.**

m. —— *Primâ facie evidence of regularity.*]—A discharge from a foreign bkpcy. ct. :—*Held : primâ facie* evidence that all proper steps had been taken to obtain it.—OHLEMACHER *v.* BROWN (1879), 44 U. C. R. 366.—**CAN.**

n. —— *Pleading.*]—A discharge under the insolvency laws of another country, if a bar to an action against insolvent, should be pleaded. It cannot be set up on an application to stay proceedings in the action.—BRAND *v.* GREEN (1898), 12 Man. L. R. 337.—**CAN.**

Sect. 10.—*English, colonial, and foreign orders of discharge.*]

Société Industrielle & Commerciale des Métaux (1890), 25 Q. B. D. 399, C. A.

5457. —— —— Action in England on contract to be performed in England.]—A party to a contract made & to be performed in England is not discharged from liability under such contract by a discharge in bkpcy. or liquidation under the law of a foreign country in which he is domiciled.—GIBBS & SONS *v.* SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES MÉTAUX (1890), 25 Q. B. D. 399; 59 L. J. Q. B. 510; 63 L. T. 503; 6 T. L. R. 393, C. A.

Annotations:—**Apprvd.** New Zealand Loan & Mercantile Agency Co. *v.* Morrison, [1898] A. C. 349, P. C. **Consd.** Taylor *v.* Hollard, [1902] 1 K. B. 676. **Refd.** Cooke *v.* Vogeler Co., [1901] A. C. 102, H. L.; *Re* Nelson, *Ex p.* Dare & Dolphin, [1918] 1 K. B. 459, C. A.

5458. —— —— Arrest in England for debt contracted in Bremen.]—The ct. will not discharge deft. out of custody on filing common bail, on the ground of his having become bkpt. & obtained his certificate in Bremen, where the debt was contracted.—EARLIER *v.* LANGUISHE (1814), 2 Chit. 55.

5459. Foreign cessio bonorum—Effect on promise to pay balance of old debt.]—A , formerly a trader in Holland, failed there, upon which there was a *cessio bonorum*. He came to England, & having been appointed a governor abroad, applied to B. to be his security, & to advance him a sum of money. B. agreed, provided A. would give him a bond, that should comprise the remainder of an old debt due before the *cessio bonorum* as well as the further sum advanced, which was done. A. becomes a bkpt.:—*Held:* in the circumstances B. was entitled to be admitted a creditor for the whole money upon his bond.

I am of opinion on such a case so circumstanced, that petitioner is entitled to be admitted a creditor for the whole money upon his bond, & lay no stress upon the word composition, in the determination in Holland, for it was a disposition made by the judge, & not a voluntary composition by bkpt. (LORD HARDWICKE, C.).—*Ex p.* BURTON (1744), 1 Atk. 255; 26 E. R. 163.

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